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October 4, 2006

**HAND DELIVERY**

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

**RE: In Re: Application of Electric Power Board of Chattanooga for  
Expanded Certificate of Public Convenience and Necessity to Provide  
Intrastate Telecommunications Services Statewide, TRA Docket No.  
06-00193**

Dear Chairman Kyle:

Enclosed please find an original and thirteen copies (13) of the *Objections of Electric Power Board of Chattanooga to Petition to Intervene of Aeneas Communications, LLC and to Petition to Intervene of the Tennessee Cable Telecommunications Association*. An additional copy of this filing is enclosed to be "File Stamped" for our records.

If you have any questions or require additional information, please let me know.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Melvin J. Malone", is written over the typed name.

Melvin J. Malone

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

**IN RE:**

<b>APPLICATION OF ELECTRIC</b>	<b>)</b>	<b>DOCKET NO. 06-00193</b>
<b>POWER BOARD OF CHATTANOOGA</b>	<b>)</b>	
<b>TO EXPAND ITS CERTIFICATE OF</b>	<b>)</b>	
<b>CONVENIENCE AND NECESSITY TO</b>	<b>)</b>	
<b>PROVIDE INTRASTATE</b>	<b>)</b>	
<b>TELECOMMUNICATIONS SERVICES</b>	<b>)</b>	
<b>STATEWIDE</b>		

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**OBJECTIONS OF ELECTRIC POWER BOARD OF CHATTANOOGA TO  
PETITION TO INTERVENE OF AENEAS COMMUNICATIONS, LLC AND  
TO PETITION TO INTERVENE OF THE TENNESSEE CABLE  
TELECOMMUNICATIONS ASSOCIATION**

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The Electric Power Board of Chattanooga d/b/a EPB Telecom (“EPB” or “Applicant”), by and through its undersigned counsel, hereby opposes and objects to the Petition to Intervene of Aeneas Communications, LLC and the Petition to Intervene of the Tennessee Cable Telecommunications Association. For the reasons set forth below, EPB respectfully requests the Tennessee Regulatory Authority (“TRA” or “Authority”) to deny said intervention petitions.

**I.**

**Travel of the Case**

In its Order dated May 10, 1999, in Docket 97-07488, the Authority found that EPB satisfied the managerial, technical and financial requirements set forth in Tenn. Code Ann. § 65-4-201(c) to provide telecommunications services within Hamilton, Bledsoe, Bradley, Marion,

Rhea and Sequatchie Counties.<sup>1</sup> The Authority also found that EPB had filed an acceptable Small and Minority-Owned Telecommunications Business Participation Plan pursuant to Tenn. Code Ann. § 65-5-212. On July 28, 2006, EPB submitted its *Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* (the “Application”) and requested that the Authority modify its existing Certificate of Public Convenience and Necessity to permit EPB to provide intrastate telecommunications services statewide. In order to serve the public interest in a timely manner, EPB requested expedited approval of its *Application*.<sup>2</sup>

On September 14, 2006, the Authority issued a *Notice of Hearing* in this docket setting this matter for hearing on September 25, 2006. The *Notice of Hearing* provided, in part, that “Any motion to change the date of this hearing must be made in writing and filed with the Office of the Chairman of the Authority no later than seven (7) days prior to the date of the Hearing.” No such motions were filed within the prescribed period.

On September 15, 2006, the Authority issued its *Final Conference Agenda*, set for September 25, 2006, listing for public consideration, among other items, the *Application*. No parties submitted petitions to intervene prior to September 25, 2006.

## II.

### **September 25, 2006, Hearing on the Application**

On September 25, 2006, and sometime prior to the convening of the September 25, 2006, Conference, counsel for Aeneas Communications, LLC (“Aeneas”) submitted by facsimile a

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<sup>1</sup> See Order Approving Application For Certificate of Public Convenience and Necessity, *In Re: Application of Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, TRA Docket No. 97-07488 (May 10, 1999).

