LAW OFFICES
PAUL A. ROBINSON JR.
147 JEFFERSON, STE. 905
MEMPHIS, TENNESSEE 38103
(901) 649-4053

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

March 13, 2006

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

Dear Chairman Jones:

Enclosed please find the Motion For A Late Filed Response of W. Isaac Luboti and the GETCO Partners along with the proposed response of W. Isaac Luboti and the GETCO Partners .

Thank-you for your courtesies in this matter. Please advise if you have questions or require anything further.

Sincerely

Paul A. Robinson Jr.

PAR/par

cc: Parties of Record

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE TENNESSEE

IN RE:

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

MOTION FOR LATE FILED RESPONSE

TO THE HONORABLE COMMISSIONERS OF THE TENNESSEE REGULATORY AUTHORITY:

Come now GETCO, a Tennessee General Partnership and W. Isaac Luboti through counsel and respectfully request that they be allowed to file the attached response to the motion of Respondents MLG&W and Memphis Broadband's motion to dismiss.

Paul A. Robinson Jr. 014464
147 Jefferson Ave., Ste. 905
Memphis, Tennessee 38103
(901) 649-4053

Certificate of Service

I hereby certify that a true and correct copy of the foregoing motion has been forwarded via U.S. Mail to the following on this the 13th day of March 2006.

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

Melvin J. Malone
Mark W. Smith
Miller & Martin PLLC
150 Fourth Avenue North
Nashville, Tennessee 37219-2433

Nathan A. Bicks
Junaid Odabeko
Burch Porter & Johnson PLLC
130 North Court Ave.
Memphis, Tennessee 38103

Paul A. Robinson Jr.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE TENNESSEE

IN RE:

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

GETCO AND W. ISAAC LUBOTI'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS THE PETITION WITHOUT CONVENING A CONTESTED CASE

TO THE HONORABLE COMMISSIONERS OF THE TENNESSEE REGULATORY AUTHORITY:

Come now GETCO and W. Isaac Luboti, submitting this pleading jointly in opposition to the request of MLG&W and Memphis Broadband requesting the Tennessee Regulatory Authority (hereinafter"TRA") decline to commence a contested case for lack of jurisdiction, or in the alternative, to dismiss without convening a contested case. And thus, GETCO and W. Isaac Luboti respectfully ask that the Commissioners would proceed to commence a contested case for the following reasons:

I.
FACTS

On August 9, 2001, the Tennessee Regulatory Authority (hereinafter the "TRA") issued a Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity (the "Final Order") In the Final Order of August 9, 2001, the Authority granted: (1) the Joint Petition of MLG&W and Broadband, as amended, for approval of the Operating Agreement for the creation

and operation of Memphis Networx; and (2) the Application of Memphis Networx, as amended, for a Certificate of Public Convenience and Necessity.

Article 3, Section 3.4 of the Operating Agreement clearly states that:

Community Participation: To the extent **permitted by law, MLG&W and Memphis Broadband 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 (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).**

This section 3.4 of the Operating Agreement requires that Memphis Broadband and MLGW negotiate in good faith to sell a portion of their financial rights in Memphis Networx to one or more minority businesses. Pursuant to the expectations and requirements set forth in Section 3.4 of the Operating Agreement, Mr. W. Isaac Luboti and the GETCO partners did petition the Owners of Memphis Networx, notably, Memphis Broadband and MLGW to either purchase financial rights in or make a direct investment in Memphis Networx. Mr. Luboti and his partners contacted the owners of Memphis Networx who at that time were represented by a Mr. Andrew Seamons of Paradigm Capital Partners, LLC. Paradigm Capital Partners, LLC representing Memphis Broadband and MLG&W, instead of negotiating in good faith to enable and bring about a

direct ownership in Memphis Networx through the purchase of financial rights directed Mr. Luboti and his investment partners to invest in the Memphis Telecom Group. And later after Mr. Luboti's refusal of an offer to invest in Memphis Telecom, offered investment participation in Memphis Broadband; however, not in Memphis Networx. The June 20, 2001 letter from Andrew Seamons of Paradigm Capital Partners LLC (a copy of which is attached hereto as Exhibit 1) clearly states that a direct investment in Memphis Networx by the minority investors is "not practical and not in the best interest of the minority investors". Moreover, in the initial phase, Paradigm Capital Partners, LLC revealed confidential information that required the signing of a confidentiality agreement. The information revealed contained the scope and future plans of Memphis Networx that included Memphis Network's ownership, financial and operational infrastructure in addition to the architectural design and telecommunications build-up of Memphis Networx. By providing the in-depth information about Memphis Networx, Paradigm Capital Partners, LLC representing Memphis Broadband and MLGW led Mr. W. Isaac Luboti and his Partners to believe they would be allowed to invest in Memphis Networx.

In the June 20, 2001 letter, Mr. Seamons does not indicate why his group unilaterally determined what is in the best interest of the minority investment group. However, Paradigm Capital Partners, LLC's push of this group of minority investors toward an investment in Memphis Telecom. and Memphis Broadband instead of the sale of financial rights in Memphis Networx is the source of this dispute.

Paradigm Capital Partners, LLC's offer of an investment in either Memphis Telecom. or in Memphis Broadband rather than the sale of a portion of financial rights in Memphis Networx that indeed would have brought about a direct ownership by Mr.

Luboti and his partners in Memphis Networx did not meet the good faith standard set forth in section 3.4 of the operating agreement, and as such forms the gravamen and basis of Plaintiff's cause of action in this case. Paradigm Capital Partners, LLC representing Memphis Broadband and MLG&W offered an investment structure whereby GETCO would have become a member of either Memphis Telecom. or Memphis Broadband. Yet, membership in either entity carried unpredictable management and operational costs. Furthermore, in Mr. Luboti's view, any financial rights purchased from MLGW would have to be transferred to Memphis Broadband for such scenario to work. Indeed, in the scenario proposed by Paradigm Capital Partners, LLC, any rights purchased from MLGW would have to be transferred to Memphis Broadband to the benefit of Memphis Broadband members (shareholders). Because such an investment scenario meant that no financial rights in Memphis Networx would be directly held by GETCO, Mr. Luboti objected.

Paradigm Capital Partners, LLC representing Memphis Broadband and MLG&W contended that GETCO should not directly hold title to any financial rights in Memphis Networx. As previously stated, in the structure proposed by Paradigm Capital Partners, LLC, GETCO would only hold financial rights in Memphis Broadband, not in Memphis Networx. Similarly any financial rights purchased from MLG&W by W. Isaac Luboti and GETCO would be assigned to Memphis Broadband.

Mr. Luboti and GETCO refused to accept the idea that this indirect investment structure is what the TRA intended. Mr. Luboti and his investors insisted and still insist that any financial rights in Memphis Networx purchased by their investment group be transferred to GETCO upon payment of the fair market value. Paradigm Capital Partners,

LLC was saying in essence to Mr. Luboti, "you buy it and Memphis Broadband keeps it for you or even spends it for you!" Mr. Luboti and his partners were saying "no" we buy it and keep it for ourselves in our own investment vehicle, which is GETCO. The Petitioners contend that the defendants through their representative did not and never intended to negotiate in good faith with Mr. Luboti and his group as intended by and in accordance with Section 3.4 of the Operating Agreement. The unwillingness on part of the representative of the defendants to accept a direct investment in Memphis Networx that would have occurred by Mr. Luboti and his partners purchasing a portion of financial rights in Memphis Networx from the defendants has led the petitioners to the TRA. Consequently, the defendants remain in violation of the Operating Agreement, as they have never negotiated in "good faith" with Mr. Luboti and his investment group. The Petitioners herein not only will prove to the TRA that they were impeded and blocked from purchasing a portion of financial rights in Memphis Networx from both Memphis Broadband and MLGW, but also will request the TRA to suspend the license of Memphis Networx until both defendants subject themselves to the good faith negotiation requirements of section 3.4 of the Operating Agreement that will lead to the sale of financial rights to Mr. Luboti and the GETCO.

II.

THE TRA HAS JURISDICTION TO ENFORCE ITS ESTABLISHED POLICIES, RULES AND ORDERS

The Tennessee General Assembly has charged the TRA with the "general supervisory and regulatory power jurisdiction and control over all public utilities," Tenn. Code Ann. 65-4-104 (1997 Supp.). In fact the legislature "has explicitly directed that statutory

provisions relating to the authority of the TRA shall be given a liberal construction," BellSouth Advertising & Publishing Corp. vs. Tennessee Regulatory Authority 79 S.W.3d 506, 508 (Tenn. 2002) and has mandated that any doubts as to the existence or extent of power conferred on the TRA..... Shall be resolved in favor of the existence of the power, to the end that the TRA may effectively govern and control the public utilities placed under its jurisdiction... BellSouth, supra at 508. The General Assembly, therefore, has signaled its clear intent to vest in the TRA plenary authority over the utilities within its jurisdiction. Tennessee Cable Television Ass'n v. Tennessee Public Services Commission 844 SW 2d 151, 159 (Tenn. App. 1992).

The Primary Grant of Authority to the TRA is located at Tenn. Code Ann. 65-4-104 (Supp2001), the provision defining the TRA's general jurisdiction. The statute provides in pertinent part that "the authority has general supervisory and regulatory power, jurisdiction and control over all public utilities, and also over their property, property rights, facilities and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." TCA 65-4-104. In the exercise of this general power, Tenn. Code Ann 65-4-117 provides "The authority has the power to..... after hearing , by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility. Tenn. Code Ann 65-4-117(3) (Supp 2001) Thus, undoubtedly, the Authority has enforcement power sufficient to deter persons and entities who seek to ignore, avoid and evade the clear intent and policy of the Authority as clearly expressed in its August 2001 Final Order.

The operating agreement approved by the final order of August 9, 2001 was approved pursuant to TCA 7-52-103(d). However, while 7-52-103(d) permits a municipality operating an electric plant to establish a joint venture , the statute makes it clear that such joint venture or business relationship shall be subject to regulation by the Tennessee Regulatory Authority in the same manner and to the same extent as other certified providers of telecommunications services, including , but not limited to rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility as defined in TCA 65-4-101. And the joint venture remains subject to the provisions of Tennessee Code Annotated 7-52-402 through 7-52-407.

Therefore, the entity created pursuant to 7-52-103(d) is still subject to regulation by the Authority in the same manner and to the same extent as any other provider of telecommunication services. Also TCA 65-4-101 makes it clear that the authority has general supervisory and regulatory power, jurisdiction and control over all public utilities and also over their property, property rights, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of the telecommunications chapter. Therefore, the Authority has jurisdiction in this matter to convene a contested case in this matter and to enforce the rights of Mr. W. Isaac Luboti and the GETCO partners.

III.

MLGW AND MEMPHIS BROADBAND SEEK TO RENDER AS MEANINGLESS ANY EFFORT OR ATTEMPT BY THE AUTHORITY TO ENCOURAGE OR PROTECT MINORITY INVESTMENT

In the Final Order issued August 9, 2001, the Authority approved the amended and restated operating agreement and granted a certificate of public convenience and

necessity. The order makes it clear that the right of minorities to participate through an investment in Memphis Networx is a condition precedent to the very existence of Memphis Networx and the granting of its certificate of public convenience and necessity. Memphis Broadband and MLG&W sought and continue to seek to exclude minority direct ownership in Memphis Networx in order to reserve to themselves the undiluted benefits of any proceeds resulting from investment in Memphis Networx. The provisions of the Final Order were intended to dismantle economic impediment whereby minorities are excluded from participation in business - investment opportunities, and entry into the economic mainstream of the telecommunications industry. However, the refusal of the owners of Memphis Networx to negotiate in good faith serves to perpetuate economic impediments where minorities are effectively excluded from genuine ownership and investment opportunities, specifically in this case, a direct and not an indirect investment participation by minority groups in Memphis Networx.

