

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 4, 2008

IN RE:)	
)	
PETITION OF CII HOLDCO, INC., MEMPHIS)	DOCKET NO.
NETWORX, LLC, MEMPHIS LIGHT GAS &)	07-00178
WATER DIVISION AND MEMPHIS)	
BROADBAND, LLC FOR APPROVAL OF)	
CHANGE OF CONTROL OF MEMPHIS)	
NETWORX, LLC)	

**ORDER HOLDING DOCKET IN ABEYANCE
& DIRECTING PARTIES TO PROVIDE STATUS UPDATE**

This matter came before the Hearing Officer during a Status Conference held for the purpose of resolving objections to discovery requests and determining whether this docket should be held in abeyance pending the resolution of a threshold issue.

RELEVANT PROCEDURAL BACKGROUND

According to the *Petition*, filed with the Authority on July 27, 2007, CII Holdco, Inc., now known as Zayo Bandwith, Inc. (“Zayo”) entered into a contract with Memphis Light Gas and Water Division (“MLG&W”) and Memphis Broadband, LLC (“Memphis Broadband”) (referred to herein collectively as “Joint Petitioners”), to purchase all of the issued and outstanding equity of Memphis Networx, LLC (“Memphis Networx”), a competitive local exchange carrier (“CLEC”) certified by the TRA to offer intrastate communications services.¹ The *Petition* states that upon completion of the proposed transaction, Memphis Networx will continue to own and operate the certificate awarded by the Authority in Docket No. 99-00909,

¹ See, *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity*, TRA Docket No. 99-00909 (August 9, 2001).

but Zayo will effectively control Memphis Networkx. The *Petition* therefore requests that the Authority approve the change of control of Memphis Networkx to Zayo pursuant to Tenn. Code Ann. Section 65-4-113.² Subsequently, the Joint Petitioners requested approval of the *Petition*, *nunc pro tunc*, as reflected in their response to TRA Data Request No. #1,

As explained in cover letter accompanying the “Petition for Approval of Change of Control” (Docket 07-00178), CII [Zayo] 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].³

On November 27, 2007, the Hearing Officer held a Status Conference to consider certain petitions to intervene and to establish a procedural schedule in the docket. On January 15, 2008, an *Order Granting Petitions for Intervention and Establishing Procedural Schedule* was issued memorializing decisions of the Hearing Officer and certain agreements of the parties. In accordance with the Procedural Schedule, on January 18, 2008, Zayo filed pre-filed direct testimony and a proposed protective order. On January 22, 2008, the Hearing Officer issued the Protective Order as submitted by the parties, without alteration.

On February 22, 2008, the City of Memphis (the “City”), an intervening party, served its *First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents to Petitioners, CII Holdco, Inc., MLGW and Memphis Broadband (“Discovery Requests”)*, in which it requested that the Joint Petitioners provide responses and produce documents to its discovery requests. On February 25, 2008, Tennessee Cable Telecommunications Association (“TCTA”), an intervening party, filed a letter stating that it did not intend to propound discovery to the Joint Petitioners.

² *Petition*, p. 1 (July 27, 2007).

³ Data Response of Zayo to TRA Data Request No. 1, p. 1 (September 25, 2007).

On March 3, 2008, the Joint Petitioners filed *Objections of Petitioners to Discovery Request of the City of Memphis* (“*Objections*”), in which they object to certain discovery requests as not being proper or relevant to the subject of the docket. In their *Objections*, the Joint Petitioners state,

The majority of the discovery questions asked by the City relate to a long and ongoing dispute between the City and Memphis Networx (and now between the City and Zayo Tennessee) over various provisions of the twenty-year franchise agreement granted by the City to Memphis Networx on December 5, 2000. If the parties cannot amicably resolve those issues, these disputes will ultimately be addressed by a court of competent jurisdiction. [Footnote omitted.] Those matters are not within the agency’s purview and are therefore irrelevant to this proceeding.⁴

On March 13, 2008, the City filed its *Response of City of Memphis to Zayo’s Objections to the City’s Discovery Requests* (“*City Response to Objections*”), in which it contends that its requests for discovery are directly related, and thus relevant, to the statutory criteria by which the Joint Petitioners’ *Petition* is to be considered by the Authority.⁵ On April 23, 2008, the *Petitioner’s Reply to “Response of City of Memphis to Zayo’s Objections to the City’s Discovery Requests”* was filed with the Authority.