<sup>2</sup> Pursuant to Chapter 1220-4-8-.04(3)(a) of the Rules and Regulations of the Tennessee Regulatory Authority, a petition to modify a certificate must be acted upon “within sixty (60) days of filing.”

letter to the Authority requesting that he be provided the opportunity to be heard at the Hearing scheduled on the *Application*.<sup>3</sup> Pursuant to the afore-referenced *Notice of Hearing*, the Hearing in TRA Docket No. 03-00193 was called to order on September 25, 2006, by the presiding panel. No party objected to the convening of the Hearing.<sup>4</sup>

During the Hearing in TRA Docket No. 03-00193, EPB presented its *Application*, along with the Pre-filed Testimony of Kathy M. Harriman.<sup>5</sup> Ms. Harriman was sworn and presented a summary of her Pre-filed Testimony.<sup>6</sup> Thereafter, Ms. Harriman was tendered for questions by the presiding panel.<sup>7</sup> After Ms. Harriman answered the questions submitted by the presiding panel,<sup>8</sup> EPB concluded its presentation.<sup>9</sup> No party sought recognition prior to EPB concluding its case.

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<sup>3</sup> Counsel for EPB did not receive the facsimile letter prior to departing his offices for the TRA to attend the September 25, 2006, Conference and Hearing.

<sup>4</sup> Counsel for Aeneas was present telephonically when the Hearing in TRA Docket No. 06-00193 was convened.

<sup>5</sup> Transcript of Authority Conference, *In Re: Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide*, TRA Docket No. 03-00193, pp. 3-7 (Sept. 25, 2006) ("*Transcript of Authority Conference*").

<sup>6</sup> *Id.* at 4-6.

<sup>7</sup> *Id.* at 6-7.

<sup>8</sup> Although not addressed to Witness Harriman, there was some discussion from the presiding panel regarding the relevance of an 8<sup>th</sup> Circuit opinion to the *Application*. If EPB correctly understands the discussion, it relies upon page 5, paragraph 4 of the *Application* and other TRA decisions. See, e.g., Initial Order Granting Amendment to Certificate of Public Convenience and Necessity, *In Re: Application of Knology of Tennessee, Inc. to Amend its Certificate of Public Convenience and Necessity to Provide Telecommunications Services in the State of Tennessee*, TRA Docket No. 04-00092 (June 10, 2004); Initial Order Granting Amendment to Certificate of Public Convenience and Necessity, *In Re: Application of XO Tennessee, Inc. to Amend its Certificate of Public Convenience and Necessity to Provide Telecommunications Services in the State of Tennessee*, TRA Docket No. 03-00567 (Feb. 23, 2004); Order Approving Application of Level 3 Communications, L.L.C. to Amend its Certificate of Public Convenience and Necessity, *In Re: Application of Level 3 Communications, LLC to Expand its Certificate of Convenience and Necessity to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in All Tennessee Service Areas*, TRA Docket No. 02-00230 (June 28, 2002). Given that no citation to said 8<sup>th</sup> Circuit opinion was provided, EPB reserves the right to comment thereon at a later time, should it become necessary to do so.

<sup>9</sup> *Id.* at 7.

### III.

#### **Aeneas Communications, LLC's Request to Postpone/Suspend Hearing And Subsequent Petition to Intervene**

After the conclusion of EPB's statutorily required presentation, counsel for Aeneas requested the presiding panel to "adjourn" the Hearing "until next month" to provide Aeneas the opportunity to review state law and the implications of the *Application*.<sup>10</sup> Counsel for EPB maintained that Aeneas' request should be denied for the following reasons: (1) Aeneas did not submit a petition to intervene seven (7) days prior to the Hearing;<sup>11</sup> (2) counsel for Aeneas did not demonstrate good cause for postponement of the matter;<sup>12</sup> (3) counsel for Aeneas did not claim that Aeneas did not receive either the *Notice of Hearing* or the *Final Conference Agenda*;<sup>13</sup> and (4) because state law unambiguously mandates that the TRA act upon a request to expand a Certificate of Public Convenience and Necessity ("CCN") within sixty (60) days. After hearing the arguments of counsel, the presiding panel determined to waive Authority Rule 1220-1-2-.08(3) pursuant to 1220-1-1-.06 to provide Aeneas merely with the "opportunity"<sup>14</sup> to evaluate

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<sup>10</sup> *Id.* at 9.

