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March 13, 2008

Mr. Eddie Roberson  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

Electronically filed in docket office on March 12, 2008

RE: Memphis Networx, LLC; TRA Docket No. 07-000178

Dear Mr. Roberson:

Enclosed are copies of the Response to Zayo's Objections to the City's Discovery Requests served on the Petitioners. Please forward a filed copy to us in the enclosed envelope. Thank you for your assistance.

Very truly yours,

/s/ Allan J. Wade

AJW/tcp  
Enclosures

cc Sharla Dillon, Docket Manager ([sharla.dillon@state.tn.us](mailto:sharla.dillon@state.tn.us))  
Counsel of Record

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

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IN RE:

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

Docket No. 07-000178

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**RESPONSE OF CITY OF MEMPHIS TO ZAYO'S OBJECTIONS TO THE CITY'S  
DISCOVERY REQUESTS**

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Zayo Bandwidth, Inc. ("Zayo") has objected to the discovery requests propounded by Intervenor, City of Memphis (the "City") for several reasons. Generally, Zayo asserts that the City's discovery requests relate to issues that are irrelevant to the statutory criteria set forth in *Tenn. Code Ann.* §65-4-113 (the "Act"). Indeed, Zayo believes that TRA approval is not required since the proposed change of control does not involve the transfer of a certificate or the assets of a regulated utility.<sup>1</sup> The City will show that both of Zayo's positions are misplaced and that the City's discovery requests are directly related to the criteria set forth in the Act.

Before the City addresses Zayo's objections to the City's discovery requests, the City will address Zayo's contention that TRA approval is not required for the proposed transfer of control of Memphis Networkx, because the proposed change of control does not involve the transfer of a certificate or the assets of a regulated utility. *Tenn. Code Ann.* §65-4-113(a) provides:

- (a) 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,

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<sup>1</sup> See Petition for Change of Control filed July 27, 2007, page 1, footnote 1.

corporation or other entity without first obtaining the approval of the authority.

(emphasis added).

Under this section, the transfer of the certificate is not the relevant act; TRA approval is required if a public utility transfers its “authority.” Thus, Networx cannot directly or indirectly transfer its “authority” to provide utility services without TRA approval. In this case, Networx’s “authority” was encumbered by a number of conditions, requirements and continuing obligations.<sup>2</sup> Zayo’s petition acknowledges these encumbrances, but cavalierly dismisses them as being no longer necessary.<sup>3</sup> Until this Authority releases Networx’s “authority” from those regulatory conditions, they still apply. As of this date Networx’s “authority” is still subject to those regulatory conditions and restrictions and Zayo has not yet requested that they be discontinued. Thus, a key issue in these proceedings will be the extent to which Networx’s “authority” will be transferred to Zayo, if at all, and the extent to which that authority will be modified, if at all.

There is no dispute that Networx was previously owned by a public/private joint venture and funded in part with public funds.<sup>4</sup> TRA approval recognized this unique structure and fashioned regulatory oversight to prevent public funds from being used in anti-competitive manner. Clearly, the proposed transfer to Zayo will transform Networx from a public/private joint venture and the public funds invested therein to a purely private entity. Consequently, Networx will no longer be the same entity; yet, it still owns publicly funded assets. The City contends that before Networx’s authority is transferred and/or modified, the TRA must engage in the same rigorous review<sup>5</sup> that it performed prior to its original approval of Networx’s certificate

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<sup>2</sup> See TRA’s Final Order in Docket No. 99-00909 (“Final Order”) at pages 37-41.

<sup>3</sup> See Petition, Page 4, Section IV.

<sup>4</sup> This is fact also acknowledged by Zayo in its Petition. See Petition, page 4, Section IV.

