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March 20, 2005

ELECTRONICALLY & HAND DELIVERY

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

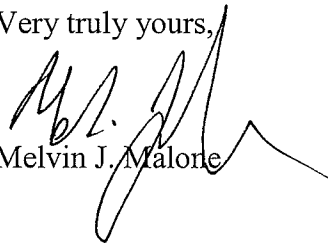
***RE: In Re: Petition of GETCO, a Tennessee General Partnership, and
Isaac Luboti, Individually, for Enforcement of Operating Agreement
and Sale of Financial Rights, TRA Docket No. 05-00304***

Dear Chairman Jones:

Enclosed please find an original and thirteen (13) copies of Memphis Light Gas & Water and Memphis Broadband LLC's Response in Opposition to Petitioners' Motion for Late Filed Response.

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

Very truly yours,


Melvin J. Malone

MJM:kdn

Enclosures

cc: Parties of Record

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

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

**MEMPHIS LIGHT GAS & WATER AND MEMPHIS BROADBAND LLC's
RESPONSE IN OPPOSITION TO PETITIONERS'
MOTION FOR LATE FILED RESPONSE**

Memphis Light Gas & Water ("MLGW") and Memphis Broadband LLC ("Broadband") submit this pleading in response to the *Motion for Late Filed Response* (the "*Motion*") filed on behalf of GETCO Partnership and Mr. Isaac Luboti (collectively "GETCO" or "Petitioners") on March 15, 2006. MLGW and Broadband appear individually, but submit this responsive pleading jointly.

For the reasons set forth below, MLGW and Broadband request that the Tennessee Regulatory Authority ("TRA" or "Authority") summarily deny the *Motion*, without oral argument, and grant *Memphis Light, Gas & Water and Memphis Broadband LLC's Request for the Authority to Decline to Commence a Contested Case for Lack of Jurisdiction or, in the Alternative, Motion to Dismiss the Petition without Convening a Contested Case*. In support of their *Response in Opposition to Petitioners' Motion for Late Filed Response*, MLGW and Broadband respectfully submit the following.

I.

TRAVEL OF THE CASE

On November 1, 2005, GETCO filed its *Petition for Enforcement of Operating Agreement and Sale of Financial Rights* (the “*Petition*”) seeking to force a sale of rights in Memphis Networx, LLC (“Networx”) under Section 3.4 of the Operating Agreement of Memphis Networx, LLC (“*Operating Agreement*”). In response to the *Petition*, MLGW and Broadband submitted their *Request for the Authority to Decline to Commence a Contested Case for Lack of Jurisdiction, or, in the Alternative, Motion to Dismiss the Petition Without Convening a Contested Case* (the “*Respondents’ Motion to Dismiss*”) on December 1, 2005.

On or about February 10, 2006, 70 days or so after the filing of *Respondents’ Motion to Dismiss*, the Authority issued its Final Conference Agenda for February 21, 2006, which listed the “Request or Motion to Dismiss” filed by MLGW and Broadband in TRA Docket No. 05-00304 for consideration. Thereafter, GETCO sought to have the matter continued to April 3, 2006. GETCO did not, however, seek, directly or indirectly, leave to file a late reply to *Respondents’ Motion to Dismiss*. In the spirit of cooperation, MLGW and Broadband agreed, in deference to the request, to continue the matter until sometime in March 2006. On February 21, 2006, the Authority continued consideration of *Respondents’ Motion to Dismiss* to March 2006.

On or about March 10, 2006, sixteen (16) days after the Authority granted GETCO’s request for a continuance, the Authority issued its Final Conference Agenda for March 20, 2006, which listed the “Request or Motion to Dismiss” filed by MLGW and Broadband in TRA Docket No. 05-00304 for consideration. Finally, on March 15, 2006, twenty (20) days after the Authority granted GETCO’s request for a continuance, and on the eve of consideration of *Respondents’ Motion to Dismiss* by the Authority, GETCO filed the *Motion*.

II.

ARGUMENT

a. The 103-Day Old Motion is Inconsistent with the Authority's Rules

Authority Rule 1220-1-2-.06(2) provides as follows: “Any party opposing a motion shall file and serve a response within seven (7) days after service of the motion. The Authority or Hearing Officer may shorten or extend the time for responding to any motion.” The *Motion* is inconsistent with both the letter and the spirit of the foregoing rule.