IV.

GOOD FAITH NEGOTIATION WITH MINORITY INVESTORS IS A CONDITION PRECEDENT TO MEMPHIS NETWORX' RIGHT TO EXIST IN TENNESSEE

The certificate of public convenience and necessity received by Memphis Networx is conditioned upon the filing of a small and minority-owned business participation plan pursuant to TCA 65-4-212. In order to receive and maintain a certificate of public convenience and necessity TCA 65-4-212 requires the telecommunications service provider to demonstrate that it will adhere to all applicable authority policies, rules and orders. As a condition for receipt of a certificate of public convenience and necessity,

Memphis Networx together with its Owners agreed that it would comply with authority policies, rules and orders (Final Order, Page 37). The owners of Memphis Networx were required to file a small and minority-owned telecommunications business participation plan. (Attached hereto as Exhibit 2)

B.) The Minority Business Participation Plan is very clear in its requirements and is incorporated into the Final Orders' grant of a certificate of public convenience and necessity. The Small and Minority Owned Telecommunications Business Participation Plan addresses the Authorities concerns and intent **in Paragraph seven (7).** Paragraph seven (7) states that: Minority Ownership Interest in Memphis Networx. **In accordance with Section 3.4 of the operating agreement of Memphis Networx each of the initial members will negotiate in good faith to sell a portion of its financial rights in Memphis Networx to one or more Minority Businesses within four years of the Approval Date as defined in the Operating Agreement.**

No third party beneficiary status is needed for GETCO and Mr. Luboti to enforce the terms of the Operating Agreement and the Final order of the Authority. The very right of Memphis Networx to exist in Tennessee is conditioned upon Memphis Broadband and MLGW negotiating in good faith with minority investors for the sale of a portion of financial rights, which they have not done. .

V.

ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED PRIOR TO APPEAL TO STATE COURT

Defendants herein seek to rely upon the forum selection provision in Section 14.6 of the Operating Agreement that any dispute must be resolved in Shelby County. It is well

established in Tennessee law that administrative remedies must first be exhausted prior to seeking redress of grievances in the state courts. Until the Administrative remedies with the Authority have been exhausted, the matter is not ripe for adjudication in the Shelby County court, which is why the Petitioner herein removed the matter from the Chancery Court to the Authority. Tennessee courts have held that a person affected by the rulings or regulations of an administrative body must first present his case to that body and seek relief and then, if the decision of that agency is adverse to his interest, he has a right to seek court review of that decision. Seagram Distillers Co. v. James 548 S.W. 2d 667 (Tenn. App. 1976), aff'd 432 U.S. 901, 97 S. Ct. 2943, 53 L. Ed. 2d 1074 (1977). The administrative remedy must be exhausted before the courts will act. The administrative remedy must be pursued to an appropriate conclusion, and the courts will not interfere at intermediate stages of an administrative proceeding. Bracey v. Woods 571 S.W. 2d 828 (Tenn. 1978). Therefore, the instant matter must be resolved before the TRA prior to any hearing before the state courts.

VI.

LACHES IS NOT APPLICABLE WHEN DELAY IS CAUSED BY BAD FAITH OF THE COMPLAINING PARTY

The Defendants herein contend that the doctrine of laches should attach as the Petitioners have delayed too long to be heard; however, the doctrine of laches does not attach when the delay is occasioned by the bad faith of the complaining party. Mr. Luboti and his

partners did not delay in approaching the Memphis Networx owners. It was the Memphis Networx Owners, through their representative, Paradigm Capital Partners, who refused to negotiate in good faith. Their refusal to negotiate in good faith is the proximate cause of the delay. Mr. Luboti and his partners approached the Memphis Networx owners in 2001 to resolve this situation and were met with denial that required seeking legal redress to compel the Memphis Networx Owners to act in good faith. The offending parties should not be allowed to profit from the delay emanating from their own bad faith.

Tennessee courts have held that laches is not a bar where the delay is acquiesced in by the party seeking it or where he himself may be equally at fault. Walker v. Moore 745 S.W. 2d 292 (Tenn. Ct. App. 1987). The doctrine of laches does not apply where the defendant has acted in an open and known hostility to the plaintiff's rights and has not been misled by apparent acquiescence on the Plaintiff's part. Church of God v. Tomlinson Church of God 193 Tenn. 583, 247 S.W. 2d 63 (1962). Mr. Luboti never acquiesced in any way to the refusal of Memphis Networx " owners to negotiate in good faith, while the owners were clearly hostile to the idea of allowing minority investors a direct investment in Networx, (See attached Exhibit 3) Mr. Luboti never indicated that he would accept anything other than a direct investment in Networx. (See attached Exhibit 4). Broadband and MLGW have raised the laches defense; however, Laches is an equitable remedy and he who comes into equity must come in with clean hands. O'Brien v. O'Brien 734 S.W. 2d 639 (Tenn. Ct. App. 1987). Mr. Luboti and his partners were impeded, hence, delayed by the refusal of Memphis Networx owners to negotiate in good faith. Memphis Networx 'owners should not be allowed to use the delay occasioned by their own bad faith efforts to reserve the benefits of direct ownership of financial rights in

the Memphis Networx for themselves against the minority investors who were excluded and denied the economic opportunity to make an investment in Memphis Networx via the purchase of financial rights from both Memphis Broadband and MLGW.

VII.

MR. LUBOTI AND GETCO DID NOTIFY THE AUTHORITY OF MEMPHIS NETWORX OWNERS' BREACH OF THE TERMS OF THE OPERATING AGREEMENT WITHIN THE FOUR-YEAR PERIOD.

As to the August deadline for the four-year period, Mr. Luboti and GETCO did notify the Authority and its officers of the grievance within the four-year period. See the letter dated August 5th 2005 to Chairman Ron Jones, (Attached as Exhibit 5). The August 5th letter indicated that Mr. Luboti and his partners had sought investment participation in Memphis Networx and were unfairly impeded. The letter along with copies of the filings in Chancery Court was sent to Chairman Jones and the other Commissioners to safeguard the time line. However, after the Memphis Broadband response was filed in the Chancery court proceedings (a copy of which is attached hereto as Exhibit 6), it became clear that certain administrative issues regarding the sufficiency of direct or indirect investment structures in addition to the disagreement over whether the TRA intended for a direct ownership of financial rights by investors of any minority group had to be resolved administratively with the TRA prior to any state court proceedings. Again, the structural issues raised in the response of Broadband to Petitioners original complaint filed in the Chancery Court in Shelby County could only be resolved by the TRA because only the TRA can interpret Section 3.4 of the Operating Agreement. Only the TRA can properly interpret the requirements of the Operating Agreement and the Final Order's

requirements regarding direct or indirect ownership of financial rights in Memphis Networx. The response of Memphis Broadband to the Chancery Court Filing demonstrates the existence of a fundamental chasm and difference in interpretation of the requirements for minority investment participation. For example page four of the Memphis Broadband response states that ""Neither the Final Order nor the Operating Agreement mandates that minority participants be given a direct investment in Networx." The response goes on to say "Direct participation in Networx is contrary to the organizational structure established in the Operating Agreement and what was approved by the TRA in the Final Order. Under the approved framework, all private investors participate in Networx through their membership in Broadband." However, nowhere in section 3.4 does the Operating Agreement state that minority investors should buy financial rights in both Memphis Broadband and MLGW! Instead, the language clearly states that financial rights shall be purchased "from" Memphis Broadband and MLG&W.

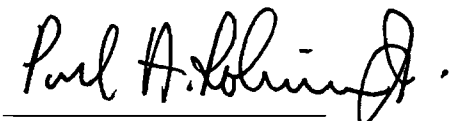
VIII.

CONCLUSION

For the foregoing reasons, the Authority should convene a contested case in this matter. Furthermore, the TRA should enforce the requirements of the Operating Agreement in order to bring about the sale of a portion of financial rights (economic interest) in Memphis Networx from both Memphis Broadband and MLGW to Mr. W. Isaac Luboti and GETCO at fair market value. The fair market value is to be determined by an independent appraisal that is to be paid by Mr. W. Isaac Luboti and GETCO. MLG&W and Memphis Broadband will be paid in cash at closing with Mr. W. Isaac

Luboti and his group, GETCO, taking title and direct ownership of any and all financial rights purchased.

Respectfully Submitted



Paul A. Robinson Jr. 014464
147 Jefferson, Ste. 905
Memphis, Tennessee 38103
Attorney for W. Isaac Luboti and
GETCO A Tennessee General
Partnership

Certificate of Service

I hereby certify that a true and correct copy of the foregoing response has been forwarded via U.S. Mail to the following on this the 13 day of March 2006.

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

Melvin J. Malone
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Miller & Martin PLLC
150 Fourth Avenue North
Nashville, Tennessee 37219-2433

Nathan A. Bicks
Junaid Odabeko
Burch Porter & Johnson PLLC
130 North Court Ave.
Memphis, Tennessee 38103

Paul A. Robinson Jr.

Exhibit 1

PARADIGM
CAPITAL PARTNERS LLC

June 20, 2001

Mr. W. Isaac Luboti
Wlu7395392@aol.com

Dear Mr. Luboti,

Thank you for your recent emails. I feel like we've gotten off track during the last week. I apologize if I have confused any of the issues during our previous discussions.

We, the current investors in Memphis Networx, appreciate your interest in Memphis Networx and hope that we can work through the structural issues that you have raised. As we have memorialized in the operating agreement approved by the Tennessee Regulatory Authority (TRA), both MLGW and the private investors are committed to minority participation in Memphis Networx. That said, rather than forcing any particular investment, we would prefer to find an investor to be our partner who shares our vision and excitement about Memphis Networx and who is coincidentally a member of a minority group. I hope that you and your investor group can be that partner.

At our initial meeting, I shared with you the information about Memphis Telecom only because I did not know anything about your interest level or structural concerns. The Memphis Telecom information was what I had readily available and provides an overview of the tiered investment structure. If we can agree on a high-level structure through which you would be comfortable investing, we can provide you with much more information about the company and its plans. You will also want to meet the management team.

Your emails indicated your investor group's desire to invest directly in Memphis Networx. Unfortunately, a direct investment is not practical and is not in the best interest of your investment group. Memphis Networx is 53% owned by MLGW and 47% owned by Memphis Broadband via an operating agreement that took months to finalize and that was approved by the Tennessee Regulatory Authority (TRA) last week. Memphis Broadband was structured to be the vehicle through which all private investors would invest including Paradigm Capital Partners and the Memphis Angels. There are two primary reasons why your investor group would invest through Memphis Broadband. First, the operating agreement with MLGW includes a number of provisions that positively impact the private

Cont. 1

investors that would not be included in a direct investment in Memphis Networx. More importantly, changing the operating agreement to include a third legal entity (i.e., your investor group) would force us to get the operating agreement approved again by the TRA. Given the expense and time involved in getting the current agreement approved, our investor group could not support anything that reopens the process. There are no other structural or economic differences between investing through Memphis Broadband versus directly into Memphis Networx.