<sup>5</sup> The Authority indicated in its Final Order in Docket 99-00909 that its responsibility was to “determine whether the operating agreement complies with and the resulting entity will abide by the Authority’s rules, regulations, and orders.” Final Order at page 31.

of public convenience and necessity to insure that Zayo has not gained a windfall or competitive advantage from a fire sale/purchase of quasi-public assets. A critical factor in the Authority's original approval of Networx, as a certificated provider, was safeguards implemented by MLGW, Broadband and Networx to prevent cross-subsidization of costs.<sup>6</sup> Additionally, the City intends to demonstrate that the TRA, if it intends to transfer Networx's authority, must do so in a manner that protects the public's interest. Otherwise, Zayo will not honor Networx's commitments to this Authority, its vendors, creditors and the public which it intends to serve. The City's discovery requests are intended to discover Zayo's intentions and suitability to serve the public's interests, which it narrowly defines in its Petition, and Zayo's financial responsibility to pay all of Networx's lawful debts, which it assumed as a part of this transaction. Tenn. Code Ann. §65-4-113(b) provides:

Upon petition 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. (emphasis supplied).

The statute sets forth four (4) nonexclusive factors and one (1) required factor to be considered by the Authority in determining whether to approve the transfer of Networx's operating authority two of which are primarily implicated by the City's discovery requests. The City intends to prove Zayo is not a suitable transferee of Networx operating authority and that the transfer is not in the public's interest.

Zayo obviously believes that it has no responsibility to honor the prior contracts, commitments and obligations of Networx. Surely, Zayo does not contend that its intention to ignore and ultimately disavow agreements, commitments and obligations of Networx is not a

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<sup>6</sup> Final Order at pages 33, 37.

factor that the Authority should consider in determining its suitability as a transferee of Networx's operating authority. This issue relates to Zayo's financial responsibility, because if it does not intend to honor its just debts, it should not be approved as a certified telecommunications provider.

The City intends to prove that without express commitments from Zayo to honor agreements, debts and obligations of Networx, Zayo is not a suitable transferee of Networx's operating authority and that any such transfer would not be in the public's interest. Specifically, the City seeks to establish:

- (a) Networx has failed to obtain the consent of the City to the transfer of its franchise to use the City's public rights of way ("PROW");
- (b) Zayo has expressed his intention to disregard the 20 year franchise agreement made in and entered into by its predecessor Networx with the City;
- (c) Zayo has intentionally failed to pay the lawful debts, trade payables and obligations of Networx, which Zayo assumed and agreed to pay is a part of the purchase price for Networx;
- (d) Networx and Zayo have not and do not intend to honor the commitments and agreements made to the Authority (i) to install telecommunications fibers at certain locations in and near St. Jude Hospital and housing developments known as Jefferson Square, R.Q. Venson and Barry Holmes, (ii) to commit 1% of its net operating profits not to exceed \$1 million per year fiscal year to the development and enhancement of telecommunications services in the low income areas of Shelby County Tennessee and (iii) to provide

telecommunications services to underserved areas within three years of approval of the application is competition does not develop in those areas.<sup>7</sup>

It is the City's position that Zayo's intention to disavow the agreements, obligations and commitments of Networx speaks volumes as to its lack of suitability and financial responsibility to be a certificated public utility and that its assumption of Networx operating authority will be harmful to the public interest. Further, Zayo's acquisition of Networx's telecommunication assets at a cost less than their depreciated book value will result in public funds subsidizing a purely private enterprise in violation of state law and contrary to the Authority's stated intention in its final order.

Zayo's Petition for Approval does not provide one scintilla of an indication that it will honor the outstanding agreements, commitments and obligations of Networx if its petition is approved. Zayo contends that TRA approval is not required in this case, since it has indirectly acquired Memphis Networx certificate of authority; under this theory Zayo seems to argue that it continues to operate under Networx's authority as Networx could have done. Yet, Zayo then boldly states "[o]nce this transaction is completed, these statutory restrictions will no longer apply to Memphis Networx and extensive conditions imposed in Docket 99-00909 pursuant to those statutes will be moot." Zayo's inconsistent positions establishes that it has no intention of fulfilling the agreements and conditions attached to Networx certificate of Authority by the TRA.