<sup>11</sup> Chapter 1220-1-2-.08(3) of the Rules and Regulations of the Tennessee Regulatory Authority provides that "A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing." *See also* Tenn. Code Ann. § 4-5-310(a)(1).

<sup>12</sup> It is true that Chapter 1220-1-1-.06 of the Rules and Regulations of the Tennessee Regulatory Authority provides that an Authority rule may be waived "For good cause[.]" Notably, however, the same rule also provides an exception to the agency's waiver discretion: "except when a rule embodies a statutory requirement." Since the seven-day requirement of Authority Rule 1220-1-2-.08(3) embodies the requirements of Tenn. Code Ann. § 4-5-310(a)(1), the requirement that a petition to intervene be filed at least seven (7) days prior to the date of the hearing cannot be waived at the discretion of the agency.

<sup>13</sup> In fact, counsel for Aeneas expressly conceded that "some people" at Aeneas receive faxes from the TRA. *Transcript of Authority Conference*, p. 8. Although Mr. Rice stated that "he" as outside counsel did not receive notice of the pending consideration of the *Application*, at no time on September 25<sup>th</sup> did he contend that Aeneas did not receive notice of the Hearing, either via the *Notice of Hearing* or the *Final Conference Agenda*. *See Transcript of Authority Conference*, pp. 22-23. *See also id.* at 26 ("Mr. Rice has made no representation that Aeneas did not receive notice.") (Comments of Panel Member).

<sup>14</sup> *See Transcript of Authority Conference*, p. 13 ("[W]ould you-all object to suspending this case until the next conference, to give Mr. Rice an opportunity to review this application[.]") (Comments of Panel Member).

the *Application* and to determine whether to seek intervention in the docket.<sup>15</sup> The agency did not grant Aeneas intervention in this proceeding on September 25, 2006.

On September 29, 2006, Aeneas filed its petition to intervene, citing only its “lack of actual notice (now confirmed) to management of or counsel for Aeneas” and alleging only that it is a competing carrier in the State of Tennessee.

#### IV.

#### ARGUMENTS

##### a. Under the Circumstances Presented, the Authority Cannot Waive Authority Rule 1220-1-2-.08(3)

For the reasons that follow, it is the reasoned position of EPB that Aeneas’ petition to intervene should be denied. It is undisputed that Aeneas did not submit a petition to intervene within seven (7) days of the Hearing.<sup>16</sup> By its own rules, the Authority is prohibited from waiving the seven (7) day requirement of Authority Rule 1220-1-2-.08(3).<sup>17</sup> Therefore, since the sole basis of the majority’s determination relied upon Authority Rule 1220-1-1-.06, Aeneas’ petition to intervene must be denied as untimely.

##### b. Under the Circumstances Presented, Aeneas Did Not Present Good Cause to Support a Postponement/Suspension.

At the Hearing, counsel for Aeneas stated that he as outside counsel did not receive notice of the pending consideration of the *Application*. But, as noted earlier herein, counsel for Aeneas did not claim at the Hearing that Aeneas did not receive either the *Notice of Hearing* or

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<sup>15</sup> *Id.* at 12-14, 26.

<sup>16</sup> *Id.* at 8. In fact, Aeneas did not submit a petition to intervene at any time prior to the Hearing.