I suggest that we meet early next week to discuss these issues and agree on how to proceed. [redacted] Let me know. I can be reached over the next several days via email or via my mobile phone at (901) 647-5549. You can also contact my assistant, Jennifer Kendrick, at (901) 328-3031. I look forward to working through these issues with you next week.

Sincerely,

Andrew Seamons

Andrew Seamons

Exhibit 2

Small and Minority-Owned Telecommunications Business Participation Plan

Memphis Networx, LLC ("Memphis Networx") submits the following Small and Minority-Owned Telecommunications Business Participation Plan (the "Plan") in compliance with T.C.A. §65-5-212. Memphis Networx seeks to provide maximum practicable opportunity for Small and Minority-Owned businesses to compete on a fair and equitable basis for contracts and sub-contracts awarded by the company. For the purpose of this Plan, "Small and Minority-Owned Business" shall have the same meaning as defined in T.C.A. § 65-5-212, i.e., "Minority Business" means a business which is solely owned, or at least fifty-one percent (51%) of the assets or outstanding stock of which is owned, by an individual who personally manages and controls the daily operations of such business, and who is impeded from normal entry into the economic mainstream because of race, religion, sex or national origin and such business has annual gross receipt of less than four million dollars ($4,000,000); and "Small Business" means a business with annual gross receipts of less than four million dollars ($4,000,000). Memphis Networx is committed to identifying qualified businesses in these categories and encouraging their participation in the purchasing and contracting process. Moreover, Memphis Networx will award contracts to such qualified businesses to the extent reasonable and practicable.

Memphis Networx will designate a Diversity Officer who will have the responsibility of implementing the Small and Minority-Owned Telecommunications Business Participation Plan. Memphis Networx has designated the following individual as Diversity Officer:

Carlotta Maclin
Director of Operations
7555 Appling Center Drive
Memphis, Tennessee 38133-5069
Phone: (901) 213-5112

2 Cont.

The Diversity Officer will have the following general duties:

1. **Identifying, developing and maintaining lists of Small and Minority-Owned Businesses that are deemed eligible to be suppliers and contractors for Memphis Networx.** Memphis Networx's outsourcing needs will vary as Memphis Networx's operations evolve to meet its customers needs. Memphis Networx anticipates using outside contractors for outside plant construction. Memphis Networx will encourage Small and Minority-Owned telecommunications businesses to contact the Diversity Officer regarding their areas of expertise and Memphis Networx will place the names of potential contractors on its list of potential sources for services and products. To further fulfill the function of identifying suppliers, contractors and sub-contractors, the Diversity Officer will: (1) join the Tennessee Minority Purchasing Council and the MidSouth Minority Business Council which will aid in the identification of local minority vendors; (2) identify potential vendors and service providers from lists on file with the Uniform Certification Agency (a consortium of local government entities in Shelby County), the Tennessee Department of Economic and Community Development and informal networking and referral sources; (3) search for qualified Small and Minority-Owned telecommunications businesses and concerns through local and national associations and minority supplier development councils, industry meetings and advertisements in industry and local publications. The Diversity Officer shall ensure that the appropriate source listings and services are properly utilized in support of the Plan.

2. **Cultivating an awareness among such businesses as to any opportunities to develop business relations with Memphis Networx.** The Diversity Officer will cultivate and maintain relationships with minority, women's and small business trade associations and business development organizations in an effort to locate and qualify

2 Cont.

businesses for participation in contracting opportunities. The Diversity Officer will attend or arrange for Memphis Networx representatives to attend business opportunity workshops, minority business enterprise seminars and trade fairs for this purpose.

3. **Inviting bids, or issuing requests for proposals, or otherwise soliciting offers from qualified entities to furnish specified goods or services.** Among other things, the procurement request should be structured to permit Small and Minority-Owned Business concerns to participate to the maximum extent possible. This includes, to the greatest extent possible, arranging solicitations, time for preparation of bids, quantities, specifications, and delivery schedules so as to facilitate participation. On all purchase orders, the person requesting authorization will make a good faith effort to include at least one Small or Minority-Owned Business on every solicitation for products and services. In addition, Memphis Networx will encourage large contractors that sub-contract Memphis Networx's projects to utilize Small and Minority-Owned businesses as sub-contractors.

4. **Provide advice and counsel for Small and Minority-Owned Business concerns.** The Diversity Officer shall act as the company contact for suppliers interested in bidding on Memphis Networx opportunities. The Diversity Officer shall also ensure that Memphis Networx offers assistance and counseling to explain requests for quotations, progress payments; technical and quality assurance programs; advice on types of business typically being contracted and the mechanics of procurement requirements of quality expectations.

5. **Ensuring the establishment and maintenance of records of solicitations and contract activity.** Memphis Networx will maintain records of its contract solicitations and awards so that it can monitor results achieved under the Plan. Memphis Networx will allow the TRA access to such records in accordance with its regulatory authority.

2. Cont.

6. **Paying contractors in a timely manner, pursuant to the terms of their contracts, and ensuring that large contractors establish procedures to ensure timely payment to sub-contractors that are Small and Minority-Owned Business concerns.** Memphis Networx will strive to be sensitive to the cash flow concerns of Small and Minority-Owned Businesses and structure its contracts and practices with such businesses accordingly. In addition, Memphis Networx will address this issue with large contractors in order to facilitate participation of Small and Minority-Owned Business in sub-contracts.

7. **Minority ownership interest in Memphis Networx.** In accordance with Section 3.4 of the Operating Agreement of Memphis Networx, each of the initial members of Memphis Networx will negotiate in good faith to sell a portion of its financial rights in Memphis Networx to one or more Minority Businesses within four years of the Approval Date as defined in the Operating Agreement.

As required by Tennessee law, Memphis Networx will update its Plan annually.

Exhibit 3

Subj:	Investment in Memphis Networx
Date:	6/5/2001 1:04:45 AM Central Daylight Time
From:	Aseamons@paradigmcp.com (Andrew Seamons)
To:	wlu7395392@aol.com

Isaac,

Thanks again for meeting with us on Wednesday. We appreciate your interest in Memphis Networx and look forward to working with you to complete your due diligence and an investment in the company. It appears that the Memphis Telecom investor group is going to complete an investment as well. For that reason, we need to think about your investment as incremental to there investment. The valuation would be the same as it was for the Paradigm Capital/Memphis Angels investment and for the Memphis Telecom investment. The resulting ownership percentage would depend on the amount of your investment and the final amount of the Memphis Telecom investment. Additionally, the current investor ownership will be diluted when we approach additional investors to raise the remaining amount of capital needed to implement the business plan. The structure of your investment will likely involve investing directly into Memphis Broadband along side the Memphis Angels, Memphis Telecom, and the Belz and Boyle investments.

I'm sorry that we were not able to talk in person this evening. I'm in California and we had a long series of meetings this today and this evening. I will try to reach you in the morning so we can discuss next steps. Have a good evening.

Andrew

Andrew Seamons
Vice President
Paradigm Capital Partners, LLC
6410 Poplar Avenue
Suite 395
Memphis, TN 38119

Exhibit 4

Subj:	Re: Investment in Memphis Networx
Date:	6/9/2001 10:09:07 AM Central Daylight Time
From:	Wlu7395392
To:	Aseamons@paradigmcp.com

Mr. Andrew Seamons:

The following comments are a result of having read your email that you sent to me.

a). It is clear that Memphis Telecom investment is unknown. Consequently, there is no determination of what they will do!

b). Apparently, there is no minimum investment set for the Memphis Telecom.

c). Memphis Telecom has all the time in the world to hold on their interest.

d). We are not in position to invest through the Memphis Telecom. We are familiar with some of the members in the investment group.

e). It is clear that in spite of the dollar amount of their investment, they are entitled to a seat on the management board and the Memphis Networx. If that is the case, then we will expect 2 seats on each board, given the level of our financial participation.

g). At the present time, we are waiting because there exists no concrete format for minority involvement.

h). Because we have no concrete transaction on hand, we can only do nothing other than look for other ways to be

4 cont.

Subj: **Memphis Networx: Direct Investment**
Date: 6/15/2001 2:50:46 PM Pacific Daylight Time
From: Wlu7395392
To: Aseamons@paradigmcp.com

June 15, 2001

Dear Mr. Seamons:

must be noted that the information we have was aimed at getting us to be involved with the nemphis Telecom Group, LLC. Our aim has never been to invest in the Memphis Telecom Group, LLC. All along we have made this clear.

ur aim has been to invest in Memphis Networx as minority partners with MLGW and anyone else. As par The Commercial Appeal article dated December 7, 2000; it was understood ıat minority investment directly in Memphis Networx would not be hindered. We believe we are being hindered and yet our cash for investment is ready. Instead what we have is a prospectus for memphis Telecom Group, LLC.

Given the dynamics, we intend to seek a waiver for direct minority participation when on ɔnsiders the costs involved going through Memphis Telecom Group, LLC and to an extent roadband. Our objective is 13.8% of Memphis Networx @$2,266,000 on the first round of vestment and $2,642,500 on the second round of investment based on $9,000,000.00 as ıe projected need. As direct investors we would seek seats on Memphis Networx and not roadband. There is a community right that minorities invest in Memphis Netrworx. Waivers should be put in place for minority investment.

lease, I would be prepared to meet with you to discuss this matter if necessary. Because of the quarky nature of how a minority share of invesyment is expected we intend to do everything to protect our investment and make sure that our resources go directly into Memphis Networx, hence, expected returns subject to zero costs.

I believe with effort, we can achieve a waiver.

Yours,

W. Isaac Luboti

4 Cont

ubj: **Memphis Networx**
ate: 6/18/2001 5:16:32 PM Pacific Daylight Time
om: Wlu7395392
: Aseamons@paradigmcp.com

June 18, 2001

Dear Mr. Andrew Seamons:

here are no intentions on my part to offend you or any of your associates. I am limiting the effort to the Memphis Networx business situation alone. So far we have not been furnished with any relevant information regarding the venture.

We felt insulted to be furnished with information that called upon us to invest in Memphis Telecom Group, LLC after making it clear that our interest can be secured by investing directly in Memphis Networx given the level of participation we had suggested prior to the meeting.

Our interest in investing as a minority group is based upon the fact that a commitment or direct investment by a minority group was made to both the city council and county commission. It is that opportunity to invest directly in Memphis Networx that we have been seeking, but to no avail.

We stand ready to invest in the Memphis Networx as shareholders in the company. Given the level of our involvement, our funds can be secured with a direct investment mechanism.

Again, we as a minority group are ready to move forward with the investment, however, it will not take place through telephone conversations, but written documents.

Yours:

W. Isaac Luboti

4 Cont.

Subj: **Investment Obstacle-Memphis Networx**
Date: 6/18/2001 6:40:58 AM Pacific Daylight Time
From: Wlu7395392
To: Aseamons@paradigmcp.com

June 18, 2001

Dear Mr. Andrew Seamons:

After a thorough analysis of the Memphis Networx business situation, the following are fundamental issues that must be resolved for us to proceed:

: We have made ourselves understood that our investment is to hold direct ownership of ACTUAL shares in the Memphis Nerworx as an investment opportunity for minority or people of color.