### **CITY'S DISCOVERY REQUESTS ANNOTATED**

**REQUEST FOR ADMISSION NO. 1:** Please admit that the statements contained in the Petition of Memphis Networx, LLC filed with the TRA and docketed under case number 01-00091 were truthful statements and contained a true and exact copy of the Franchise Agreement.

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<sup>7</sup> See Final Order at page 38.

### **RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the agreements and representations made by representatives of Networkx to the Authority were true and correct statements that bind Networkx and its successors or assigns; any change in Networkx's agreements would not be in the public's interest.

**REQUEST FOR ADMISSION NO. 2:** Please admit the Memphis City Council approved the Franchise Agreement by Ordinance No. 4744 on December 5, 2000 and that the Grantee of the Franchise Agreement was Memphis Networkx, LLC, a joint venture between Memphis Light, Gas and Water Division and Memphis Broadband, LLC ("Grantee") and that the copies of said Ordinance and Agreement, attached hereto as Exhibits "1" and "2", respectively, may be admitted into evidence in these proceedings.

### **RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that a joint venture between MLGW and Networkx entered into a lawful and valid franchise agreement with the City of Memphis, which Zayo has expressed an intention to disavow. This request is related to Zayo's financial responsibility and suitability.

**REQUEST FOR ADMISSION NO. 3:** Please admit that the Grantee accepted the terms and conditions contained in Ordinance No. 4404, which were incorporated into the Franchise Agreement by reference and that Grantee agreed that the Franchise Agreement would be deemed to constitute a contract by and between Grantee and the City of Memphis and shall be enforceable in accordance with its terms even if Ordinance No. 4404 or any subsection, sentence, clause, phrase, term, provision, condition, covenant or portion thereof is held invalid or unenforceable by a court of competent jurisdiction.

### **RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that a joint venture between MLGW and Networkx entered into a lawful and valid franchise agreement with the City of Memphis, which Zayo has expressed an intention to disavow. This request is related to Zayo's financial responsibility and suitability.

**REQUEST FOR ADMISSION NO. 4:** Please admit that BellSouth

Telecommunications, Inc. sought to and was granted permission to intervene in TRA docket No. 01-00091.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that BellSouth contended the Network's franchise agreement with the City did not constitute a valid and binding agreement and that this was a contention that was rejected by Network further evidencing the fact that Network's franchise agreement with the City was intended to be a valid and binding agreement, which should be honored.

**REQUEST FOR ADMISSION NO. 5:** Please admit that Zayo in TRA docket No.

01-00091 sought approval of its Franchise with the City notwithstanding BellSouth's Petition to Intervene and that Grantee did not adopt BellSouth's position that Grantee's Franchise Agreement was an illegal Franchise and unenforceable.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that BellSouth contended the Network's franchise agreement with the City did not constitute a valid and binding agreement and that this was a contention that was rejected by Network further evidencing the fact that Network's franchise agreement with the City was intended to be a valid and binding agreement, which should be honored.

**REQUEST FOR ADMISSION NO. 6:** Please admit that prior to September 16,

2007 Grantee did not object in any way to the City that the Franchise Agreement was illegal, invalid or unenforceable in accordance with its terms or file suit against the City to declare the Franchise Agreement illegal and unenforceable.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that Network's franchise agreement with the City was intended to be a valid and binding agreement, which Network should honor.

**REQUEST FOR PRODUCTION NO. 1:** To the extent your response to the preceding

request for admission was anything but an unqualified admission, please produce any and all



documents which evidence your objection in any way to the City that the Franchise Agreement was illegal, invalid or unenforceable in accord with its terms.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that Networkx's franchise agreement with the City was intended to be a valid and binding agreement, which Networkx should honor.

**REQUEST FOR ADMISSION NO. 7:** Please admit that Grantee, represented by counsel knowledgeable in telecommunications matters, actively sought, solicited and lobbied for the City's approval of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This requests seeks to establish that Networkx's franchise agreement with the City was intended to be a valid and binding agreement, which Networkx should honor.

