

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 25, 2011

IN RE:

PETITION OF CII HOLDCO, INC., MEMPHIS  
NETWORKX, LLC, MEMPHIS LIGHT GAS &  
WATER DIVISION AND MEMPHIS ROADBAND,  
LLC FOR APPROVAL OF CHANGE OF  
CONTROL OF MEMPHIS NETWORKX, LLC

DOCKET NO.  
07-00178

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ORDER APPROVING *PETITION*

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This matter came before Chairman Mary W. Freeman, Director Kenneth C. Hill 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 May 9, 2011 for consideration of the *Petition of CII Holdco, Inc., Memphis Networkx, LLC, Memphis Light Gas & Water Division and Memphis Broadband, LLC for Approval of Change of Control of Memphis Networkx, LLC* ("Petition") filed on July 27, 2007 by CII Holdco, Inc. ("CII"), Memphis Networkx, LLC ("Memphis Networkx"), Memphis Light Gas & Water Division ("MLG&W") and Memphis Broadband, LLC ("Memphis Broadband") (collectively, "Petitioners"). The Petitioners seek Authority approval of the sale of the outstanding membership interests of Memphis Networkx by its current owners, MLG&W and Memphis Broadband to a new owner, CII.

CII is a corporation wholly owned by Communications Infrastructure Investments, LLC ("CII-Parent" and together with CII, the "Company").<sup>1</sup> The Company was recently organized to acquire and support long-term development of fiber-based bandwidth solutions-oriented businesses. CII is not authorized to provide telecommunications services in Tennessee.

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<sup>1</sup> CII is now known as Zayo Bandwidth. To avoid confusion, this Order uses the names of companies as set out in the *Petition*. Memphis Networkx has requested to change its name to Zayo Bandwidth Tennessee, LLC. The name change request is pending in Docket No. 07-00194, which will be addressed separately from this docket.

Memphis Networkx was certificated by the TRA to offer intrastate communications services in Docket No. 99-00909.<sup>2</sup> Memphis Networkx owns a network of fiber optic lines and provides broadband connectivity for telecommunications carriers, internet service providers, and business users. Memphis Networkx is a limited liability company wholly owned by Memphis Light, Gas & Water Division, a division of the City of Memphis, Tennessee, and Memphis Broadband. Memphis Broadband is a limited liability company created specifically for the purpose of participating in the Memphis Networkx project.

#### **RELEVANT PROCEDURAL BACKGROUND**

After the filing of the *Petition*, the Tennessee Cable Telecommunications Association (“TCTA”) sought intervention on September 18, 2007.<sup>3</sup> The City of Memphis (“City”) subsequently requested to intervene on October 2, 2007.<sup>4</sup> During a regularly scheduled Authority Conference held on October 8, 2007, Director Pat Miller, Director Sara Kyle and Director Ron Jones, the voting panel initially assigned to this docket, appointed a Hearing Officer to hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion and prepare the case for hearing before the panel.<sup>5</sup>

On November 27, 2007, the Hearing Officer convened a Status Conference in which counsel for CII, MLG&W, TCTA and the City participated. During the Status Conference, with no objections raised, the Hearing Officer granted the petitions to intervene filed by the City and TCTA. Also during the Status Conference, the parties proposed a procedural schedule, subsequently adopted by the Hearing Officer, which set dates for the filing of testimony and the conduct of discovery. The Hearing Officer established that the hearing on the *Petition* would be held in May, 2008.

During the course of the discovery phase of this case, it became clear that many of the discovery requests related to a long and ongoing dispute between the City and Memphis Networkx

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<sup>2</sup> See *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity*, Docket No. 99-00909 (August 9, 2001).

<sup>3</sup> *Petition of the Tennessee Cable Telecommunications Association for Leave to Intervene* (September 18, 2007).

<sup>4</sup> *Petition of the City of Memphis for Leave to Intervene* (October 2, 2007).

<sup>5</sup> See *Order Convening a Contested Case and Appointing a Hearing Officer* (November 21, 2007).

over various provisions of the twenty-year franchise agreement granted by the City to Memphis Networx on December 5, 2000. Ultimately, the Hearing Officer ruled that

. . . regardless of the statutory criteria to be applied, there exists in this docket a threshold issue that must be first resolved before the Authority may approve of any such transfer or change of control; that is, the dispute concerning the interpretation and enforcement of the Franchise Agreement and resulting legal ownership of Memphis Networx.<sup>6</sup>

Thereafter, the Hearing Officer ordered this docket be held in abeyance pending notice that the threshold issue regarding the Franchise Agreement and legal ownership of Memphis Networx has been resolved.<sup>7</sup> The Hearing Officer also directed the parties to file periodic status reports.<sup>8</sup>

On December 30, 2010, the City filed a *Notice of the Withdrawal by City of Memphis of Its Objection to Petition for Change of Control* (“Notice”). The City indicates that it has settled the dispute with the Petitioners regarding the Franchise and withdraws its opposition to the Petition, deferring to the Authority to act in the manner it deems appropriate with respect to the Petition.