Having voluntarily attempted to avail themselves of the Authority's jurisdiction, GETCO failed, for reasons unknown, to make any attempt whatsoever to comply with Authority Rule 1220-1-2-.06(2). Moreover, having ignored said rule week after week and month after month for about 103 days, GETCO, without any explanation therefore, rational or otherwise,¹ now seeks leave to respond to *Respondents' Motion to Dismiss*.

To be sure, and as acknowledged by the language of Authority Rule 1220-1-2-.06(2), there are occasions when a timely request to file late should receive consideration as a matter of procedural courtesy. There are, as well, other times when a timely request to file late may be deemed reasonable for just cause shown. The foregoing notwithstanding, there must be some point in time at which a request to file late should fail. Otherwise, Authority Rule 1220-1-2-.06(2) is rendered completely meaningless.

It is uncontraverted that a significant amount of time has passed since a timely response to *Respondents' Motion to Dismiss* was due on or about December 8, 2005, specifically about 103 days. To fairly resolve the *Motion*, the Authority does not have to establish a bright line for determining when a request to file late is too tardy. Hence, whether GETCO's request to file late

¹ See Motion for Late Filed Response, *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 (Mar. 15, 2006) (no justification for request to late file provided).

should have come before the agency in 10 days, 30 days, or 60 days need not be resolved here. It is clear, however, that, even by generous standards, GETCO's 103-day old, non-explained request has simply come too late. Additionally, the Authority should not over look the fact that the Petitioners made no attempt to demonstrate "just cause" for the lateness of the *Motion*.

In the spirit of cooperation, neither MLGW nor Broadband opposed GETCO's request for a continuance. In doing so, said parties did not concede to the submission of GETCO's long overdue response to *Respondents' Motion to Dismiss*. For these reasons, GETCO's 103-day old request to late file should be denied.

b. Even Assuming the Motion is Granted, the Authority Should Still Decline to Convene a Contested Case for Lack of Jurisdiction, or, in the Alternative, Dismiss the Petition Without Convening a Contested Case.²

Pursuant to the legal standards under which *Respondents' Motion to Dismiss* is reviewed, *GETCO and W. Isaac Luboti's Response in Opposition to Motion to Dismiss the Petition Without Convening a Contested Case* ("GETCO's Response") fails to sufficiently rebut the arguments set forth in *Respondents' Motion to Dismiss*. More specifically, *GETCO's Response* does not adequately, if at all, address the arguments set forth in *Respondents' Motion to Dismiss*, including, but not limited to,³ the following: (1) that the requested relief is beyond the jurisdiction of the Authority under Tenn. Code Ann. § 7-52-103 and is also contrary to the forum selection clause included in Section 14.3 of the *Operating Agreement*; (2) that the requested relief inappropriately attempts to turn the "negotiate in good faith" between MLGW and

² Should the agency grant GETCO's request to late file, and to the extent required by Authority rules, MLGW and Broadband hereby request leave to submit the response set forth hereinafter to *GETCO and W. Isaac Luboti's Response in Opposition to Motion to Dismiss the Petition Without Convening a Contested Case*. Among other things, *GETCO's Response* raises matters not set forth in the *Petition*. In fact, should the Authority grant GETCO's request to late file, MLGW and Broadband hereby respectfully move the Authority to strike those portions of *GETCO's Response* that attempt to improperly raise new factual issues. A responsive pleading to a motion to dismiss is not the appropriate procedural vehicle to enhance a bare-bones *Petition*.

³ MLGW and Broadband incorporate by reference any and all arguments set forth in *Respondents' Motion to Dismiss*.

Broadband language in Section 3.4 of the *Operating Agreement* into a provision that provides GETCO an enforceable right where none was intended; (3) that Section 14.6 of the *Operating Agreement* unambiguously provides that the parties, MLGW and Broadband, did not intend to confer enforceable rights on any third parties; and (4) that the requested relief should be barred due to untimeliness.

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

In the *Petition*, Petitioners seek to “enforce provisions of operating agreements entered into pursuant to that certain Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity dated August 9, 2001.”⁴ More specifically, the Petitioners are requesting the Authority to “require the sale of the financial rights by the members of Memphis Networkx to GETCO as set forth in Section 3.4 of the operating agreement thereby [sic] enforcing the terms and provisions of the operating agreement.”⁵ Though Petitioners cite the general jurisdiction of the Authority under Tenn. Code Ann. § 65-4-104 in their attempt to establish proper jurisdiction, neither MLGW nor Broadband are public utilities subject to the general jurisdiction of the Authority over public utilities. Both Broadband and MLGW joined the Application in TRA Docket No. 99-00909 for the limited purpose of obtaining approval of the *Operating Agreement*.

