BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 29, 2012

IN RE:	)	
	)	**DOCKET NO.**
COMPLAINT OF CITY OF KNOXVILLE, ET AL. AGAINST AT&T TENNESSEE	)	**12-00082**
	)	

ORDER DENYING REQUEST TO STRIKE LEGISLATORS' COMMENTS

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority") upon a letter filed on August 22, 2012, by Knox County, Tennessee ("County") requesting that the Authority strike from the record a letter filed on August 2, 2012, by two legislative sponsors of the Competitive Cable and Video Services Act, Tenn. Code Ann. § 7-59-301, *et seq.* (2008).[1] On September 14, 2012, BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T") filed its response opposing the County's request.

COUNTY'S POSITION

In its letter, the County asserts that the legislators' statement, whether sworn or unsworn, is inadmissible for the consideration of the Authority in its determination of the statutory language at issue in this docket. The County contends that because the language of the statute is unambiguous, under the general rules of statutory construction, the Authority needs look no further than the face of the statute itself. Thus, the Authority's consideration of extraneous

[1] On August 2, 2012, Senator Bill Ketron and Representative Steve McDaniel, as sponsors of the 2008 Competitive Cable and Video Services Act, Tenn. Code Ann. § 7-59-301, *et seq.,* filed a letter in the docket file, wherein, they state that, based on their review and assessment of the Complaint filed by the City of Knoxville, Tennessee, the City's interpretation of the statutory language at issue in this docket is inconsistent with the compromise negotiated with the stakeholders to the legislation. Further, the legislators assert that it was their intention that cable providers be required to provide encoder equipment for Public, Education and Government (PEG) channels, but that the repair and maintenance of PEG equipment be funded from the franchise fees paid to the local governments. Ketron/McDaniel Letter (August 2, 2012).

statements filed by legislators whom had been involved in the legislative process of the underlying Bill is not appropriate. In addition, the County cites the Tennessee Court of Appeals case of *James Cable Partners v. City of Jamestown* for the proposition that the Authority is not to rely on the opinions of individual legislators in order to construe or ascertain statutory meaning and intent:

> [I]t is a well settled principle in this state that while documents and reports evidencing legislative intent and purpose have been freely admitted into evidence when construing statutes, we cannot resort to 'opinions of legislators or others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislator' even when there is ambiguous language used therein.[2]

Therefore, the County requests that the August 2, 2012 letter be stricken from the record and given no consideration by the Authority in its determination of this matter.

AT&T'S POSITION

In its response, AT&T contends that based on the provisions of Tenn. Code Ann. § 65-2-109, which addresses the application of the rules of evidence in contested case proceedings before the Authority, and the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-313, concerning evidence in contested cases before administrative agencies in this state, the Authority should deny the County's request to strike the legislators' letter. Citing the language of the statute, AT&T asserts that under Tenn. Code Ann. § 65-2-109, the Authority is not bound by the rules of evidence applicable in a court, and instead, may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs. AT&T further contends that, in fact, a reasonably prudent person would consider the opinions of the sponsors of legislation in determining the application of the statute.

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[2] County's Letter, p.2 (August 22, 2012) (*citing James Cable Partners v. City of Jamestown,* 818 S.W.2d 338 (Tenn. Ct. Apps. 1991).

In addition, in its response, AT&T references an evidentiary ruling rendered by Authority Chairman Hill during a hearing in another matter, in which he explains the application of the evidentiary standards in proceedings before the agency, as set forth in Tenn. Code Ann. §§ 65-2-109 and 4-5-313.[3] Accordingly, AT&T asserts that the County is free to present argument opposing the opinions of the legislators, to which the Authority may accord the appropriate weight when considering all of the arguments presented, but the Authority is not prohibited from considering the opinions expressed by the legislators in their letter.

Finally, AT&T maintains that it disagrees with the County's construction of the statutory language, and asserts that in addressing the parties' competing claims of what the statute "unambiguously" means, it is reasonable and prudent that the Authority consider the opinions offered by the legislative sponsors. Therefore, AT&T requests that the Authority deny the County's request to strike the legislators' letter based on the provisions of Tenn. Code Ann. §§ 65-2-109 and 4-5-313.

FINDINGS & CONCLUSIONS

As an administrative agency, the TRA is not bound by the rules of evidence applicable in a court[4] and conducts contested case hearings according to its own rules and the Tennessee Uniform Administrative Procedures Act ("UAPA") (Tenn. Code Ann. § 4-5-301 *et seq.*). Tenn. Code Ann. § 65-2-109(1) states,

> The authority shall not be bound by the rules of evidence applicable in a court *but it may admit and give probative effect to any evidence* which possesses such probative value as would entitle it to be accepted by reasonably prudent persons

[3] AT&T's Letter, p. 2 (September 14, 2012), *citing Complaint of Concord Telephone Exchange, Inc., et al., against Halo Wireless, Inc., et al., for Failure to Pay Terminating Intrastate Access Charges for Traffic and Other Relief and Authority to Cease Termination of Traffic,* Docket No. 11-00108, Transcript of Proceedings, pp. 7-8 (January 23, 2012).