<sup>17</sup> *See supra* n. 12.

the *Final Conference Agenda*.<sup>18</sup> Since counsel did not claim then, and does not expressly represent in Aeneas' petition to intervene now, that Aeneas did not receive either the *Notice of Hearing* or the *Final Conference Agenda*, counsel has failed to demonstrate good cause to support its request for postponement under either Authority Rule 1220-1-1-.06 or Tenn. Code Ann. § 4-5-310(b).<sup>19</sup> Thus, Aeneas' petition to intervene should be denied.

c. The State Law Requiring that the Application be Acted Upon Within Sixty (60) Days Does Not Provide the Agency With Any Discretion to Disregard It.

Tenn. Code Ann. § 65-4-201(c)(2) expressly provides that an Authority order regarding the *Application* "shall be entered no more than sixty (60) days from filing."<sup>20</sup> This statute does not provide the Authority with any discretion to exceed the sixty (60) day period.<sup>21</sup> While the agency's good faith efforts to provide Aeneas the late opportunity to review the *Application* subsequent to the Hearing are certainly well-intended, the statute is, nonetheless, not discretionary. Hence, exceeding the sixty (60) day period, absent an agreement of the

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<sup>18</sup> See *supra* n. 13. For purposes of this discussion, EPB will not address whether the agency's web site provided adequate notice to Aeneas. Still, EPB does not waive this argument. See *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wash.2d 403, 415-416, 128 P.3d 588 (Wash. 2006) (Finding adequate notice, the court declared that agency postings on a web site "hardly could be more public." Further, the court declared that "posting on a public web site is at least as likely to provide the community with notice as . . . notice given to a newspaper[.]").

<sup>19</sup> See Order Denying Petitioners' Motion to Late-File Response and Dismissing Petition, *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 (Aug. 2, 2006) (In enforcing TRA rules, agency held that "Because the Motion of the Petitioners failed to recite any basis in fact or law demonstrating good cause for permitting the late filing under [TRA rules] . . . the Motion to late-file . . . should be denied."). In its petition to intervene, Aeneas claims that it did not receive "actual notice (now confirmed) to management of or counsel for Aeneas[.]" This representation is not clear. It appears from this clouded recitation that someone at Aeneas received either the *Notice of Hearing* or the *Final Conference Agenda* or both. This is consistent with the statement made by counsel for Aeneas at the Hearing. See *supra* n. 13. The TRA does not independently and randomly choose to whom at a company to send information. Rather, interested parties affirmatively designate a recipient for the TRA to rely upon when issuing information. Whoever is the company's designated recipient on the TRA's service lists receives the information, and it is the responsibility of the company to determine how TRA-issued information is distributed within the company.

<sup>20</sup> See also *supra* n. 2.

<sup>21</sup> *Gray v. Cullom Machine, Tool & Die, Inc.*, 152 S.W.3d 439, 446 (Tenn. 2004) ("Given that the term "**shall**" is **mandatory**, the statutory language is unambiguous and must be applied as written.") (emphasis in original).

applicant,<sup>22</sup> constitutes a clear and unambiguous violation of state law and the express will of the Tennessee General Assembly. If the General Assembly intended for the agency to have unfettered discretion in this regard, it could have said so.<sup>23</sup> For this reason, Aeneas' petition to intervene must be denied.

d. Even if Aeneas' Request to Postpone Was Reviewed Under Tenn. Code Ann. § 4-5-310(b) At The Hearing, And It Was Not, the Petition Must Still Be Denied.

Tenn. Code Ann. § 4-5-310(b) provides as follows:

The agency may grant . . . petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice, and shall not impair the orderly and prompt conduct of the proceedings.

Although the majority did not invoke § 4-5-310(b) during its deliberations, even a consideration under this statute would result in the denial of Aeneas' petition to intervene. The statute requires that before an intervention is granted at any time, a determination must be made that the intervention "shall not impair the orderly and prompt conduct of the proceedings." Since the Hearing was convened, testimony presented, and the witness tendered and excused, granting Aeneas' petition to intervene would certainly, under any standard, impair the orderly and prompt conduct of the proceedings.<sup>24</sup> For this reason, Aeneas' petition to intervene must be denied.