The controlling jurisdictional statute with respect to the *Operating Agreement* is Tenn. Code Ann. § 7-52-103(d), and the jurisdiction of the Authority under Tenn. Code Ann. § 7-52-103(d) is limited. Applying Tenn. Code Ann. § 7-52-103(d), the Authority specifically enumerated the statutory criteria for evaluating the *Operating Agreement* approved in the *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of*

⁴ *Petition* at 2 .

⁵ *Id.* at 5.

Public Convenience and Necessity, which is the same operating agreement that is the subject matter of the *Petition*.⁶ With respect to its review of the *Operating Agreement*, the Authority expressly found that only the afore-referenced criteria were at issue.⁷ It follows that any permitted challenge to the *Operating Agreement* before the Authority must be grounded in said criteria.⁸ The matters raised in the *Petition* plainly fall outside the established criteria.

Pursuant to the *Final Order*, applying state law, any petition or complaint before the Authority upon the *Operating Agreement* must be based upon one (1) of the five (5) statutorily based criteria recognized by the Authority.⁹ Thus, as maintained in *Respondents' Motion to Dismiss*, the Authority should decline to convene a contested case and dismiss the *Petition* for lack of jurisdiction.¹⁰

GETCO's Response simply misses the mark. Rather than credibly refuting the foregoing, Petitioners merely maintain that Networx is subject to TRA regulation.¹¹ MLGW and Broadband do not contend in *Respondents' Motion to Dismiss* that Networx is not subject to TRA regulation.

⁶ Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity, *In Re: Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval of Agreement Between MLGW and A&L Regarding Joint Ownership of Memphis Networx LLC*, TRA Docket No. 99-00909 at 29-30 (Aug. 9, 2001) (the "*Final Order*").

⁷ *Id.* at 30.

⁸ It is noteworthy that the Petitioners are not challenging the CCN granted in the *Final Order* or any failure of Networx to abide by state law or the rules and regulations of the TRA.

⁹ This is not to say that the *Operating Agreement* may not be the basis of a dispute on something other than the enumerated criteria, but all matters outside the ambit of these criteria must be brought in another forum.

¹⁰ See, e.g., *Tennessee Mfr'd Housing Ass'n v. Metropolitan Gov't*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990) (courts must take statutes as they find them); and *State of Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) ("Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory test believing that the General Assembly chose its word deliberately, and that the General Assembly meant what it said.").

¹¹ *GETCO's Response* at 7.

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

As set forth in *Respondents' Motion to Dismiss*, the forum selection clause in Article 14, Section 14.3 of the *Operating Agreement*,¹² and established Tennessee precedent, combine to require the Authority to decline to convene a contested case and to dismiss the *Petition*.¹³ To rebut the foregoing, Petitioners claim that they are required to exhaust their administrative remedies prior to attempting to have their alleged dispute addressed in state court. In sum, the two (2) lone cases submitted by Petitioners in support of this contention do not, under the circumstances presented, aid Petitioners' response.

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

Section 3.4 of the *Operating Agreement* provides a limited obligation on the part of the members of Networx, MLGW and Broadband, "to negotiate in good faith" with each other towards the sale of financial rights in Networx, but it does not impose any obligation on either member to actually dispose of its financial rights irrespective of the circumstances. Section 3.4 – especially when read together with Section 14.6 of the *Operating Agreement*¹⁴ – certainly does not create any enforceable rights in third parties to "force" a sale of these financial rights.

¹² Article 14, Section 14.3 of the *Operating Agreement* provides, in full, as follows:

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

¹³ See *Thomas v. Costa Cruise Lines N.V.*, 892 S.W.2d 837 (Tenn. Ct. App. 1995) (upheld forum selection clause noted on cruise line ticket); and *Dyersburg Mach. Works v. Rentenbach Eng. Co.*, 650 S.W.2d 378, 380 (Tenn. 1983) (Generally, "*The Model Choice of Forum Act* provides that an unselected court must give effect to the choice of the parties and refuse to entertain the action[.]").

¹⁴ Section 14.6 of the *Operating Agreement* provides as follows:

None of the provisions of the Operating Agreement shall be for the benefit of or enforceable by any third parties, including, without limitation, any creditors of the Company. (emphasis added).