So far we do not have a clear clue to what the Memphis Networx is all about because the inf. provided to s was that of the Memphis Telecom Group, LLC. A COMPANY WHICH IS POORLY STRUCTURED AND AS SUCH WILL NOT BE ABLE TO RAISE THE MONEY.

We plan to push the issue for a waiver to invest in nothing other than the Memphis Networx. We strongly believe that you will appreciate our position given the level of cash infusion already suggested, Thus, approx. $2,266,000 on the first round of investment and $2,642,000 on the second (as projected) for 13.8% position in the Memphis Networx. We believe that should an opportunity for us to invest as a minority group exist as stipulated before the City Council and County Commission, then such an pportunity must be transparent. As such, we choose to maximize our risks BY DIRECTLY INVESTING IN THE MEMPHIS NETWORX.

: Our funds must go directly into the Memphis Networx's commercial operations in exchange for an assignment of shares in the company. The company being Memphis Networx.

: Should there be reasons why we as a minority group are not permitted to invest in the Memphis Networx, we would like to know.

Our group has been ready and on standby to invest in the Memphis Networx for direct ownership of shares in the Memphis Networx. The only hold up is a document that will serve as a vehicle for our vestment. That document should be signed by both MLGW and BROADBAND, the only two entities that so far have invested. We as a minority group, will make the third.

If necessary that we develop a political approach to this issue, we intend to do so. From a commercial perspective, we are not getting anywhere. Should there be no room for us as a group of minority investors that can sustain the first and second round of cash infusion, we would like to be advised accordingly.

: The push for a waiver that will enable us invest in the Memphis Networx is underway.

ur belief is that we have been denied an opportunity to directly invest in the Memphis Networx and as such by the end of the day, Memphis Networx will not have any minority group holding a significant umber of shares despite the fact that people in the minority category make up a large percentage of household utility payers within the city limits.

ally, was the City Council and County Commission lied to? If not, then, is it honorable for one state that

4 Cont.

involved as minority investors.

1). Whatever team approaches us with the appropriate and proper format for us as minorities to invest in the Memphis Networx, we will do so!

2). Our object is to bring about a viable investment vehicle now and in the near future. Should we not succeed with you on this particular project, we hope you can look at another project that we have been working on for the previous 12 years. Please advise Mr. Sklar and Mr. Horne of the same.

Yours,

Isaac

Exhibit 5

Law Offices
Paul Robinson, Jr.
146 Jefferson Street, Suite 905
Memphis, Tennessee 38103

August 5, 2005

Chair Ron Jones
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Docket No. 99-00909

Dear Chairman Jones:

I am an attorney representing W. Isaac Luboti and the GETCO Partnership. Mr. Luboti and his partners are seeking an investment participation in Memphis Networx, LLC as a minority group. Mr. Luboti and his partners sought investment participation in Memphis Networx, LLC as a minority group but were vigorously and unfairly impeded.

The members of the Memphis Networx, LLC did not adhere to the written terms of the operating agreement, as such Mr. Luboti and his partners are requesting an extension of the four (4) year period stated in section 3.4 of the operating agreement requiring the members of Memphis Networx, LLC to allow minority investment participation to occur.

A petition is being filed in the Chancery Court of Shelby County to compel the members of Memphis Networx, LLC to comply with section 3.4 of the operating agreement. A copy of the Chancery Petition is enclosed for your review.

Your involvement in this matter and your approval of the extension will enable Mr. Luboti and his partners to become minority investors as stipulated in the operating agreement.

If you have concerns or require additional information, please contact me at (901) 649-4053. Thank you for your assistance in this matter

Sincerely,

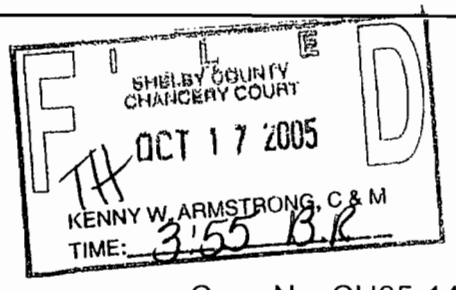
Paul A. Robinson, Jr.

Exhibit 6

IN THE CHANCERY COURT OF SHELBY COUNTY
THIRTIETH JUDICIAL DISTRICT OF TENNESSEE

GETCO, a Tennessee General Partnership, and ISAAC LUBOTI, individually

Plaintiffs



v.

Case No. CH05-1457
Part I

MEMPHIS LIGHT GAS & WATER, and MEMPHIS BROADBAND LLC

Defendants

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OF MEMPHIS BROADBAND LLC

Defendant Memphis Broadband LLC ("Broadband") respectfully submits this memorandum of points and authorities in support of its Rule 12.02(6) motion to dismiss.

INTRODUCTION

In this case, the plaintiffs, who claim to be a minority business enterprise,[1] ask the Court to create a contractual vehicle through which they seek to acquire an interest in Memphis Networx, LLC ("Networx"). Networx is a telecommunications joint venture between Memphis Light Gas & Water ("MLGW") and Broadband, a limited liability company structured to channel private investments into Networx. Networx holds a Certificate of Public Convenience issued by the Tennessee Regulatory Authority ("TRA") on August 9, 2001, after a lengthy and arduous contested hearing process that

[1] As required under the applicable Tennessee law governing adjudication of Rule 12 06 motions, for the purposes of this motion, Broadband will assume the allegations of the Complaint to be true, without waiving the right to later contest those same allegations. Lourcey v Estate of Scarlett, 146 S.W.3d 48 (Tenn. 2004)

lasted throughout 2000 and 2001[2]. Part of the action by the TRA included review and approval of the Amended and Restated Operating Agreement of Networx (the "Operating Agreement") which delineates the rights and obligations among and between MLGW and Broadband concerning their interests in Networx. As discussed in detail below, the Operating Agreement contains a provision that requires both MLGW and Broadband to negotiate with minority businesses who seek to invest in Networx. As explained below, Plaintiffs initiated discussions with Broadband for an investment in Networx, but, by their own admission, failed to conclude an agreement. The Plaintiffs now improperly ask the Court to complete negotiations between the parties by creating an investment vehicle for them.

In their Complaint, the Plaintiffs try to shoe horn the minority participation provision in the Operating Agreement to create a contractual entitlement to a share of Networx, even though they did not pursue concluding an agreement with the Defendants. As demonstrated by the Complaint and its exhibits, the Plaintiffs' demands were unreasonable and contrary to the structure of Networx as approved by the TRA. Their claims do not have a basis in either law or equity and must be dismissed for failure to state a claim under Rule 12.02.

After a brief overview of the pertinent facts, this memorandum will review the applicable law regarding the rights of third parties under contractual agreements such as the Operating Agreement. Then we shall examine why the Plaintiffs' claims should be barred by the doctrine of laches due to the extensive amount of time that has passed since the events that are the focus of the Complaint.

FACTS

Networx is a limited liability company ("LLC") organized under the laws of Tennessee in 1999 for the purpose of providing telecommunications services, primarily local exchange services to carriers, retail local exchange services to end users and other local services over its own facilities and the facilities of other

[2] See Docket sheet for Application of Memphis Networx, LLC, TRA Docket No. 99-00909 (available on State of Tennessee web site), attached hereto as Exhibit 1

6 Cont.

carriers. It has established an extensive network of cable and other networking facilities across the greater Memphis area.

Originally Networx's investors were MLGW and A&L Underground ("A&L"), a private company (see *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity* ("Final Order") issued by the Tennessee Regulatory Authority on August 9, 2001, a copy of which is attached hereto as Exhibit 2) In December 2000, while the matter was pending before the TRA, Broadband acquired the interests of A&L, and was substituted as a party-applicant before the TRA. *see* Final Order, at pg. 6. Broadband is a limited liability company, and it was designed to be the entity through which private investments into Networx would be channeled (as a corollary to the public investment through MLGW). As the attachments to the Complaint make clear, Broadband is composed of many different private investors, including minority participants. *see* Exhibits B and C to the Complaint.

On August 9, 2001, the TRA granted Networx a Certificate of Public Necessity and Convenience after almost two years of hotly-contested administrative proceedings. The *Final Order* expressly approves the Networx Operating Agreement. (Final Order, pg.39) and requires that any change in structure or control requires the further approval of the TRA. (Final Order, pg 40).

In the *Final* Order, the TRA found that Networx had complied with the requirements of T.C.A. § 65-5-212 (mandating the participation of small and minority-owned businesses) through its submission of a business participation plan. (A copy of the Small and Minority-Owned Telecommunications Business Participation Plan is attached hereto as Exhibit 3). Section 7 of that document contains the following language:

> **7. Minority ownership interest in Memphis Networx.** In accordance with Section 3.4 of the Operating Agreement of Memphis Networx, each of the initial members of Memphis Networx will ***negotiate in good faith*** to sell a portion of its financial rights in Memphis Networx to one of more Minority Businesses within four years of the Approval Date as defined in the Operating Agreement.

6. Cont.

(emphasis supplied). Section 3.4 of the Operating Agreement picks up on this requirement and directs that both MLGW and Broadband negotiate in good faith to sell a portion of ***their*** financial interest in Networx to minority participants:

> 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 percent (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 supplied). Neither the *Final Order* nor the Operating Agreement mandates that minority participants be given a direct investment in Networx, as the Plaintiffs seek in this lawsuit. Direct participation in Networx is contrary to the organizational structure established in the Operating Agreement and what was approved by the TRA in the *Final Order*. Under the approved framework, all private investors participate in Networx through their membership in Broadband. An offer to invest in Broadband was rejected out of hand by the Plaintiffs in 2001. *see* Exhibits B and C to the Complaint.

According to the attachments to the Complaint (see Exhibits B and C), the Plaintiffs contacted Paradigm Capitals Partners, LLC ("Paradigm"), the then managing member of Broadband, in the summer of 2001 to inquire about

minority investment opportunities in Networx. In an exchange of correspondence, representatives of Paradigm provided information to the Plaintiffs about Networx, and the opportunities to invest through its private capital vehicle, Broadband (*see* Exhibits B and C to the Complaint).. Throughout their discussions with Paradigm representatives, Plaintiffs insisted that they were entitled to a direct investment in Networx and that they would only consider becoming a third stakeholder in Networx (with MLGW and Broadband), despite the fact that such a transaction would be contrary to the structure approved in the *Final Order* and would require further action by the TRA. (*see* Exhibits B and C to the Complaint). The Plaintiffs demanded that they be granted both financial and ***governance rights*** in Networx, despite the fact that Section 3.4 requires MLGW and Broadband to negotiate the sale of their financial rights only. (*see* Exhibit C to the Complaint). In short, during their brief communications with Broadband on this issue, the Plaintiffs made demands that were unreasonable and had no basis in either the Operating Agreement or the Final Order, upon which they rely now.

The Plaintiffs were assured that there were no "economic or structural differences between investing through Memphis Broadband versus investing directly into Memphis Networx." (Exhibit B). They were also told of the long and arduous battle that was the initial approval process by the TRA, and how it would be unreasonable to reopen that process simply to satisfy the Plaintiffs' demand for a direct investment in Networx. Nonetheless, the Plaintiffs insisted on a direct stake in Networx, and that they would not be a participant in Broadband. Since approximately June, 2001, Plaintiffs had no further communications with the Defendants until this lawsuit was filed on August 8, 2005.