On April 9, 2008, the Hearing Officer issued a *Notice of Status Conference* setting a Status Conference on May 5, 2008 to resolve the discovery disputes between the parties. Subsequently, the Hearing Officer reset the Status Conference for May 19, 2008. Following a request by the Joint Petitioners to postpone the May 19, 2008, Status Conference, the Hearing Officer issued a *Notice of Continuance of Status Conference* directing the parties to provide mutually acceptable dates and times to reschedule the Status Conference. Thereafter, on May 27, 2008, the Hearing Officer issued a *Notice of Status Conference* setting a Status Conference at 2:00 p.m. on May 29, 2008.

⁴ *Objections*, p. 2 (March 3, 2008).

⁵ *City Response to Objections* (March 13, 2008).

MAY 29, 2008 STATUS CONFERENCE

The Status Conference began as noticed in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties in attendance were as follows:

Zayo – Mr. Henry M. Walker, Esq., Boulton, Cummings, Connors & Berry PLC, 1600 Division Street, Suite 700, P.O. Box 340025, Nashville, Tennessee 37203;

MLG&W – Mr. Mark W. Smith, Esq., Miller & Martin, PLLC, 832 Georgia Avenue, Suite 1000, Chattanooga, Tennessee 37402;

City – via telephone, Mr. Allan J. Wade, Esq., Law Offices of Allan J. Wade, PLLC, One Commerce Square, Suite 2275, Memphis, Tennessee 38103.

During the Status Conference, the Hearing Officer began by clarifying a previous ruling he had made during a Status Conference held on November 27, 2007, concerning the fact that there is another open docket involving Memphis Networx, an investigation docket,⁶ and noted that these two dockets have separate and distinct purposes. The Hearing Officer further stated that in the present docket, the Authority is concerned with determining whether the *Petition* filed by the Joint Petitioners on July 27, 2007, meets the statutory criteria for transfers of control.⁷

THRESHOLD ISSUE CONCERNING FRANCHISE AGREEMENT/LEGAL OWNERSHIP

In their pleadings, the parties have raised certain questions concerning whether there is a breach of the Franchise Agreement executed between the City and Memphis Networx which would justify a revocation or termination of such franchise in accordance with City Ordinance 4404.⁸ During the Status Conference, the Hearing Officer stated that resolution of this issue is not one that is appropriate for determination by the Authority, and rather is to be litigated in a

⁶ See, *In re Request for an Investigation of the Business Partnership between Memphis Light Gas & Water and Memphis Networx, LLC*, Docket No. 07-00183.

⁷ Tenn. Code Ann. § 65-4-113.

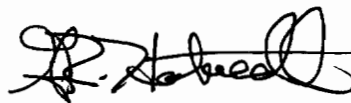
⁸ According to the City, the validity and compliance with the Franchise Agreement could affect the underlying sale of Memphis Networx to Zayo. See, Transcript of Status Conference, May 29, 2008, pp. 8-13.

court of competent jurisdiction. Therefore, 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.

Following additional discussion with the parties, the Hearing Officer found that in light of this unresolved threshold issue, the docket should be held in abeyance pending resolution of the dispute between the parties. The parties concurred in the Hearing Officer's conclusion and asserted that the necessary filings would be made in an appropriate court of law without unnecessary delay.

IT IS THEREFORE ORDERED THAT:

1. Docket 07-00178, *In re Petition of CII Holdco, Inc., Memphis Networx, LLC, Memphis Gas Light & Water Division and Memphis Broadband, LLC for Approval of Change of Control of Memphis Networx, LLC*, shall be held in abeyance pending notice from the parties of the resolution of the threshold issue discussed herein concerning the Franchise Agreement and legal ownership of Memphis Networx, LLC.
2. The parties shall provide a status report concerning resolution of the above referenced threshold issue by **January 30, 2009**.



Gary Hotvedt, Hearing Officer