Moreover, Tennessee law is clear that the creation of new membership interests in limited liability companies is a function of the agreement of all the members of the limited liability company (“LLC”) and that third parties have no claims under contractual agreements unless they were intended beneficiaries.¹⁵ 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.¹⁶ Traditional rules of privity provide that those who are not parties to agreements cannot sue to enforce them.¹⁷

Based on the test set forth by the Tennessee Supreme Court in *Concord EFS*, as later applied by the decision in *AmSouth Erectors*,¹⁸ which are more thoroughly discussed in *Respondents’ Motion to Dismiss*, Petitioners are not intended third-party beneficiaries entitled to enforce the *Operating Agreement*. Applying Tennessee precedent, the Authority should honor the intent of MLGW and Broadband, as plainly expressed in Section 14.6 of the *Operating Agreement*, to reserve to themselves the benefits of the agreement and deny Petitioners’ request.¹⁹

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

Article 3, Section 3.4 of the Authority-approved *Operating Agreement* provides that any sale or sales under Section 3.4 “shall be closed within four (4) years from the approval date[.]”

¹⁵ See, generally, Tenn. Code Ann. § 48-232-102.

¹⁶ *Oman Constr. Co. v. Tenn. Cent. Ry. Co.*, 370 S.W.2d 563, 572 (Tenn. 1963).

¹⁷ *Owner-Operator Independent Drivers’ Assn. v. Concord EFS, Inc.*, 59 S.W.3d 63, 69 (Tenn. 2001).

¹⁸ *AmSouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540 (Tenn. Ct. App. Aug. 5, 2003) (copy attached to *Respondents’ Motion to Dismiss*).

¹⁹ Petitioners’ only response to this argument, without any legal support or any support from TRA Docket No. 99-00909, is “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” because “The very right of Memphis Networkx to exists 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.” *GETCO’s Response* at 9. Networkx exist in Tennessee under General Assembly-established authority in Tenn. Code Ann. § 7-52-103(d).

At its June 12, 2001, Agenda Conference, the Authority approved the *Operating Agreement*.²⁰

GETCO's attempt to force a sale with the *Petition* on November 1, 2005, is simply too late.²¹

Having failed to act in accordance with the unambiguous date-specific terms of the *Operating Agreement*, Petitioners are, in effect, now asking the Authority to modify and re-write Section 3.4 of the *Operating Agreement* to extend the time period within which a Section 3.4 sale must take place.²² To say the least, it would be inappropriate, if not unlawful, for the Authority to revise the contract terms.²³ Therefore, the Authority should decline to commence a contested case upon the *Petition*, and dismiss the same, for failure to state a claim upon which relief can be granted.²⁴

Petitioners claim that the *Petition* is not untimely because they "did notify the Authority and its officers of the grievance within the four-year period."²⁵ Notwithstanding any such "notification" to the Authority, an agreement regarding Petitioners' request to participate in Networx was not mutually reached before the expiration of the four (4) year period in the

²⁰ *Consumer Advocate Division v. TRA*, No. 01A01-9708-BC-00301, 1998 WL 684536, at *3 (Tenn. Ct. App. July 1, 1998) (TRA decisions may be in writing or oral.) (copy attached to *Respondents' Motion to Dismiss*).

²¹ Even assuming that GETCO provided "notification" of its concerns to the Authority prior to August 9, 2005, the *Petition* is untimely for two (2) reasons: (1) the *Operating Agreement* was approved on June 12, 2001; and (2) the *Operating Agreement* provides that any sale or sales under Section 3.4 shall be closed within 4 years from the approval date, not that the agency must be "notified" of any problems or concerns within 4 years from the approval date. Nothing prohibited GETCO from filing a complaint with the Authority or in state court within the 4 year period.

²² According to Exhibit 5 to *GETCO's Response*, Petitioners appear to have requested that the Authority "approve" an extension of the four (4) year period set forth in Article 3, Section 3.4 of the *Operating Agreement*. No underlying authority for such a request is provided.

²³ Initial Order of Hearing Officer, *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No. 98-00118 at 21 (April 21, 1998), *aff'd*, Order Affirming the Initial Order of Hearing Officer, *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No. 98-00118 (Aug. 17, 1998) (In respecting the contractual terms of the parties before it, the Authority declared that it "should not serve as the conduit through which [a party] is allowed to circumvent and/or modify contractual obligations[.]" (citing *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Systems, Inc.*, 884 S.W.2d 458, 62 (Tenn. App. 1994)).

²⁴ Petitioners have not alleged, nor could they, that MLGW and/or Broadband acted in bad faith to intentionally hamper, or otherwise delay, Petitioners' ability to act (i.e. file a complaint) within the date-specific terms of the *Operating Agreement*.