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<sup>22</sup> For instance, it is not uncommon for an applicant to agree to waive the sixty (60) day period to permit the agency itself to gather additional necessary information or to permit the applicant to more fully respond to agency requests for additional information.

<sup>23</sup> See, e.g. *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73, 83 (Tenn. 2001) ("Courts are not authorized to alter or amend a statute, and must 'presume that the legislature says in a statute what it means and means in a statute what it says there.'") (citations omitted); *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 text believing that the General Assembly chose its words deliberately, and that the General Assembly meant what is said.").

<sup>24</sup> As noted earlier, under Tennessee law the *Application* must be acted upon within sixty (60) days. The failure to do so, absent an agreement of the applicant, surely impairs the orderly and prompt conduct of the proceedings. See *City of Los Angeles v. David*, 538 U.S. 715, 716-717 (2003) (The "fundamental requirement of due process" is "the opportunity to be heard at a meaningful time and in a meaningful manner.") (citation omitted).



e. Under the Circumstances Presented, TCTA's Petition to Intervene Must Be Denied.

TCTA filed its petition to intervene on September 29, 2006, four (4) days subsequent to the Hearing. TCTA did not intervene in this docket prior to the Hearing held on September 25, 2006, nor did TCTA or any of its members seek to be heard at the Hearing, though counsel for TCTA was present at the September 25<sup>th</sup> Conference and the Hearing in this docket. Unlike Aeneas, TCTA has not alleged that neither it nor its counsel received notice of the Authority's consideration of the *Application*. To the contrary, TCTA is merely seeking to ride Aeneas' coattails - Aeneas' receipt of grace by the Authority due to the letter that Aeneas filed prior to the convening of the September 25<sup>th</sup> Conference. In sum, TCTA is attempting to avail itself of an "exception" or "opportunity" created solely for Aeneas. TCTA is not similarly situated to Aeneas and thus should not be granted intervention, irrespective of whether Aeneas' petition to intervene is granted. Moreover, assuming that the agency denies Aeneas' petition to intervene, it is axiomatic that it must then also deny TCTA's petition to intervene.

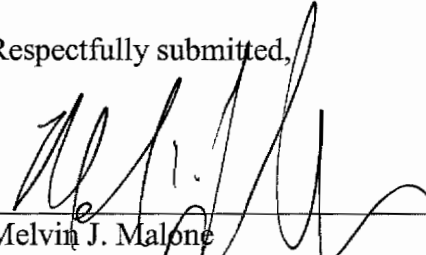
VI.

CONCLUSION

On September 25, 2006, the Authority deemed it appropriate to provide Aeneas with "the opportunity" to evaluate the *Application* and to determine whether to seek intervention in the docket. The agency did not grant Aeneas intervention in this proceeding on September 25, 2006. Having in good faith provided said opportunity to Aeneas, under the particular and unique circumstances presented, it is, for the foregoing reasons, now appropriate for the Authority to deny both the Petition to Intervene of Aeneas Communications, LLC and the Petition to

Intervene of the Tennessee Cable Telecommunications Association.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark W. Smith', is written over a horizontal line.

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**Attorneys for:**

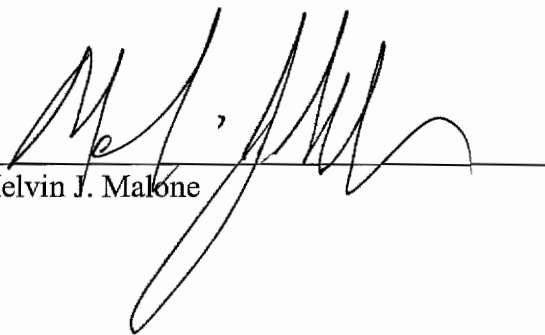
**Electric Power Board of Chattanooga d/b/a  
EPB Telecom**

### 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 7<sup>th</sup> day of October 2006.

Paul F. Rice  
P.O. Box 1692  
Jackson, Tennessee 38302-1692

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Melvin J. Malone