On February 2, 2011, the Petitioner filed a *Motion to Lift Abeyance and Approve Petition* (“*Motion to Lift Abeyance*”). The Petitioners note in the *Motion to Lift Abeyance* that the City has removed its objections to the approval of the transfer of control in the City’s December 30, 2010 Notice. Further, the Petitioners note the lawsuit filed by the City against Memphis Networx has been dismissed by the federal district court with prejudice.<sup>9</sup>

On April 28, 2011, the TCTA submitted a letter filing informing the Authority that the TCTA no longer opposes the Petitioners’ request for the transfer of control. Thereafter, on April 29, 2011, the Hearing Officer issued an Order lifting the abeyance of the proceedings and reinstating the docket proceedings.<sup>10</sup>

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<sup>6</sup> *Order Holding Docket in Abeyance & Directing Parties to Provide Status Update*, p. 5 (November 4, 2008).

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

<sup>8</sup> *Id.*

<sup>9</sup> *Motion to Lift Abeyance*, p. 2 (February 2, 2011).

<sup>10</sup> *Order Lifting Abeyance and Reinstating Docket Proceedings* (April 29, 2011).

## **DESCRIPTION OF THE TRANSACTION**

On June 7, 2007, CII entered into a “Membership Interest Purchase Agreement” with MLG&W and Memphis Broadband to purchase for \$11,500,000 all of the issued and outstanding equity of Memphis Networkx. The sale will affect neither the operating authority nor the ownership of assets of Memphis Networkx, as both the operating authority and ownership of assets will remain with Memphis Networkx. Ultimately, “[CII], now called Zayo Bandwidth, Inc., has purchased the ownership interests of MLG&W and [Memphis] Broadband. Following the purchase, Memphis Networkx, LLC is a wholly-owned subsidiary of Zayo Bandwidth, Inc.”<sup>11</sup> Memphis Networkx will cease to be connected with MLG&W.

The *Petition* requests that the Authority approve this change of control from Memphis Networkx to CII pursuant to Tenn. Code Ann. § 65-4-113.<sup>12</sup> Subsequently, the Petitioners requested *nunc pro tunc* approval of the *Petition* because “[CII] needed to close the deal in order to insure the continued financial health of Memphis Networkx. The sale was closed on July 30, 2007. The Petitioners seek approval, *nunc pro tunc*, of the *Petition*, as the TRA has granted on several other occasions. [Reference omitted].”<sup>13</sup>

## **FINDINGS AND CONCLUSIONS**

Tenn. Code Ann. § 65-4-113(a) (2004) requires a public utility to obtain TRA approval to transfer its authority to provide utility services and provides:

No public utility, as defined in § 65-4-101, shall transfer all or any part of its authority to provide utility services, derived from its certificate of public convenience and necessity issued by the authority, to any individual, partnership, corporation or other entity without first obtaining the approval of the authority.

Tenn. Code Ann. § 65-4-113(b) (2004) provides the standards by which the TRA shall consider an application for transfer of authority, which in pertinent part, states as follows:

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<sup>11</sup> Data Response, p. 2 (September 25, 2007).

<sup>12</sup> *Petition*, p. 1.

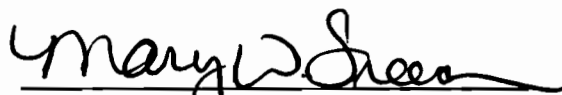
<sup>13</sup> Data Response, p. 1 (September 25, 2007).

Upon application for approval of the transfer of authority to provide utility services, the authority shall take into consideration all relevant factors, including, but not limited to, the suitability, the financial responsibility, and capability of the proposed transferee to perform efficiently the utility services to be transferred and the benefit to the consuming public to be gained from the transfer. The authority shall approve the transfer after consideration of all relevant factors and upon finding that such transfer furthers the public interest.

The panel found that the transaction is in the public interest because it provides Memphis Networx with CII's technical and managerial expertise and the financial resources to expand and improve its services. The transfer was consummated on July 30, 2007 and was seamless and transparent to the customers. Based on these findings, the panel unanimously voted to approve the *Petition, nunc pro tunc*, pursuant to Tenn. Code Ann. § 65-4-113 (2004).

**IT IS THEREFORE ORDERED THAT:**

The *Petition of CII Holdco, Inc., Memphis Networx, LLC, Memphis Light Gas & Water Division and Memphis Broadband, LLC for Approval of Change of Control of Memphis Networx, LLC* is approved, *nunc pro tunc*.

  
Mary W. Freeman, Chairman

  
Kenneth C. Hill, Director

  
Sara Kyle, Director