²⁵ *GETCO's Response* at 12.

Operating Agreement. Therefore, under the express and unambiguous terms of the *Operating Agreement*, the *Petition* is untimely.

While Petitioners, MLGW and Broadband did not come to mutually satisfactory terms upon Petitioners' request to participate in Networkx, it does not follow that the *Petition* should withstand *Respondents' Motion to Dismiss*.²⁶ First, while Petitioners appear to be requesting the Authority to "force" a sale of financial rights,²⁷ the *Operating Agreement* contemplates a meaningful opportunity for a minority investor(s) – not a guarantee. Next, simply because Petitioners, MLGW and Broadband could not come to mutually satisfactory terms does not translate into *de facto* bad faith on the part of MLGW and Broadband.²⁸ A break down of negotiations does not equate to bad faith.²⁹ Notably, Petitioners have not alleged that some entity or party prohibited or thwarted further negotiations from 2001, nor have Petitioners cited any reasons justifying a four (4) year delay in filing the complaint.³⁰

²⁶ See *infra* n. 32.

²⁷ *GETCO's Response* at 5 ("that will lead to the sale of financial rights to Mr. Luboti and the GETCO") (emphasis added) and *id.* at 13 ("in order to bring about the sale") (emphasis added).

²⁸ It should be noted that while *GETCO's Response* contains an "allegation" of bad faith on the part of MLGW and Broadband, the *Petition* does not contain an allegation of bad faith. See *infra* n. 31. See also Attachment (Exhibit B) to August 5, 2005, Letter to TRA Chairman Jones from Counsel to GETCO, *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 ("We, the current investors in Memphis Networkx, appreciate your interest in Memphis Networkx 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 [TRA], both MLGW and the private investors are committed to minority participation in Memphis Networkx.").

²⁹ Petitioners complain that MLGW and Broadband only discussed an investment participation opportunity for Petitioners different from that contemplated by the plain language of Section 3.4 of the *Operating Agreement*. Without conceding the accuracy of this representation, MLGW and Broadband note that Petitioners, by their own admission, were seeking an investment participation different than that contemplated by the plain language of Section 3.4 of the *Operating Agreement*.

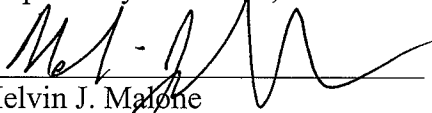
³⁰ Petitioners assert that the breakdown of the 2001 discussions "required seeking legal redress to compel the owners of Networkx to act in good faith." *GETCO's Response* at 11. Yet, Petitioners avoid any explanation whatsoever for their self-induced delay, from 2001 to 2005, in seeking such redress. Petitioners contend that "[t]he offending parties should not be allowed to profit from the delay emanating from their own bad faith." *Id.* Again, MLGW and Broadband were not responsible, and it is not alleged that they were, for the delay in seeking redress from 2001 to 2005.

III.

CONCLUSION

For the foregoing reasons, the Authority should deny GETCO's request to submit a late-filed response to *Respondents' Motion to Dismiss*. In the alternative, even should the Authority grant GETCO's request to late-file,³¹ the Authority should decline to convene a contested case and dismiss the *Petition*.³²

Respectfully submitted,



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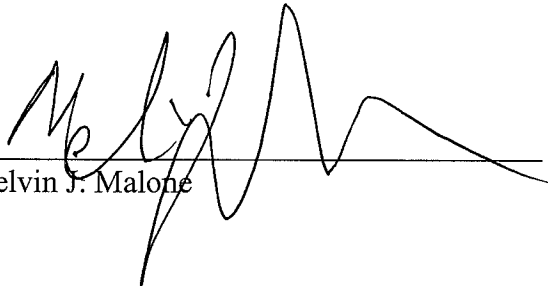
³¹ Again, should the Authority grant GETCO's request to late file, MLGW and Broadband respectfully move the Authority to strike those portions of *GETCO's Response* that attempt to improperly raise new factual issues. A responsive pleading to a motion to dismiss is not the appropriate vehicle to seek to enhance a bare-bones *Petition*.

³² See, e.g., *Seagram Distillers Co. v. Jones*, 548 S.W.2d 667, 671 (Tenn. App. 1976) ("[T]he power or authority of the administrative agency either exists or does not exist and . . . such authority may not be conferred upon an agency by the conduct of the parties before it.").

Certificate of Service

I hereby certify that a true and correct copy has been forwarded via U.S. Mail to the following on this the 20th day of March 2006.

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



Melvin J. Malone