**REQUEST FOR ADMISSION NO. 8:** Please admit that the City performed all of its Agreements under the Franchise Agreement and that the City allowed Grantee full access to its streets and PROW to construct its telecommunications system.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that Networkx's franchise agreement with the City was intended to be a valid and binding agreement, which Networkx should honor.

**REQUEST FOR ADMISSION NO. 9:** Please admit that Grantee accepted and received all of the benefits it bargained for from the City in the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that Networkx's franchise agreement with the City was intended to be a valid and binding agreement, which Networkx should honor.

**REQUEST FOR ADMISSION NO. 10:** Please admit that Grantee received gross revenues from the operation of its telecommunications Networkx as defined in section 3 (§ 2.14 of Ordinance No. 4404) of the Franchise Agreement between January 3, 2001 and February 22, 2008.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish the Networkx breached its valid and lawful franchise agreement with the City and that Zayo does not intend to fulfill these agreements thereby indicating its lack of financial responsibility and suitability to be an approved transferee of Networkx's operating authority.

**INTERROGATORY NO. 1:** Please list for each calendar quarter from January 3, 2001 through and including February 22, 2008 the amount of all gross revenues received by Grantee from the operation of its telecommunications Networkx as defined in section 3 (§ 2.14 of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish the Networkx breached its valid and lawful franchise agreement with the City and that Zayo does not intend to fulfill these agreements thereby indicating its lack of financial responsibility and suitability to be an approved transferee of Networkx's operating authority.

**REQUEST FOR ADMISSION NO. 11:** Please admit that Grantee has not paid any general compensation to the City as Grantee agreed in section 3 (§ 21 of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish the Networkx breached its valid and lawful franchise agreement with the City and that Zayo does not intend to fulfill these agreements thereby indicating its lack of financial responsibility and suitability to be an approved transferee of Networkx's operating authority.

**REQUEST FOR PRODUCTION NO. 2:** If your response to request for admission No. 11 was anything but an unqualified admission please produce all documents which evidence

your payments of general compensation to the City as required by section 3 (§ 21 of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish the Networkx breached its valid and lawful franchise agreement with the City and that Zayo does not intend to fulfill these agreements thereby indicating its lack of financial responsibility and suitability to be an approved transferee of Networkx's operating authority.

**REQUEST FOR ADMISSION NO. 12:** Please admit that the statements, representations and agreements in the application of Memphis Networkx, LLC for a certificate of public convenience and necessity to provide intrastate telecommunications services and joint petition of Memphis Light Gas and Water Division, a division of the City of Memphis, Tennessee and A&L Networkx – Tennessee LLC (A&L) for approval of agreement between MLGW and A&L regarding Joint Ownership of Memphis Networkx, LLC filed with the TRA under Docket No. 99-00909, including all amendments and prefiled testimony of William Larry Thompson, Andrew P. Seamons and Ward Huddleston, Jr. were truthful.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the agreements and representations made by representatives of Networkx to the authority were true and correct statements that bind Networkx and its successors or assigns. This request relates to whether the elimination of Networkx's agreements with the TRA are in the public's interest.

**REQUEST FOR ADMISSION NO. 13:** Please admit that Memphis Networkx, LLC made a commitment to the TRA and agreed in the proceedings docketed under TRA Docket No. 99-00909 that it would within two years from the TRA approval install telecommunication fibers in certain locations in and near St. Jude's Hospital and the housing developments known as Jefferson Square, R.Q. Vincent and Barry Holmes and that in fiscal years in which the company had net operating profits would commit 1% of its net operating profits not to exceed \$1 million

per fiscal year to the development and enhancement of telecommunications services in the low income areas of Shelby County, Tennessee.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the agreements and representations made by representatives of Networkx to the authority were true and correct statements that bind Networkx and its successors or assigns. This request relates to whether the elimination of Networkx's agreements with the TRA are in the public's interest.

