

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

August 2, 2006

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

**ORDER DENYING PETITIONERS' MOTION TO
LATE FILE RESPONSE AND DISMISSING PETITION**

This matter came before Chairman Ron Jones, Director Pat Miller and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on March 20, 2006 for consideration of the *Petition for Enforcement of Operating Agreement and Sale of Financial Rights* ("Petition") filed by GETCO, a Tennessee General Partnership, and Isaac Luboti, Individually, ("GETCO" or the "Petitioners") on November 1, 2005.

BACKGROUND

TRA Docket No. 99-00909

On November 24, 1999, Memphis Light Gas & Water ("MLGW"), A&L Networks-Tennessee, LLC ("A&L") and Memphis Networkx, LLC ("Networkx") filed an *Application and Joint Petition* ("Joint Petition") requesting that the Authority approve the Operating Agreement entered into by MLGW and A&L to create Networkx and grant a Certificate of Public Convenience and Necessity ("CCN") to Networkx to provide intrastate telecommunications services. An amendment to the *Joint Petition* was filed on December 21, 2000 by MLGW, Memphis Broadband, LLC ("Broadband") and Networkx. The *Joint Petition*, as amended, requested approval of the Amended

and Restated Operating Agreement entered into by MLGW and Broadband for the purpose of creating Networx. After a vigorously litigated contested case proceeding which took place over the course of eighteen months, the Authority deliberated the matter on June 12, 2001 and voted unanimously to grant the Amended and Restated Operating Agreement for the creation and operation of Networx and to approve the Application of Networx for a CCN.¹ The CCN specifically provided for the provision of telecommunications services in and around Shelby County.

The Amended and Restated Operating Agreement (“Operating Agreement”) was approved by the Authority pursuant to Tenn. Code Ann. § 7-52-103(d), which specifically grants jurisdiction to the TRA to regulate a division within a municipality engaged in the provision of telecommunications services. Tenn. Code Ann. § 7-52-103(d) requires that the entity created as a result of the joint venture “shall be considered as and have the duties of a public utility, as defined in T.C.A. § 65-4-101, but only to the extent necessary to effect such regulation and only with the respect to the provision of related services.”² Thus, the Authority reviewed the Operating Agreement to ensure that it created an entity capable of fulfilling the statutory duties of a public utility.³ The Authority further determined that the Operating Agreement complied with the Authority’s rules and orders.⁴

TRAVEL OF THIS DOCKET

This docket was opened upon the filing of the *Petition* by GETCO on November 1, 2005. The *Petition* is filed against MLGW and Broadband and seeks redress under Section 3.4 of the Operating Agreement between MLGW and Broadband. GETCO alleges that the parties have

¹ See *In re: Application of Memphis Networx, L.L.C. for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee (“MLGW”) and A&L Networks-Tennessee, L.L.C. (“A&L”) for Approval of Agreement Between MLGW and A&L Regarding Joint Ownership of Memphis Networx, L.L.C.*, Docket No. 99-00909, *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity* (August 9, 2001) (“*Networx Final Order*”).

² Tenn. Code Ann. § 7-52-103(d) (2005).

³ *Networx Final Order* at 31. In approving the Operating Agreement creating Networx, the Authority recognized that the provision of service by the joint venture must be subject to Tenn. Code Ann. § 7-52-402 through § 7-52-407 and examined these statutes in addition to the criteria set forth in Tenn. Code Ann. § 7-52-103(d).

⁴ *Id.*

violated the Operating Agreement by denying GETCO the opportunity to purchase rights in Networkx pursuant to the Operating Agreement. The prayer for relief in the *Petition* seeks an order from the Authority that “would require the sale of the financial rights by 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

The cover letter from the attorney representing GETCO, filed with the *Petition*, states that GETCO has filed a similar petition in the Chancery Court for Shelby County, Tennessee. In addition, attached to the *Petition* is a copy of GETCO’s *Motion to Suspend Proceedings and Hold in Abeyance* filed in the Chancery Court contemporaneously with the *Petition* filed with the TRA. The *Motion to Suspend* asks the Court to “hold the court proceedings in abeyance until administrative remedies available through the Tennessee Regulatory Authority have been exhausted.”⁶ The *Motion to Suspend* asserts that the Authority possesses the regulatory power and jurisdiction to enforce the provisions of the Operating Agreement.⁷

On December 1, 2005, MLGW and Broadband responded to the *Petition* by filing *Memphis Gas Light and 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* (“*Request and Motion to Dismiss*”). In the *Request and Motion to Dismiss*, MLGW and Broadband argue that the Authority should decline to convene a contested case on the grounds that the relief requested by GETCO is beyond the jurisdiction of the Authority and the Authority is not the proper forum for this dispute. Section 14.3 of the Operating Agreement sets forth the exclusive forum provision as follows:

⁵ *Petition* at 5.