[4] The TRA's predecessors, the Railroad & Public Utilities Commission and the Tennessee Public Service Commission have been held on several occasions to be an administrative body and not a "court." *See In Re: Cumberland Power Co.*, 249 S.W. 818, 147 Tenn. 504 (1923); *GBM Communications v. United Inter-Mountain Telephone Company*, 723 S.W.2d 109 (Tenn. App. 1986).

> in the conduct of their affairs; provided, that the authority shall give effect to the rules of privilege recognized by law; and provided further, that the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence *(emphasis added)*.[5]

Similarly, the UAPA authorizes the Authority, in the evaluation of evidence, to consider evidence admissible in a court of law, as well as evidence that might be considered inadmissible, under some circumstances.[6] In the case of *Tennessee Consumer Advocate v Tennessee Regulatory Authority and United Cities Gas Co.*, the Tennessee Court of Appeals stated,

> It is elementary that administrative agencies are permitted to consider evidence which, in a court of law, would be excluded under the liberal practice of administrative agencies. Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information.[7]

Thus, information that is relevant to the proceedings may be considered, provided that the parties have adequate notice and opportunity to present counter evidence or argument. The parties have been given such an opportunity in these proceedings through the filing of briefs and setting of oral argument before the Authority panel.

As reiterated, in part, by AT&T in its response, former Chairman Hill has aptly stated the standard applied by the Authority, "Taken together these statutes require the Authority to admit evidence that would be admissible in a court but permit the Authority to admit any other evidence that is . . . of a type commonly relied upon by reasonably prudent men in the conduct of

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[5] Tenn. Code Ann. § 65-2-109(1).

[6] Tenn. Code Ann. § 4-5-313(1) provides that in contested cases, "The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records, and shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious. Tenn. Code Ann. § 4-5-313(1).

[7] *Tennessee Consumer Advocate v Tennessee Regulatory Authority and United Cities Gas Co.*, Appeal No. 01A01-9606-BC-00286, Court of Appeals of Tennessee, Middle Section, at Nashville, 1997 Tenn. App. LEXIS 148 (March 5, 1997).

their affairs."[8] In addition, the Authority "is not limited by the Rules of Evidence . . . [i]t can exclude evidence under the rules, but is not required to do so, but must still give effect to the rules of privilege."[9] The foregoing leaves little doubt that it is the prerogative of the Authority to accept any information that it deems necessary in making a determination on the matters set before it.

Nevertheless, in the exercise of its regulatory judgment and discretion, the Authority has broad leeway in its assessment of the appropriate weight to be given any evidence in the record, including the extent to which the agency in full or in part may rely or disregard evidence and the way in which it resolves any conflicts therein.[10] Based upon the foregoing, the Hearing Officer is not inclined to enforce strictly the rules of evidence so as to preclude the Authority's consideration of the letter filed in the record by Senator Ketron and Representative McDaniel, even if such opinions might be inadmissible in a court of law. As such, the County's request to strike from the record the letter filed on August 2, 2012, is denied.

IT IS THEREFORE ORDERED THAT:

Knox County, Tennessee's request to strike from the record the August 2, 2012, letter filed by Senator Ketron and Representative McDaniel, two legislative sponsors of the 2008 Competitive Cable and Video Services Act, is denied.

Kelly Cashman-Grams, Hearing Officer

[8] *See Complaint of Concord Telephone Exchange, Inc., et al., against Halo Wireless, Inc., et al., for Failure to Pay Terminating Intrastate Access Charges for Traffic and Other Relief and Authority to Cease Termination of Traffic,* Docket No. 11-00108, Transcript of Proceedings, p. 8 (January 23, 2012).

[9] *Id.*

[10] *See Collins v. Richardson*, 356 F. Supp. 1370, 1372 (E.D. Tenn. 1972) (Opinion evidence, addressed to a statutory agency, even if entitled to some weight, has no such conclusive force that there is an error in law in the agency's refusing to follow it.); *and see Hoover Motor Exp. Co. v. R.R. & Pub. Utilities Comm'n*, 195 Tenn. 593, 607, 261 S.W.2d 233, 239 (1953) (The weight to be given particular evidence is a matter peculiarly within the province of the trier of the facts, unhampered by mechanical rules governing the weight or effect of evidence.)