ARGUMENT

I. AS ADMITTED IN THE COMPLAINT, NO AGREEMENT WAS REACHED BETWEEN THE PARTIES, AND THUS THE PLAINTIFFS LACK STANDING TO ENFORCE THE PROVISIONS OF THE OPERATING AGREEMENT

The gravamen of the Complaint is that the Plaintiffs were "impeded" from becoming an investor in Networx and seek a court order to require sale of a

6 Cont.

percentage in the LLC to them. The Complaint acknowledges that there was never a meeting of the minds to create a membership interest for the Plaintiffs in the Networx LLC. Nonetheless, they turn to Section 3.14 of the Operating Agreement as the basis for their claims herein. 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 LLC, *see generally* T.C.A. §48-232-102, and that third parties have no claims under contractual agreements unless they were intended beneficiaries.

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. Oman Constr. Co. v. Tenn. Cent Ry. Co. 370 S.W. 2d 563, 572 (Tenn. 1963). Traditional rules of privity provide that those who were not parties to agreements could not sue to enforce them. Owner-Operator Independent Drivers' Assn. v. Concord EFS, Inc. 59 S.W.3d 63, 69 (Tenn. 2001).

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. Id. Under the modern rule, such third parties may enforce a contract if they are the *intended* beneficiaries of the contract. Willard v. Claborn 419 S.W.2d 168, 169 (Tenn. 1967). 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. Id. To maintain an action as an "intended beneficiary," a third party to an agreement, such as the Plaintiff herein, must show clear and direct evidence of the intent of the agreeing parties to confer a benefit upon it. Owner-Operator Independent Drivers' Assn., supra, 59 S.W.3d at 69-70.

Section 14.6 of the Operating Agreement for Networx expressly reserves the benefits of the Agreement to MLGW and Memphis Broadband and states that "**none of the provisions of the Agreement shall be for the benefit of or enforceable by any third parties,** including, without limitation, any creditors of the Company." (emphasis supplied). (*see* Exhibit A to the Complaint, pg. 41). 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.

Owner-Operator Independent Drivers Ass'n v. Concord EFS Inc., supra, is the leading Tennessee case on the requirements for third-party beneficiary status. In Concord, a group of independent truck drivers claimed they were third party beneficiaries of contracts between a bank that processed credit card transactions and two truck stop operators. Id. at 65. The contracts at issue prohibited the truck stop operators from adding a surcharge to purchases of fuel made with credit cards. Id. Despite the fact 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. Id. The Tennessee Supreme Court held the plaintiffs lacked standing to sue and therefore could not pursue their claims for damages. Id. 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 performance indicate that either:
    a. the performance of the promise will satisfy an obligation or discharge a duty owed by the promise to the beneficiary; or
    b. the promisee intends to give the beneficiary the benefit of the promised performance.

Id. at 70-71.

According to the Concord court, the primary focus is upon the intent of the contracting parties. Id. at 71. Thus, consistent with the first prong of the test, courts should honor any expression of intent by the parties to reserve to themselves the benefits of the contract. Id. The contracts at issue in Concord, contained statements that "weigh[ed] in favor of a finding that the parties

6. Cont.

intended to exclude third-party beneficiary claims." Id. at 72. 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, like Section 14.6 of the Operating Agreement here. Id.

In AmSouth Erectors, LLC v. Skaggs Irons Works, Inc., 2003 WL 21878540 (Tenn.Ct.App. 2003), (copy attached hereto as Exhibit 4) the Court of Appeals case applied the rule articulated in Concord to a situation where the parties had explicitly reserved the benefits of the contract to themselves, like the instant matter. In AmSouth, a subcontractor sued a building owner, and a prime contractor and consulting firm who had contracted with the owner to build an entertainment center, for payment for its services. *supra*, 2003 WL 21878540 *1. The Court of Appeals recognized, as instructed by the rule set forth in Concord 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.* at *3. 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, "the parties to the contract must have not otherwise agreed." Id. In AmSouth, 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. Id.

Based on the test set forth by the Tennessee Supreme Court in Concord, as later amplified by the decision in AmSouth, GETCO and Isaac Luboti are not intended third-party beneficiaries entitled to enforce the Agreement between MLGW and Broadband. This court should honor the intent of MLGW and Broadband as expressed in Section 14.6 of the Agreement to reserve to themselves the benefits of the Agreement and deny Plaintiffs' request to enforce the covenants of the Operating Agreement. The Plaintiffs therefore lack

6. Cont.

standing to pursue any claims derived from Section 3.4 or any other covenants of the Operating Agreement.

2. THE DOCTRINE OF LACHES BARS PLAINTIFFS' CLAIMS

As evident from the attachments to the Complaint, the events that form the basis of the Plaintiffs' allegations occurred primarily in the summer of 2001, over four years prior to the filing of this action. In short, after a flurry of activities that consisted of the exchange of information between representatives of Paradigm Capital, the managing partner of Broadband, and Isaac Luboti, a plaintiff herein who was ostensibly acting on behalf of Getco, all communications ceased. After the series of exchanges that went between Paradigm and Mr. Luboti about the structure of Networx, the availability of investment opportunities, and the interest of Getco and its member partners, and Mr. Luboti essentially quit communicating with representatives on the issue. Four years later, this suit was filed.

Due to the extensive amount of time that has passed since the events that are the focus of the Complaint, Plaintiffs' claims should be barred by the doctrine of laches. Equity aids the vigilant, not those who sleep upon their rights. William H. Inman, Gibson's Suits in Chancery § 93, p. 89 (7th ed. 1988). Tennessee courts have stated the doctrine of laches as follows:

> 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

Brown v. Ogle, 46 S.W.3d. 721, 726 (Tenn.Ct.App. 2000).

Based on the holding by the Tennessee Court of Appeals in Brown, the Plaintiffs' claims should be barred by the doctrine of laches. Since the time of the communications between Paradigm and Mr. Luboti, potential witnesses are no

6. Cont.

longer available and the status of pertinent records is unknown. Paradigm's controlling member passed away in February, 2002, and Paradigm effectively ceased to function approximately three years ago. The result of the four year delay by Getco and Isaac Luboti will certainly prejudice Broadband and the Plaintiffs' claims should be dismissed.

CONCLUSION

For the reasons set forth above, Broadband asks the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

BURCH, PORTER & JOHNSON PLLC

Nathan A. Bicks (BPR No. 10903)
Junaid Odubeko (BPR No. 23809)
130 North Court Avenue
Memphis, Tennessee 38103
(901) 524-5000
(901) 524-5024 -fax

6. Cont.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the parties listed below via U.S. Mail, postage prepaid on September 16, 2005.

Date:
Sept 16, 2005

Paul Robinson, Jr.
147 Jefferson Avenue, Suite 1010
Memphis, Tennessee 38103

Allan J. Wade
119 South Main, Suite 700
Memphis, Tennessee 38103

Nathan A. Bicks

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

GETCO,
A Tennessee General Partnership,
Isaac Luboti, Individually
Plaintiff

Vs.

Case No. CH05-1457
PART 1

Memphis Light Gas & Water, and
Memphis Broadband LLC

Defendants.

PETITION FOR SALE OF FINANCIAL RIGHTS

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT

Comes now your Petitioner GETCO, A Tennessee General Partnership consisting of W. Isaac Luboti and Leonard Ray Brown Jr., through counsel and would state and show unto the court as follows.

1. Memphis Light Gas and Water ("MLGW") is a Tennessee public utility, which may be served with process at its principal place of business located at 220 South Main Street in Memphis, Tennessee.

2. Memphis Broadband is a Delaware corporation which may be served with process by serving its registered agent in Tennessee, Mr. Warner B. Rodda at 130 North Court Ave. Memphis, Tennessee 38103.

79 S W.3d 506

79 S W 3d 506

(Cite as: 79 S.W.3d 506)

H

Supreme Court of Tennessee,
at Nashville.
BELLSOUTH ADVERTISING & PUBLISHING CORPORATION
v
TENNESSEE REGULATORY AUTHORITY.
and
BellSouth Advertising & Publishing Corporation
v.
Nextlink Tennessee.
No. M1998-01012-SC-R11-CV.
No. M1998-00987-SC-R11-CV.

July 10, 2002.

Telephone directory publisher appealed from orders of the **Tennessee Regulatory Authority** (TRA) requiring it to brand covers of telephone directory with names and logos of local telecommunications companies in competition with its parent company. On consolidated appeal, the Court of Appeals reversed. Upon grant of permission to appeal, the Supreme Court, Adolpho A. Birch Jr., J., held that: (1) TRA had authority to order publisher to include competitor's names and logos on directory covers; (2) TRA had jurisdiction over directory publisher; and (3) requiring publisher to include competitor's names and logos did not violate First Amendment.

Court of Appeals reversed

West Headnotes

[1] Telecommunications ⇨876
372k876 Most Cited Cases
(Formerly 372k267)
Tennessee Regulatory Authority (TRA) had authority to require telephone directory publisher to include names and logos of competing local telephone service providers on cover of directory T.C.A. §§ 65-2-102(a)(2), 65-4- 104, 65-4-106.

[2] Public Utilities ⇨194
317Ak194 Most Cited Cases
The Supreme Court interprets the statutes governing the **Tennessee Regulatory Authority's** (TRA) authority de novo as a question of law, and construes the statutes liberally to further the legislature's intent to grant broad authority to the TRA. T.C.A. § 65-4-104.

[3] Telecommunications ⇨876
372k876 Most Cited Cases
(Formerly 372k267)
Tennessee Regulatory Authority (TRA) had jurisdiction over telephone directory publisher, which was subsidiary of incumbent local exchange telephone company, and thus TRA could require that directory publisher include names and logos of competing local telephone service providers on directory cover, where parent company was required by law to provide white pages directory in its market areas, and parent company contracted that duty to subsidiary.

[4] Constitutional Law ⇨90.1(9)
92k90.1(9) Most Cited Cases

[4] Telecommunications ⇨876
372k876 Most Cited Cases
(Formerly 372k267)
Requirement that telephone directory publisher include names and logos of competing local telephone service providers on cover of directory did not violate First Amendment, where requirement was reasonably related to state's interest in advancing competition in provision of local telephone services by informing consumers as to existence of alternative local telephone services, requiring names and logos on directory covers did not impose inordinate burden on incumbent local exchange telephone company, requiring that logos of competing firms be displayed on equal footing with incumbent's logo did not substantially affect incumbent's ability to communicate its own speech

to customers in market, and requirement was reasonably related to state's interest in preventing deception of consumers. U.S.C A. Const Amend. 1.

[5] Constitutional Law ⚿90.2
92k90 2 Most Cited Cases

[5] Constitutional Law ⚿274.1(2.1)
92k274.1(2.1) Most Cited Cases
Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14.
***507** J. Richard Collier and Julie M Woodruff, Nashville, Tennessee, for the appellant, **Tennessee Regulatory Authority**.

Henry Walker, Nashville, Tennessee, for the appellants, AT&T Communications of South Central States, Inc, MCI Worldcom Network Services, Inc., and XO Tennessee, Inc

Paul S Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, Daniel J Thompson, Jr., Tucker, Georgia, and James F. Bogan, III, Atlanta, Georgia, for the appellee, BellSouth Advertising & Publishing Corporation

OPINION

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK DROWOTA, III, C.J, E. RILEY ANDERSON, JANICE M HOLDER, and WILLIAM M. BARKER, JJ joined.