⁶ *GETCO, a Tennessee General Partnership, and W. Issac Luboti, Individually v. Memphis Light Gas & Water, and Memphis Broadband L.L.C.*, Case No. CH 05-1457.1, *Motion to Suspend Proceedings and Hold in Abeyance* (Chancery Court, Shelby Co., October 28, 2005) p. 1.

⁷ *Id.* at 2.

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.

Further, MLGW and Broadband ask for a dismissal of the *Petition* for failure to state a claim upon which relief may be granted because the *Petition* is untimely and is based on the incorrect assertion that GETCO has an enforceable right under the Operating Agreement.

This matter was initially noticed on February 11, 2006 to be considered by the panel at the February 21, 2006 Authority Conference. The matter was deferred to a later conference at the request of the attorney for the Petitioners. On March 10, 2006, this matter was renoticed to be heard by the panel at the March 20, 2006 Authority Conference. On March 15, 2006, the attorney for Petitioners filed a *Motion for Late Filed Response* (“Motion”) together with *GETCO and W. Isaac Luboti’s Response in Opposition to Motion to Dismiss the Petition Without Convening a Contested Case* (“Proposed Response”). On March 20, 2006, MLGW and Broadband filed a response opposing the Petitioners’ Motion and Proposed Response.

The Motion to Dismiss raises the central issue of exclusivity of the forum selected by the parties to the agreement for resolving disputes arising under the agreement and questions whether such a provision precludes the TRA from having jurisdiction over disputes under the agreement.

FINDINGS AND CONCLUSIONS

Petitioners’ Motion and Proposed Response

The Respondents’ *Request and Motion to Dismiss* was served by mail on the Petitioners on December 1, 2005. The Motion and Proposed Response was filed and served on MLGW and Broadband via mail on March 15, 2006, over 100 days after service of the *Request and Motion to Dismiss* and over 20 days after the date of the Authority Conference on which the matter was originally scheduled to be deliberated by the panel. TRA Rule 1220-1-2-.06(2) provides that a party

opposing a motion “shall file and serve a response within seven (7) days after service of the motion.” TRA Rule 1220-1-1-.05(1) permits the Authority to waive a procedural rule on the motion of a party or on its own motion for good cause shown. The Motion asks the Authority to allow GETCO to late-file the Proposed Response but contains no grounds for being permitted to file the Proposed Response outside of the time period provided in the TRA procedural rules.

The Proposed Response itself reiterates the position stated in the original *Petition* that the Petitioners are entitled to an order from the Authority requiring the sale of the financial rights to GETCO pursuant to Section 3.4 of the Operating Agreement between MLGW and Broadband. The Proposed Response did not address the principle arguments of MLGW and Broadband against convening a contested case arising under Section 14.3 of the Operating Agreement. Because the Motion of the Petitioners failed to recite any basis in fact or law demonstrating good cause for permitting the late filing under the TRA Rule 1220-1-1-.05 and Petitioners offered nothing further at the March 20, 2006 Conference, the panel found that the Motion to late-file the Proposed Response should be denied.

Petition and Respondents’ Request and Motion to Dismiss

The Operating Agreement approved by the Authority in Docket No. 99-00909 is clearly an agreement between two parties, MLGW and Broadband. GETCO is not a party to the Operating Agreement. The *Petition* alleges that, through Section 3.4, GETCO derives some status from the agreement whereby it should be able to enforce provisions of the agreement that are specifically between MLGW and Broadband. In the *Request and Motion to Dismiss*, MLGW and Broadband reject the notion that GETCO may have some third-party beneficiary status derived from Section 3.4. The relevant provision in the Operating Agreement addressing enforceability is Section 14.6, which provides:

Creditors and Other Third Parties. None of the provisions of the Operating Agreement shall be for the benefit of or enforceable by any third parties, including, without limitation, any creditors of the Company.

MLGW and Broadband also raise the central issue of exclusivity of the forum selected by the parties to the agreement for resolving disputes arising under the agreement. Section 14.3 of the Operating Agreement sets forth the exclusive forum provision 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.

Selection of forum provisions in agreements are commonly used and are generally enforced by the courts unless found to be unreasonable or unfair.⁸ In the Operating Agreement, the parties to the agreement selected the courts of Shelby County as the forum in which they want disputes under the Operating Agreement litigated. The Authority approved this provision as part of the Operating Agreement in Docket No. 99-00909.

On its face, the selection of forum provision in Section 14.3 is not unreasonable or unduly burdensome to either of the parties because the parties to the Operating Agreement reside and/or conduct business in Shelby County. Even if GETCO was a party to the agreement, GETCO would have the demonstrate unreasonableness or unfairness in the face of judicial deference generally afforded the selection of forum provision.⁹ Second, because GETCO is not a party to the agreement, GETCO would have the additional burden of demonstrating that it has the right to attack the selection of forum provision. In either case, by the terms of the Operating Agreement itself, an attack on Section 14.3 would constitute a dispute under the Operating Agreement and that battle should be litigated in the courts of Shelby County, not in an administrative agency such as the TRA.