**INTERROGATORY NO. 4:** Please describe Zayo's efforts to comply with and satisfy its commitment and agreement to the TRA as described in the preceding discovery request, including each and every activity or accomplishment made by Zayo in the furtherance of such commitments and agreements.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the agreements and representations made by representatives of Networkx to the authority were true and correct statements that bind Networkx and its successors or assigns. This request seeks to discovery Zayo's intentions to honor these agreements in the future. The City contends this request relates to addresses Zayo's financial responsibility and suitability to assume control of Networkx.

**INTERROGATORY NO. 5:** Please describe CII Holdco's intention to satisfy Memphis Networkx, LLC's commitments and agreements to the TRA in the proceedings docketed under TRA Docket No. 99-00909 as described in the TRA's Final Order.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the agreements and representations made by representatives of Networkx to the authority were true and correct statements that bind Networkx and its successors or assigns. This request seeks to discovery Zayo's intentions to honor these agreements in the future. The City contends this request relates to addresses Zayo's financial responsibility and suitability to assume control of Networkx.

**INTERROGATORY NO. 6:** Please describe and list each and every payment made by you since June 7, 2007 to any person or entity to whom Memphis Networkx, LLC owed

or was obligated to pay any money, debt, obligation or trade payable, including tax or franchise compensation to the City.

**RESPONSE TO ZAYO'S OBJECTION**

This request relates to Zayo's agreement to assume and pay all trade payables of Networkx as a part of the purchase price. The City is informed and believes that Zayo may have failed to pay these obligations and that Zayo intends to repudiate the lawful obligations of Networkx. This intent is suggested in its objections to the City's discovery requests when it refers to these obligations as "...statements made by various people before Zayo purchase the company and changed its name from Memphis Networkx to Zayo Tennessee." This statement suggests that Zayo does not intend to honor Networkx's obligations and commitments if they were incurred before it purchased the equity of MLGW and Broadband. Zayo's intention if proven is certainly not in the public's interest, reflects on the suitability of Zayo to operate Networkx in the future and its suitability to serve the public's interest.

**INTERROGATORY NO. 7:** To the extent you have not made all payments of any money, debt, obligation or trade payable, including tax or franchise compensation to any person that Memphis Networkx, LLC owed or was obligated to pay on or after June 7, 2007, please describe your intentions to pay and satisfy any such debt, obligation or trade payable, including tax or franchise compensation to the City.

**RESPONSE TO ZAYO'S OBJECTION**

This request relates to Zayo's agreement to assume and pay all trade payables of Networkx as a part of the purchase price. The City is informed and believes that Zayo may have failed to pay these obligations and that Zayo intends to repudiate the lawful obligations of Networkx. This intent is suggested in its objections to the City's discovery requests when it refers to these obligations as "...statements made by various people before Zayo purchase the company and changed its name from Memphis Networkx to Zayo Tennessee." This statement suggests that Zayo does not intend to honor Networkx's obligations and commitments if they were incurred before it purchased the equity of MLGW and Broadband. Zayo's intention if proven is certainly not in the public's interest, reflects on the suitability of Zayo to operate Networkx in the future and its suitability to serve the public's interest.

**REQUEST FOR ADMISSION NO. 14:** Please admit that Grantee has not filed any of the reports that Grantee agreed to file in section 3 (§ 22 of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on suitability and financial responsibility to operate Networkx in the future.

**REQUEST FOR PRODUCTION NO. 3:** If your response to request for admission No. 14 was anything but an unqualified admission, please produce all documents which evidence your reports filed with the City as required by section 3 (§ 22 of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on suitability and financial responsibility to operate Networkx in the future.

**REQUEST FOR ADMISSION NO. 15:** Please admit that Grantee has not obtained the prior written consent of the Memphis City Council to the transfer of Grantee's rights as Grantee agreed in section 3 (§§ 26 and 28.1(8) of Ordinance No. 4404) of the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

This discovery request relates to whether Networkx has the lawful authority to use and occupy the City's public's rights of way. Tenn. Code Ann. § 65-4-107 as interpreted by the Tennessee Supreme Court establishes that a public utility must have permission from the municipality to use the streets and public ways and approval from the Authority. While the former is not a condition precedent to TRA approval, it is a necessary requirement before a utility can exercise operating authority granted by the TRA. In this case, the City has notified Networkx and Zayo that it has not approved the transfer of the privileges in franchise agreement from Networkx, a joint venture between MLGW and Broadband, to Zayo.