ADOLPHO A. BIRCH, JR., J.

This consolidated appeal presents two very important issues. They are: (1) ***508** whether the **Tennessee Regulatory Authority** has the authority to require that the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc. be included on the cover of white pages telephone directories published by BellSouth Advertising & Publishing Corporation on behalf of BellSouth Telecommunications, Inc; and (2) whether the **Tennessee Regulatory Authority's** decisions in these consolidated cases violate the First Amendment of the Constitution of the United States. For the reasons discussed herein, we hold that the **Tennessee Regulatory Authority** is authorized to require that the names and logos of competing local telephone service providers be included on the covers of the white pages telephone directories published on behalf of BellSouth Telecommunications, Inc., and that the **Tennessee Regulatory Authority's** decisions in these two cases do not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals in this consolidated appeal and reinstate the judgments of the **Tennessee Regulatory Authority**.

I. Facts and Procedural History

Prior to June 1995, local telephone services in Tennessee were sold to the consumer by monopoly providers. Provision of those services changed dramatically, however, with the Tennessee General Assembly's enactment of 1995 Tenn. Pub. Acts 408 (effective June 6, 1995) (Chapter 408), which comprehensively reformed the rules under which providers of telephone services operate in Tennessee. One of the more notable changes effected by the enactment of Chapter 408 was the abolition of monopolistic control of the local telephone service market and the initiation of open-market competition in the provision of local telephone service.

Under the two above-cited telecommunications statutes, any local telephone service provider who operated as a monopoly under the prior system was thenceforth designated as an "incumbent local exchange telephone company." Likewise, any telecommunications company providing local telephone services in competition with the incumbent local exchange telephone company was designated as a "competing local exchange telephone company."

BellSouth Telecommunications, Inc. (BellSouth), under its former name, South Central Bell, operated

as a monopoly in providing local telephone service in Tennessee markets prior to the enactment of Chapter 408 BellSouth, therefore, is an incumbent local exchange telephone company for purposes of the new state and federal laws. Under the former regulatory system, BellSouth was required to publish for each service area a "white pages" telephone directory listing all telephone subscribers within the area. Tenn. Comp. R. & Regs 1220-4-2-.15 (1999). That obligation continues under the new regulatory scheme. *Id*. Tenn Code Ann. § 65-4-124(c) (Supp.2001). *See also* 47 U.S C.A. § 271(c)(2)(B)(viii) (West Supp.2001). [FN1]

> FN1. Section 271(c)(2)(B)(viii) requires any Bell operating company (which includes BellSouth) that seeks to enter the long distance market to list customers of competing local exchange carriers in its white pages directory listings.

In order to fulfill its obligation to publish a white pages directory, BellSouth contracted with BellSouth Advertising & Publishing Corporation (BAPCO) BAPCO publishes "white pages" and "yellow pages" directories for BellSouth in many different markets. While BellSouth and BAPCO are separate corporations, both are parts of BellSouth Corporation The "**BELL**SOUTH" logo is the only logo printed on the white pages and yellow ***509** pages directories published by BAPCO for BellSouth.

A. The AT&T Proceeding

AT&T Communications of South Central States, Inc. (AT&T), a competing local exchange telephone company, negotiated an "interconnection agreement" with BellSouth as was permitted under the new regulations. *See* Tenn.Code Ann. § 65-4-124(a) (Supp 2001). As to any issues relating to the telephone directories BAPCO published for BellSouth, however, BellSouth required AT&T to negotiate with BAPCO.

AT&T then opened negotiations with BAPCO for the purpose of including its subscribers within BellSouth's white pages and its name or logo on the cover of the white pages directories in areas in which AT&T competes with BellSouth in the provision of local telephone services. They reached an agreement and entered into a contract in August 1996 on all terms except the directory-cover issue, which was omitted from the contract.

At the time, the **Tennessee Regulatory Authority** (TRA), pursuant to the federal act, was conducting an arbitration proceeding pertaining to certain issues that had arisen in the implementation of the new competitive system. AT&T filed a petition in the arbitration proceeding asking the TRA to require BAPCO to place AT&T's name and logo on BellSouth's white pages directory covers. In turn, BAPCO filed a petition asking the TRA to declare that BAPCO was not subject to the TRA's jurisdiction and that issues relating to the publication of telephone directories were beyond the scope of the arbitration proceeding, which was governed by federal law. On October 21, 1996, the TRA formally declined to address the issue, finding that "private negotiations are the preferred method of resolving this issue."

On December 16, 1996, after further negotiations had proved fruitless, AT&T filed a petition with the TRA seeking a declaratory order as to the applicability of Tenn Code Ann. §§ 65-4-104 ,--117(3),--122(c), and Tenn. Comp. R. & Regs. 1220-4-2- 15 to the white pages directories published by BAPCO on behalf of BellSouth. In its petition, AT&T asked the TRA to join BellSouth and BAPCO as parties to the proceeding, to conduct a contested case hearing on the petition, and to declare that "telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth.' "

The TRA voted to convene a contested case

hearing and formally made BellSouth and BAPCO parties to the proceeding. [FN2] The TRA subsequently granted petitions to intervene filed on behalf of MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC ("Nextlink"), which, like AT&T, are competing local exchange telephone companies serving various local markets in Tennessee. [FN3]

> FN2. Both BellSouth and BAPCO participated in the AT&T declaratory order proceeding before the TRA. BellSouth, however, did not enter an appearance in the pending appeals.
>
> FN3. MCI Telecommunications, Inc , and Nextlink Tennessee, LLC now operate under new names, MCI WORLDCOM Network Services, Inc. and XO Tennessee, Inc., respectively For purposes of clarity, each company is referred to in this opinion by the name it had at the time of the administrative proceedings.

***510** After conducting a contested case hearing and considering the testimony and exhibits admitted into evidence, the TRA, in a 2 to 1 decision, ruled in favor of AT&T. In the written declaratory order issued by the majority, it declared that:

> BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the [TRA] and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

The dissenting TRA Director stated in a separate opinion that he agreed with the majority that the names and logos of competing local exchange telephone companies should be placed on the front cover of the directories published by BAPCO on behalf of BellSouth. He concluded, however, that the rule relied upon by the majority (Rule 1220-4-2-.15), which was promulgated during the time of monopoly local telephone service, did not apply to the new competitive system and that the TRA should initiate a rulemaking proceeding to amend the rule to require that competitors' names and logos appear on the white pages directory covers. BAPCO appealed the decision to the Court of Appeals. [FN4]

> FN4. *See* Tenn.Code Ann. § 4-5-322(b)(1) (1998) (stating, in pertinent part, "A person who is aggrieved by any final decision of the **Tennessee regulatory authority** .. shall file any petition for review with the middle division of the court of appeals.").

B. The Nextlink Proceeding

While the appeal of the AT&T proceeding was pending in the Court of Appeals, Nextlink requested that BAPCO include Nextlink's name and logo on the cover of the white pages directory published by BAPCO for Nextlink's service area. BAPCO denied that request Nextlink subsequently filed a petition asking the TRA for a declaratory order on the issue Nextlink asked the TRA to order BAPCO to comply with Rule 1220-4-2-.15 as interpreted in the declaratory order entered in the AT&T proceeding. Nextlink asserted that BAPCO is required to afford *all* competing local exchange telephone companies the opportunity to appear on white pages directory covers in their service areas as a result of the TRA's interpretation of the rule in the AT&T declaratory order

After hearing oral arguments by the parties, the TRA ruled in favor of Nextlink. [FN5] In pertinent part, it concluded that its interpretation of Rule 1220-4-2-.15 in the AT&T proceeding "must be equally applied to all similarly situated carriers that seek the same relief." The TRA directed BAPCO "to comply with TRA Rule 1220-4-2- 15, as interpreted in its Declaratory Order entered on

March 19, 1998 [the AT&T declaratory order]."

> FN5. Like the AT&T declaratory order, the Nextlink order was the result of a 2 to 1 vote The dissenting TRA Director in the Nextlink proceeding "voted not to support the decision of the majority because the Declaratory Order [from the AT&T proceeding] interpreting TRA Rule 1220- 4-2-.15[was] currently pending before the Court of Appeals[.]"

BAPCO appealed the decision to the Court of Appeals. The appeals of the ***511** AT&T and Nextlink proceedings were argued separately in the Court of Appeals, although the court subsequently consolidated the two appeals. [FN6]

> FN6. The Court of Appeals stated in the Nextlink case: "Because of the substantial similarity of the issues, this appeal will be consolidated for consideration with *BellSouth Advertising & Publishing Corp v Tennessee Regulatory Auth*, No. 01A01-9805-BC-00248. However, both appeals shall maintain their separate appeal numbers and papers filed in either of these appeals shall bear the appeal number of the proceeding in which they are filed "

The Court of Appeals reversed the two declaratory orders entered by the TRA A majority of the three-judge panel agreed that the TRA had exceeded its authority under state law in ordering BAPCO to include the names and logos of competing telecommunications companies on the covers of the white pages directories published by BAPCO for BellSouth. The two-judge majority agreed also that the TRA's declaratory orders violated the First Amendment. In a dissenting opinion, the third member of the panel concluded that the TRA's decisions in these two cases were authorized by state law and did not violate First Amendment principles.

The TRA applied to this Court for permission to appeal pursuant to Tenn. R.App. P. 11, and we granted the application. On appeal, we must address two issues: (1) whether the TRA has the authority to require that the names and logos of "competing local exchange telephone companies" be included on the cover of white pages telephone directories published on behalf of BellSouth; and (2) whether imposing such a requirement violates the First Amendment of the United States Constitution. [FN7] After a painstaking review of the voluminous record and a thorough consideration of the issues, we hold that (1) the TRA is authorized to require that the names and logos of competing local exchange telephone companies be included on the cover of white pages directories published on behalf of BellSouth, and (2) the TRA's decisions in these two cases do not violate the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgments of the TRA are reinstated.

> FN7. The Uniform Administrative Procedures Act, Tenn Code Ann. § 4-5-322(h) (1998), sets forth the analysis to be applied when reviewing decisions of administrative agencies Section 4-5-322(h) provides:
>
> 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 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.

Although BAPCO refers to all five subsections of the above-quoted statute in its brief, the pertinent provisions for purposes of the consolidated appeal are Tenn.Code Ann. §§ 4-5-322(h)(1) and--322(h)(2)--in other words, we must determine whether, under those subsections, the TRA's decisions either were "in violation of constitutional .. provisions" or "in excess of the statutory authority of the agency" and subject to reversal or modification for those reasons.

II. Authority of the **Tennessee Regulatory Authority**

[1] We address first the question whether the TRA has the authority to ***512** require that the names and logos of competing telephone companies be included on the cover of white pages directories published on behalf of BellSouth. In defining the authority of the TRA, this Court has held that "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power." *Tennessee Pub Serv Comm'n v Southern Ry. Co*, 554 S.W 2d 612, 613 (Tenn.1977) The primary grant of authority to the TRA is located at Tenn Code Ann § 65-4-104 (Supp 2001), the provision defining the TRA's general jurisdiction. The statute provides, in pertinent part, that "the authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." *Id.* In the exercise of this general power, Tenn.Code Ann. § 65-4-117 provides, "[T]he authority has the power to ... [a]fter hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[ ]" Tenn.Code Ann. § 65-4- 117(3) (Supp.2001).