Based on the language of the agreement itself, which was approved by the TRA, the judicial deference generally afforded selection of forum provisions in agreements and the lack of any

⁸ See *Union Planters Bank, N.A. v. EMC Mortg. Corp.*, 67 F.Supp.2d 915, 919 (W.D. Tenn. 1999) (Citations omitted).

⁹ *Id.*

argument to the contrary, the panel found that this dispute should be litigated in the Shelby County Chancery Court where an action has already been commenced.

Further, the Authority is not compelled by rule or statute to convene a contested case in this docket. The issues raised by the *Petition* and the determination of whether to convene a contested case to resolve such issues fall within the realm of the Authority's discretion.

The TRA's power to exercise discretion whether to convene a contested case is derived from statutory authority. Tenn. Code Ann. Sections § 65-4-104 and § 65-4-106 and case law interpreting these sections provide the TRA with broad powers to exercise its jurisdiction over matters involving public utilities. The Tennessee Supreme Court has acknowledged these statutes and, in *Consumer Advocate Division v. Greer*, made the following observations:

In applying these general rules in the context of this case, we first observe that the 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 [the TRA] enforces or administers." Tenn. Code Ann. § 65-2-102(1) & (2) (1997 Supp.).¹⁰

The Supreme Court in *Greer* also determined from statutory authority that the TRA is not required to convene a contested case when presented with a complaint. To the contrary, the Court found that the General Assembly intended for the TRA to have discretion in determining whether to convene a contested case.¹¹

¹⁰ *Consumer Adv. Div. v. Greer*, 967 S.W.2d 759, 761-62 (1998).

¹¹ *Greer*, 967 S.W.2d at 763.

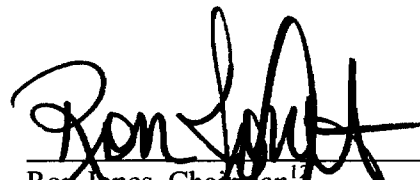
For the above reasons, the panel determined that while the *Petition* raises issues that arise out of the Operating Agreement approved by the Authority, the Authority should not exercise its discretion to convene a contested case because the ultimate relief sought by the *Petition* and the potential dispute regarding the enforceability of the agreement are matters which can be resolved by the Shelby County Chancery Court. The *Petition* does not present a case concerning whether a public utility regulated by the TRA is in violation of a specific statute, rule or order of the Authority. To the contrary, through the *Petition*, the TRA is being asked by an unregulated, non-public utility that is not a party to the Operating Agreement, to provide specific relief that is not within the regulatory framework of the agency.

During the March 20, 2006 Authority Conference the panel voted unanimously to deny the motion for late-filed response because the Petitioners failed to provide any justification whatsoever for the relief requested. As to the Respondents' request that the TRA decline to commence a contested case for lack of jurisdiction or, in the alternative, dismiss the petition, the panel voted unanimously to decline to convene a contested case because the forum selection clause of the Operating Agreement specifically provides that, to the extent permitted by law, the Shelby County Chancery Court should be the exclusive forum for the resolution of disputes arising under the terms of the Operating Agreement. The panel concluded that the law permits this matter to be filed and heard in the Shelby County Chancery Court, and there is no law that prevents the Shelby County Chancery Court from acting as the exclusive forum for the litigation of this matter.

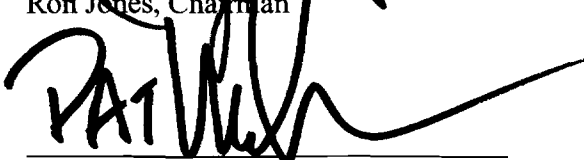
In voting to decline to convene a contested case, the panel noted that the Authority is not leaving the Petitioners without remedy. Instead, Petitioners' remedy is to pursue their claims in the Shelby County Chancery Court, the forum in which the Petitioners have already filed a petition for relief.

IT IS THEREFORE ORDERED THAT:


1. The Petitioners' Motion to file late-filed response is denied.
2. The forum selection clause of the Operating Agreement specifically provides that, to the extent permitted by law, the Shelby County Chancery Court will be the exclusive forum for the resolution of disputes arising under the terms of the Operating Agreement. As such the Authority declines to convene a contested case and hereby dismisses the *Petition*.
3. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.



Ron Jones, Chairman¹²



Pat Miller, Director



Sara Kyle, Director

¹² In his March 20, 2006 motion, Chairman Jones concluded that the Petitioners' Motion should be denied because Petitioners failed to provide any justification for the extension. As to the *Request and Motion to Dismiss*, Chairman Jones concluded in his motion that the *Petition* should be dismissed because the forum selection clause of the Operating Agreement, which was approved by the Authority, specifically provides that the Shelby County Chancery Court should be the exclusive forum for the resolution of this dispute. Any findings or conclusions included in this order as justification for the Authority's March 20, 2006 decision that are not included in Chairman Jones's March 20, 2006 motion should not be attributed to him. See Transcript of Authority Conference, pp. 18-21 (March 20, 2006).