The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on suitability and financial responsibility to operate Networkx in the future.

**REQUEST FOR ADMISSION NO. 16:** Please admit that Grantee and the City agreed in the Franchise Agreement that the Franchise Agreement shall be subject to revocation or termination in accordance with the terms and conditions and procedures of sections 27 and 28 of Ordinance No. 4404.

**RESPONSE TO ZAYO'S OBJECTION**

This discovery request relates to whether Networkx has the lawful authority to use and occupy the City's public's rights of way. Tenn. Code Ann. § 65-4-107 as interpreted by the Tennessee Supreme Court establishes that a public utility must have permission from the municipality to use the streets and public ways and approval from the Authority. While the former is not a condition precedent to TRA approval, it is a necessary requirement before a utility can exercise operating authority granted by the TRA. In this case, the City has notified Networkx and Zayo that it has not approved the transfer of the privileges in franchise agreement from Networkx, a joint venture between MLGW and Broadband, to Zayo.

This request seeks to establish that Networkx's franchise agreement with the City was intended to be a valid and binding agreement. The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on its financial responsibility and suitability to operate Networkx in the future.

**REQUEST FOR ADMISSION NO. 17:** Please admit that you received a letter dated August 31, 2007 via hand delivery and certified mail no. 7006 0100 0002 5196 2340 from a representative of the City, a copy of which is attached hereto as Exhibit 3, and that the copy of said letter attached hereto may be admitted into evidence in this proceeding.

**RESPONSE TO ZAYO'S OBJECTION**

This request seeks to establish that the City has exercised its right to acquire the telecommunications facilities of Memphis Networkx and that Zayo does not have to present ability to assume operations of Memphis Networkx.

**REQUEST FOR ADMISSION NO. 18:** Please admit that you responded to the letter described in the preceding discovery request on September 16, 2007, a copy of which response is attached hereto as Exhibit 4, and that the copy of said letter attached hereto may be admitted into evidence in this proceeding.

**RESPONSE TO ZAYO'S OBJECTION**

The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on its financial responsibility and suitability to operate Networkx in the future.

**INTERROGATORY NO. 8:** Please describe and list the original capitalized cost, before depreciation or amortization, of your telecommunications system and/or infrastructure, as defined in any federal law or in section 3 (§ 21 of Ordinance No. 4404) of the Franchise Agreement.

### **RESPONSE TO ZAYO'S OBJECTION**

As the Authority recognized in its final order approving the certificate of necessity and convenience for Networkx, state law prohibits cost subsidization by the governmental joint venturer, MLGW, for the benefit of the private owners of Networkx. The Authority went to great lengths to ensure that such cost subsidization would not occur. The City seeks to prove that Zayo is the beneficiary of cross subsidization due to the inadequacy of the purchase price for MLGW's share of the depreciated value of Networkx's telecommunications assets. In other words, the amount by which costs for such assets contributed by MLGW exceeds the amount of the purchase price attributable to such assets results in subsidization of Zayo with public funds. This request relates to whether the transfer as presently structured is in the public's interest.

### **INTERROGATORY NO. 9:**

Do you own the telecommunications system and/or

infrastructure reflected in bold on Exhibit 5 attached hereto?

### **RESPONSE TO ZAYO'S OBJECTION**

The City paid for and owns the telecommunications infrastructure described on Exhibit 5 to its discovery request. Networkx has, without consent and compensation to the City, misappropriated such assets for its own use and Zayo continues to wrongfully use and unjustly benefit from the cities infrastructure without its consent and without just compensation. Such use of publicly funded assets constitutes cross-subsidation and an inappropriate anti-competitive benefit to Zayo's business. Again, the City seeks to discover whether Zayo intends to pay for its use of the City's property; Zayo's continued misappropriation of the City's assets would also establish it lack of financial responsibility and suitability to own and operate Networkx, and whether the transfer is in the public's interest.