In construing these provisions, we are guided both by statute and by the prior decisions of this Court. At the outset,

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn.Code Ann. § 65-4-106 (Supp.2001). In addition, this Court has held that the issue whether an administrative agency's action is explicitly or implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc v Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn.1995). Moreover, this Court has observed:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities " Tenn.Code Ann § 65-4-104 (1997 Supp.) In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] .. shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Ass'n v Tennessee Public Service Comm'n,* 844 S.W.2d 151, 159 (Tenn.App.1992). To enable the TRA to effectively accomplish its designated purpose--the governance and supervision of public utilities--the General Assembly has empowered the TRA to "adopt rules governing the procedures prescribed or authorized,"

> including "rules of practice before the authority, together with forms and instructions," and "rules implementing, interpreting or making specific the various laws which ***513** [the TRA] enforces or administers." Tenn.Code Ann § 65-2-102(1) & (2) (1997 Supp.).

Consumer Advocate Div v Greer, 967 S.W.2d 759, 761-62 (Tenn.1998).

[2] Thus, in sum, we interpret the statutes governing the TRA's authority *de novo* as a question of law, and we construe the statutes liberally to further the legislature's intent to grant broad authority to the TRA.

A. Chapter 408

In Section I of Chapter 408, the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> **Declaration of telecommunications services policy.** The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn Code Ann. § 65-4-123 (Supp.2001).

Another section of Chapter 408, now codified at Tenn.Code Ann. § 65-4-124 (Supp.2001), provides, in pertinent part:

> (a) All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing . .

Two of the provisions in Tenn.Code Ann. § 65-4-124 are especially relevant to the pending cases. subparagraph (b) requires the TRA to "promulgate rules *and issue such orders as necessary* to implement the provisions of subsection (a)" (emphasis added); and subparagraph (c) requires the TRA to "ensure that all telecommunications services providers who provide basic local exchange telephone service ... provide each customer a basic White Pages directory listing.. ."

The TRA relies on the two foregoing provisions of Chapter 408 (Tenn.Code Ann. §§ 65-4-123 and--124) to support its contention that its declaratory orders did not exceed the agency's statutory authority. ***514** In addition to its reliance upon the above-enumerated statutes, the TRA relies upon Rule 1220-4-2- 15 as its authority for the declaratory orders issued in the case under submission. Mindful of the provisions of Chapter 408, we now consider Rule 1220-4-2-.15 in the context of TRA's contentions.

B. Rule 1220-4-2-.15

This rule was originally promulgated by the TRA's

predecessor agency, the Public Service Commission, long before the enactment of Chapter 408 [FN8] The rule provides, in pertinent part:

> FN8. The Administrative History for Rule 1220-4-2- 15 states: "Original rule certified May 9, 1974. Amendment filed August 18, 1982; effective September 17, 1982 Amendment filed November 9, 1984; effective December 9, 1984."

1220-4-2-.15 DIRECTORIES-ALPHABETICAL LISTING (WHITE PAGES)
(1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.
(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
(3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover...

In its declaratory orders in these two proceedings, the TRA interpreted Rule 1220-4-2-.15 to require that the names and logos of competing local exchange telephone companies be placed on the covers of the white pages directories that BAPCO publishes for BellSouth, the incumbent local exchange telephone company that is required by law to publish a white pages directory. As we stated in *Jackson Express, Inc v Tennessee Public Service Commission,* "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 679 S.W.2d 942, 945 (Tenn.1984).

We therefore must give "great deference" to the TRA's interpretation of Rule 1220-4-2-.15, and the TRA's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In addition, we review the agency's interpretation in light of the statutes, discussed above, governing the TRA. Referring again to those statutes, we note that the General Assembly has provided that the laws governing the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction ..." Tenn.Code Ann. § 65-4-106 The General Assembly also has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65-2- 102(2) (Supp.2001). Finally, the legislature has stated that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact ***515** or law arising as a result of the application of Acts 1995, ch. 408." Tenn.Code Ann. § 65-5-210(a) (Supp 2001).

As stated, Rule 1220-4-2- 15 requires that the "name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover[.]" We have considered Tenn Code Ann §§ 65-2-102(2), 65-4-104, 65-4-106 and the pertinent provisions of Chapter 408. Additionally, we have accorded the TRA's interpretation of its own rules the deference required. In so doing, we fail to find any demonstration that the TRA has acted in excess of its authority in requiring that the names of competing local exchange providers be included on the cover of BellSouth's white pages directories. The declaratory orders as promulgated serve to "resolve ... contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Accordingly, the declaratory orders are expressly authorized by Tenn.Code Ann. § 65-5-210(a).

III. TRA's Jurisdiction over BAPCO

[3] While it is abundantly clear that the TRA has jurisdiction over BellSouth, a regulated public

utility, BAPCO suggests that because it is not a public utility, it is beyond the reach of the TRA.

In its declaratory orders, the TRA required that BAPCO provide AT&T and Nextlink the opportunity "to contract with BAPCO for the appearance of AT&T's [and Nextlink's] name[s] and logo[s] on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract."

While we recognize that this issue could have been avoided had the TRA ordered BellSouth, as distinct from BAPCO, to implement the TRA's interpretation of Rule 1220-4-2- 15, we nevertheless conclude that the TRA did not err in ordering BAPCO to allow competing service providers to contract with BAPCO to be included on the covers of BellSouth's white pages directories Our conclusion is based upon the particular facts of these related proceedings and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates

Factually, much of the testimony admitted into evidence during the AT&T proceeding pertained to BAPCO's role in publishing directories on behalf of BellSouth. The testimony of a number of witnesses can be summarized by quoting a single sentence of the testimony of one witness employed by BAPCO "[a]ll editorial, publishing, and business decisions [regarding the directories] are under BAPCO's exclusive control." R , Vol 16, p. 37 (Testimony of R F Barretto, Director-Local Exchange Carrier Interface for BAPCO). Moreover, BellSouth admitted in its answer to AT&T's petition for a declaratory order that "during the course of the negotiations between AT&T and [BellSouth] for an interconnection agreement .. [BellSouth] properly maintained that negotiations with respect to telephone directories were to be conducted with BAPCO." R , Vol. I, p. 35. Likewise, BAPCO stated in its answer to the AT&T petition that "[t]he issues raised in the AT&T Petition should be resolved between AT&T and BAPCO[.]" R , Vol I, p 45.

With regard to precedent, we considered in *Tennessee Public Service Commission v Nashville Gas Co.*, an analogous issue concerning a parent corporation and its subsidiary in the context of rate-making. 551 S.W 2d 315 (Tenn.1977). In permitting the TRA's predecessor, the Public Service Commission, to consider pertinent financial data of the parent corporation (not a public utility regulated by the Commission) in setting the rates for the subsidiary ***516** corporation (a public utility regulated by the Commission), we stated:

> [A] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil," which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

Id. at 319-20. Continuing, we stated that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Id* at 321.

Although the cases under submission are not rate-making proceedings, we conclude that the reasoning and the principles stated in *Nashville Gas* are applicable thereto. BellSouth is a public utility regulated by the TRA and is required by law to provide a white pages directory in its market areas. BellSouth has contracted that duty to BAPCO, an

affiliated company within BellSouth's parent corporation. Thus, for purposes of these two declaratory order proceedings, we conclude that the TRA had jurisdiction over BAPCO. Were we to conclude otherwise, BellSouth could escape the legal responsibilities thrust upon it by Rule 1220-4-2-.15 Because BellSouth delegated its responsibility over the white pages directories to BAPCO, and because BAPCO has exclusive control over the directories, we conclude that the TRA has jurisdiction over BAPCO for the purposes of these two proceedings.

IV. First Amendment Issue

Next, the TRA contends that the Court of Appeals erred in holding that the TRA's decisions in these two cases amount to "compelled speech" and therefore violate the First Amendment. [FN9] For the reasons set out below, we hold that the TRA's orders do not violate the First Amendment.

> FN9. The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

[4] The TRA's orders in these two proceedings implicate two lines of First Amendment cases those pertaining to "compelled speech" and those pertaining to "commercial speech." The parties focus most heavily upon the former line, so we begin with an analysis of the law regarding compelled speech.

The United States Supreme Court, in its cases involving compelled speech, has held that the First Amendment not only bars the government from prohibiting protected speech, it also may bar the government from compelling the expression of certain views or the subsidization of speech to which an individual objects. ***517***United States v United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct 2334, 150 L.Ed.2d 438 (2001), *see also Lehnert v Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Wooley v Maynard*, 430 U.S. 705, 97 S.Ct 1428, 51 L.Ed.2d 752 (1977) Although the Court's compelled speech cases may be divided into numerous categories, the parties rely most heavily on those cases involving laws or regulations requiring individuals to contribute financially to speech with which they disagree. This category of cases is typified by *Abood v Detroit Board of Education* [FN10] and *Keller v State Bar of California* [FN11] In that pair of cases, the Court set out a "germaneness" test, under which compelled contributions do not offend First Amendment principles so long as they are used for activities that are germane to the organization's central purpose

> FN10 431 U.S. 209, 235-36, 97 S.Ct. 1782, 52 L.Ed 2d 261 (1977) (holding that teachers' compulsory union dues could not be used for political or ideological purposes that were not "germane" to the union's duties as a collective-bargaining representative).
>
> FN11. 496 U.S 1, 14, 110 S.Ct. 2228, 110 L Ed 2d 1 (1990) (holding that a state bar's use of compulsory dues to finance political activities with which the petitioners disagreed violated their right to free speech when the expenditures were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of [legal services]' ")

The parties focus upon two separate cases discussing *Abood* and *Keller* in the context of compelled financial contributions to commercial speech [FN12] The TRA, in contending that the Court of Appeals erred in reversing its orders on First Amendment grounds, relies on *Glickman v Wileman Bros. & Elliott, Inc* [FN13] Conversely, BAPCO, contending that the First Amendment analysis of the Court of Appeals is correct, relies upon *United States v United Foods, Inc* Both *Glickman* and *United Foods* involve federal programs administered by the Secretary of Agriculture, in which the Secretary imposed mandatory assessments on two different agricultural industries for funding generic advertising for the respective industries.

FN12. The TRA argues in the alternative that its two orders meet the test set forth in *Central Hudson Gas & Electric Corp v Public Service Commission of N.Y.*, 447 U.S. 557, 100 S Ct. 2343, 65 L Ed.2d 341 (1980). BAPCO argues in response that the orders do not meet the requirements of *Central Hudson* The application of *Central Hudson* is discussed later in this opinion.

FN13. 521 U.S 457, 117 S Ct. 2130, 138 L Ed.2d 585 (1997)

In *Glickman,* growers, handlers, and processors of California tree fruits challenged marketing orders promulgated by the Secretary. The orders imposed mandatory assessments on the petitioners to cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The petitioners asserted that the government-mandated financial contribution to the generic advertising campaign violated their First Amendment rights After summarizing the components of the regulatory scheme of which the marketing orders were a part, the Court concluded that "[t]hree characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge freedom of speech protected by the First Amendment " *Id* 521 U S at 469, 117 S Ct. 2130. The Court continued:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. *Second, they do not compel any person to engage in any actual or *518 symbolic speech.* Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70, 117 S Ct. 2130 (emphasis added). The Court then found that the assessments under the marketing orders did not constitute compelled speech. As the Court stated:

> Our compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message.