### **INTERROGATORY NO. 10:**

If your answer to the preceding discovery request

was no, please list each and every customer of yours who is connected to the telecommunications system described on Exhibit 5 including a listing of all revenue you have received from each such customer.

### **RESPONSE TO ZAYO'S OBJECTION**

The City paid for and owns the telecommunications infrastructure described on Exhibit 5 to its discovery request. Networkx has, without consent and compensation to the City, misappropriated such assets for its own use and Zayo continues to wrongfully use and unjustly benefit from the cities infrastructure without its consent and without just compensation. Such use of publicly funded assets constitutes cross-subsidation and an inappropriate anti-competitive benefit to Zayo's business. Again, the City seeks to discover whether Zayo intends to pay for its use of the City's property; Zayo's continued misappropriation of the City's assets would also establish it lack of financial responsibility and suitability to own and operate Networkx, and whether the transfer is in the public's interest.



**REQUEST FOR PRODUCTION NO. 4:** If your answer to Interrogatory No.9 was yes, please produce any and all agreements documents or evidence to establish your ownership of the telecommunications system and/or infrastructure reflected in bold on Exhibit 5 attached hereto.

**RESPONSE TO ZAYO'S OBJECTION**

The City paid for and owns the telecommunications infrastructure described on Exhibit 5 to its discovery request. Networkx has, without consent and compensation to the City, misappropriated such assets for its own use and Zayo continues to wrongfully use and unjustly benefit from the cities infrastructure without its consent and without just compensation. Such use of publicly funded assets constitutes cross-subsidation and an inappropriate anti-competitive benefit to Zayo's business. Again, the City seeks to discover whether Zayo intends to pay for its use of the City's property; Zayo's continued misappropriation of the City's assets would also establish it lack of financial responsibility and suitability to own and operate Networkx, and whether the transfer is in the public's interest.

**INTERROGATORY NO. 11:** Please list each year from and including 2001 through 2007 any and all City of Memphis franchise fees billed and/or collected from your customers pursuant to Tennessee Code Annotated § 65-4-105(e).

**RESPONSE TO ZAYO'S OBJECTION**

Under Tennessee law, Tenn. Code Ann. § 65-4-105(e) public utilities are allowed to collect from its customers pro rata any franchise payments made by the utility to a municipality. Neither Networkx nor Zayo have made any franchise payments to the City of Memphis. It would be unlawful to collect payments from its customers and use those collections for its operations. This request relates to whether Networkx and/or Zayo are suitable holders of a certificate of authority and whether the transfer is in the public's interest.

**REQUEST FOR PRODUCTION NO. 5:** Please provide any and all reports, appraisals, assessments or calculations performed by you or by anyone on your behalf which estimates, determines or values Grantee's Telecommunications Systems.

**RESPONSE TO ZAYO'S OBJECTION**

As the Authority recognized in its final order approving the certificate of necessity and convenience for Networkx, state law prohibits cost subsidization by the governmental joint venturer, MLGW, for the benefit of

the private owners of Networkx. The Authority went to great lengths to ensure that such cost subsidization would not occur. The City seeks to prove that Zayo is the beneficiary of cross subsidization due to the inadequacy of the purchase price for MLGW's share of the depreciated value of Networkx's telecommunications assets. In other words, the amount by which costs for such assets contributed by MLGW exceeds the amount of the purchase price attributable to such assets results in subsidization of Zayo with public funds. This request relates to whether the transfer as presently structured is in the public's interest.

**INTERROGATORY NO. 12:** Please describe your intentions to comply with and specifically perform the Franchise Agreement.

**RESPONSE TO ZAYO'S OBJECTION**

The City intends to show that Zayo's express repudiation of Networkx's lawful contractual obligations bears on its fitness and suitability to operate Networkx in the future.

Respectfully submitted,

By: /s/ Allan J. Wade  
Allan J. Wade (4339)  
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**CERTIFICATE OF SERVICE**

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