Id, 521 U.S. at 470-71, 117 S.Ct. 2130 (citations omitted). Applying the *Abood-Keller* "germane[ness]" test, the Court concluded that the generic advertising program was "unquestionably germane to the purposes of the marketing orders" and that the assessments were not used to fund ideological activities. *Glickman,* 521 U.S at 473, 117 S Ct. 2130.

Superficially, *United Foods* appears to be similar to *Glickman United Foods* involved a mandatory assessment imposed by the Secretary of Agriculture on handlers of fresh mushrooms, to be used primarily for funding advertising for the mushroom industry. Despite the facial similarity between the two cases, however, the Court in *United Foods* distinguished *Glickman* on the grounds that the compelled assessments in *Glickman* were part of a broad regulatory scheme, whereas the assessments in *United Foods* were not. Indeed, the *United Foods* Court found that the only program served by the compelled contributions was the very advertising scheme in question. 533 U.S at 411-12, 121 S Ct. 2334. The Court then applied the *Abood-Keller* principles to the mandatory assessments and ultimately held that they violated the First Amendment.

Having reviewed this authority, however, we cannot conclude that the cases cited by either of the parties are completely apposite to the case under submission. The principles stated in *Abood* and *Keller*, and in the later cases in which *Abood* and *Keller* have been applied (including *Glickman* and *United Foods*), are limited to cases involving compelled *contributions* to speech. The TRA's orders, on the other hand, effectively require BAPCO to engage in *actual speech* The distinction, we conclude, is significant. *Cf Glickman,* 521 U.S at 469, 117 S.Ct. 2130 (stating that the marketing orders did not "compel any person to engage in any actual or symbolic speech"), and 521 U S. at 470-71, 117 S.Ct. 2130

(stating that the Court's "compelled speech case law . . is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths... ").

Because the *Abood-Keller* standards applied in *Glickman* and *United Foods* are inapposite, we next must determine what standard to apply to these two cases. Consequently, our analysis takes us to the United States Supreme Court case law involving commercial speech.

[5] Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. *Central Hudson Gas & Elec Corp. v Public Serv. Comm'n of N Y*, 447 U.S. 557, 100 S.Ct. 2343, 65 L Ed 2d 341 (1980); ***519** *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct 1817, 48 L.Ed.2d 346 (1976). The Supreme Court, however, has distinguished between commercial speech and other types of speech in that "[t]he Constitution . accords a lesser protection to commercial speech than to other constitutionally protected expression." *Central Hudson,* 447 U.S. at 562-63, 100 S.Ct. 2343; *see also United Foods,* 533 U.S. at 409, 121 S.Ct. 2334.

In *Central Hudson,* the Supreme Court adopted a four-part analysis to be used in determining whether a law impermissibly restricts commercial speech. The Court stated.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S at 566, 100 S Ct. 2343.

The *Central Hudson* test, however, has been a subject of considerable debate Although the Court has preserved the test in cases involving *restrictions* on commercial speech, [FN14] it has not applied the test in cases involving *compelled* commercial speech or *compelled financial support of commercial speech See Glickman,* 521 U.S at 474, 117 S Ct. 2130 (holding that the Court of Appeals erred in relying on *Central Hudson* for the purpose of testing the constitutionality of government-mandated assessments for promotional advertising). [FN15]

> FN14. *See Greater New Orleans Broad Ass'n v United States,* 527 U.S. 173, 184, 119 S Ct 1923, 144 L.Ed.2d 161 (1999); *see also United Foods,* 533 U S. at 409-10, 121 S.Ct 2334 (noting criticism of *Central Hudson* test but declining to "enter into the controversy").
>
> FN15. The *United Foods* Court noted that the *Central Hudson* test has been criticized, but did not revisit the *Central Hudson* test and did not apply it to the mandatory assessments at issue in that case. The Court simply noted that the mandatory assessments could not be sustained under *any* of the Court's precedents *Id* 533 U.S at 410, 121 S.Ct. 2334.

In *Walker v Board of Professional Responsibility of the Supreme Court of Tennessee,* this Court noted that the distinction between restricted speech cases and compelled speech cases is significant, stating, "The fact that a regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment." 38 S W.3d 540, 545 (Tenn.2001). Accordingly, we looked to the more forgiving standard set forth by the United States Supreme Court in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), as the defining test for First Amendment analysis of compelled speech cases. *Walker,* 38 S.W.3d at 545. [FN16] As we noted in *Walker, Zauderer* states:

FN16. Notably, several federal circuits also have applied the *Zauderer* test to governmental regulations that require disclosure of information *See, e.g., Commodity Trend Serv, Inc. v Commodity Futures Trading Comm'n,* 233 F.3d 981, 994 (7th Cir.2000); *Commodity Futures Trading Comm'n v Vartuli,* 228 F.3d 94, 108 (2d Cir 2000); *Consolidated Cigar Corp v Reilly,* 218 F.3d 30, 54 (1st Cir.2000).

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements ***520** might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

Id at 546 (quoting *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265) In other words, "under current law--as announced in *Zauderer*--as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld." *Id*

Although both the *Zauderer* and *Walker* cases specifically involved application of First Amendment principles to attorney advertising, we noted in *Walker* that attorney advertising is considered commercial speech under the First Amendment. *Id* at 544. We see no reason why the compelled commercial speech at issue in *Zauderer* and *Walker* should be governed by a different standard than the compelled commercial speech at issue here, accordingly, we now apply the *Zauderer* standard to the case under submission.

An application of *Zauderer* to the pending appeals requires that we determine:

1. Whether the TRA's disclosure requirement is reasonably related the state's interest in preventing deception of consumers, and
2. Whether the disclosure requirement is unduly burdensome.

We first address the relationship between the TRA's orders and the state's interest in preventing deception of consumers. This interest in preventing deception presents itself in a different context than is seen in the attorney advertising regulations of *Zauderer* and *Walker.* The rules in *Zauderer* and *Walker* compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors. The ultimate object of the regulations, however, is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Richard Guepe, District Manager in the Law & Governmental Affairs organization of AT&T, in his testimony before the TRA, addressed the value of having the names and logos of the competing local exchange telephone companies on the cover of the white pages directory published on behalf of BellSouth:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers To be effective, consumer communication must be simple, it must be clear, and it must be repeated. That is why the phone book cover is important Consumers see it often. The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print We are asking that the cover of the phone book tell Tennessee consumers very clearly that they have a choice in the local service market.

R., Vol. 15, p. 64. As explained by Guepe, the TRA's two declaratory orders directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services. Thus, we conclude that the orders are reasonably related to the state's asserted interest.

The second step of the *Zauderer* test is to determine whether the TRA's orders are unduly burdensome. To assist in this determination, the

United States Supreme Court has provided guidance. In ***521***Board of Trustees of the State University of New York v Fox,* the Supreme Court held that governmental restrictions upon commercial speech are not invalid merely because they go beyond the least restrictive means capable of achieving the desired end. *Fox,* 492 U.S 469, 480, 109 S.Ct 3028, 106 L.Ed 2d 388 (1989). The Court stated:

> [W]hile we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing .. the harmless from the harmful,' " we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,"--a fit that is not necessarily perfect, but reasonable, that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed

Fox, 492 U.S at 480, 109 S.Ct. 3028 (citations omitted).

Under *Fox,* the TRA is the proper body to determine "the manner of regulation that may best be employed" to fulfill the government's objective. *Id* Thus, this Court may not determine whether the manner of regulation chosen by the TRA should have been more or less restrictive. Ours is merely to review the chosen regulation and determine whether it is unduly burdensome.

Reviewing the record thoroughly in light of the principles articulated in *Fox,* we are firmly convinced that the TRA's decisions requiring the logos and names of competing service providers to be displayed on the directory covers do not impose an inordinate burden on BellSouth. As discussed *supra,* the governmental interest in this case is important, indeed, for informing consumers about their choices in the local telecommunications service market is a fundamental aspect of promoting free competition. Moreover, the government's chosen means to advance its goals, the requirement that logos of competing telecommunications service providers be displayed on equal footing with BellSouth's logo, does not substantially affect BellSouth's ability to communicate its own speech to customers in the market. Given the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome.

Concluding the *Zauderer* analysis, we find that the TRA's orders are reasonably related to the state's substantial interest in preventing the deception of consumers, and we further find that the orders under review directly advance the state's interest without imposing an excessive burden. Thus, we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment.

V. BAPCO's Additional Arguments

BAPCO raises two other arguments in its brief, however, neither was considered and decided as an issue by the TRA or by the Court of Appeals. We find that both arguments are without merit.

In its first argument, BAPCO contends that the TRA's orders amount to a confiscatory taking in violation of the state and federal constitutions. BAPCO's claim is ***522** based upon a factual premise that the TRA's orders require BAPCO to display AT&T's name and logo (and those of other competing providers) without compensation. BAPCO's factual premise simply is incorrect. The TRA ordered BAPCO to permit AT&T and, as a result of the Nextlink proceeding, all other competing local exchange telephone companies to contract with BAPCO for the display of their names and logos on the covers of the white pages directories "under the same terms and conditions as BAPCO provides to BellSouth by contract." It is true that the evidence shows BellSouth was not paying BAPCO at the time of the hearing for

displaying the BellSouth logo on the directory covers, but nothing in the TRA's orders precludes BAPCO from charging BellSouth for displaying BellSouth's name and logos on the directory covers. The TRA's orders merely require BAPCO to contract with the competing providers "under the same terms and conditions as BAPCO provides to BellSouth by contract." BAPCO therefore has a choice--it may charge BellSouth for displaying BellSouth's name and logo, in which case BAPCO also may charge the competing companies, or it may choose not to charge BellSouth, in which case it may not charge the other companies. For this reason, BAPCO's confiscatory-taking argument is without merit.

BAPCO's second argument is that the TRA's orders violate BAPCO's trademark rights. This argument is based upon the erroneous premise that the " **BELL** SOUTH" trademark displayed on the directory covers is intended to represent BAPCO, not BellSouth. Throughout the administrative proceedings, BAPCO claimed that the "**BELL** SOUTH" trademark on the covers indicates that the directories are published by BAPCO and that the trademark only coincidentally represents BellSouth The TRA rejected BAPCO's factual argument on this point and found that the "**BELL**SOUTH" trademark on the directories referred to BellSouth, the incumbent local exchange telephone company The record fully supports the TRA's factual finding on this point. Moreover, we note that BAPCO has failed to cite any authority that would support striking down a regulatory agency's actions over a regulated utility on trademark-infringement grounds. For these reasons, we find that BAPCO's trademark issue is without merit.

VI. Conclusion

Accordingly, we hold that the TRA's two declaratory orders are not in excess of the statutory authority of the agency and that the TRA had jurisdiction over BAPCO for the purposes of these proceedings. In addition, we hold that the orders do not violate the First Amendment. Therefore, we reverse the judgment of the Court of Appeals in these two cases and reinstate the judgments of the **Tennessee Regulatory Authority**.

The costs are taxed to BellSouth Advertising & Publishing Corporation, for which execution may issue if necessary

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