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December 17, 2014

Via Email and USPS
Hon. Herbert H. Hilliard, Chairman
c/o Ms. Sharla Dillon
Tennessee Regulatory Authority
502 Deaderick Street, 4th Floor
Nashville, TN 37243

Re: TRA Docket No. 14-00139

Dear Chairman Hilliard:

Enclosed please find an original and five (5) copies of the City of Chattanooga's Memorandum in Opposition to TAWC's Motion to Dismiss. I would appreciate you stamping the extra copy of the documents as "filed," and returning it to me in the enclosed, self-addressed and stamped envelope.

With best regards, I am

Sincerely yours,

Frederick L. Hitchcock

FLH:pgh
Enclosure

cc: Mr. Wade Hinton
Mr. Vance Broemel
Mr. Wayne Irvin
Mr. Melvin Malone
Ms. Valeria Gomez

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
OPPOSITION OF THE CITY OF CHATTANOOGA TO PETITION OF TENNESSEE-AMERICAN WATER COMPANY REGARDING 2015 INVESTMENT AND RELATED EXPENSES UNDER ALTERNATIVE REGULATORY MECHANISMS	)	**Docket No. 14-00139**

MEMORANDUM IN OPPOSITION TO TAWC'S MOTION TO DISMISS

The City of Chattanooga, Tennessee, a municipal corporation ("Chattanooga"), by and through counsel, submits this memorandum in opposition to Motion to Dismiss filed by Tennessee American Water Company ("TAWC"). For the reasons set forth in Chattanooga's Complaint in Opposition and as explained more fully in this memorandum, the Authority should deny TAWC's Motion. The Authority should also initiate a contested case and grant the further relief sought by Chattanooga in its Complaint.

I. INTRODUCTION AND BACKGROUND

In its Petition in Docket No. 13-00130, TAWC sought approval of alternative regulatory methods under Tenn. Code Ann. § 65-5-103(d), seeking approval of four (4) tariff riders. The Authority initiated a contested case, in which the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") intervened.

At the express request of TAWC, and based upon written assurances provided by TAWC, Chattanooga agreed not to intervene in Docket No. 13-00130. In its November, 2013 written assurances, TAWC acknowledged that Tenn. Code Ann. § 65-5-103(d) requires that investments

and expenses to be recovered through tariff riders must meet specific statutory criteria and that the investments and expenses sought to be recovered through the tariff riders must be in the public interest. In order to avoid expensive proceedings before the Authority, TAWC promised that it would provide Chattanooga with budgets and reports that would establish that the utility's investments and expenses met these requirements. *See* Chattanooga Complaint and Exhibit B, thereto.

On January 10, 2014, TAWC and the Consumer Advocate jointly filed a Stipulation announcing that the Consumer Advocate would not oppose approval in Docket No. 13-00130 of tariff riders that contained provisions set forth in the Stipulation. The Stipulation noted that ***both*** TAWC and the Consumer Advocate agreed that the General Assembly required (i) that tariff riders seeking recovery of certain costs without convening a general rate proceeding must meet specific statutory criteria; and (ii) that the Authority make a finding that the tariff riders are in the public interest prior to their approval. The Stipulation noted that the Consumer Advocate's approval of the Stipulation did not constitute a finding by the Consumer Advocate that the tariff riders submitted in Docket No. 13-00130 were in the public interest.[1] Although the Stipulation was approved by the Authority in its conference on April 14, 2014,[2] no Order has been filed in Docket No. 13-00130.

On October 29, 2014, TAWC filed a petition, docketed as No. 14-00121, seeking approval of *a revised* tariff rider incorporating rate increases that it contended were consistent with Tenn. Code Ann. § 65-5-103 and with this Authority's action in Docket No. 13-00130.

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[1] Stipulation filed January 10, 2014, in Docket No. 13-00130, at p. 9, attached (without exhibits) as Exhibit 1.

[2] Transcript Excerpt of TRA Conference April 14, 2014, attached as Exhibit 2.

On November 19, 2014, Chattanooga timely filed its Complaint in Opposition, setting forth in specific detail its allegations that the *revised* tariff seeks to recover expenses that do not meet the specific statutory criteria set out Tenn. Code Ann. § 65-5-103 and are not in the public interest. Chattanooga alleges that TAWC has failed to comply with procedures set out in its November 25, 2013 letter to the City that were designed to document whether expenses and investments that TAWC sought to recover through tariff riders met the statutory requirements and were in the public interest. The Chattanooga Complaint asserts that the *revised* tariff rider for which TAWC seeks the Authority's approval is contrary to law and is not in the public interest.

II. LAW AND ANALYSIS

A. Standard of Review

Although the Authority has the discretion to determine whether it is appropriate to convene a contested case,[3] the Authority should exercise that discretion to convene a contested case where a complaint sets forth specific claims that raise legal and factual issues.[4]

In "*Welcoming Reward I*",[5] the Court of Appeals noted that in the exercise of its regulatory power, the Authority must comply with the terms of the statutes that define the scope of that power:

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[3] *See Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn. 1998).

[4] *See Office of the Atty. Gen. v. Tennessee Reg. Auth.*, ("*Welcoming Reward I*"), No. M2003-01363-COA-R12-CV, 2005 WL 3193684, at *11 (Tenn. Ct. App., Nov. 29, 2005); *Office of the Atty. Gen. Consumer Advocate & Protection Div. v. Tennessee Reg. Auth.*, ("*Welcoming Reward II*"), No. M2004-01484-COA-R12-CV, 2007 WL 2316458, at *3 (Tenn. Ct. App., Aug. 13, 2007) (included in Exhibit 3).

[5] *Welcoming Reward I*, 2005 WL 3193684.

> Any regulatory action the Authority takes must be the result of an express grant of authority by statute or must arise by necessary implication from an express grant of authority. Thus, while the Authority's enabling statutes should be construed in the Authority's favor, they should not be construed so broadly that they permit the Authority to exercise its power in a manner contrary to law. The Authority must comply with the statutes and constitutional provisions governing its procedures.[6]

The limits on the Authority's discretion articulated in *Welcoming Reward I* and *Welcoming Reward II*[7] involved the regulation of a telecommunications utility, as to which the Authority has been granted "practically plenary power".[8] Of course, TAWC is not a telecommunications utility. And, as TAWC admitted in the Stipulation in Docket No. 13-00130, the General Assembly has established specific criteria for the expenses and investments that may be recovered in such riders, including the requirement that the Authority find that they are in the public interest.

B. The Chattanooga Complaint Does Not Seek to Overturn the Authority's Decision in Docket No. 13-00130. Instead, the Complaint Asserts That the *Revised* Tariff Is Contrary to Statutory Requirements Acknowledged and Applied in Docket No. 13-00130.

TAWC incorrectly claims that the Chattanooga Complaint seeks to challenge and overturn the Authority's decision in Docket No. 13-00130. To the contrary, the Chattanooga Complaint asserts that TAWC's proposed *revised* tariff rider, which it asks the Authority to approve in Docket No. 14-00121, violates the statutory requirements for alternative ratemaking mechanisms that the Authority applied, ***with TAWC's stipulated agreement***, in Docket No. 13-

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6 *Id.* at *9 (case citations omitted).

7 *Welcoming Reward I*, 2005 WL 3193684; *Welcoming Reward II*, 2007 WL 2316458.

8 *Welcoming Reward I*, 2005 WL 3193684, at *9; *Welcoming Reward II*, 2007 WL 2316458, at *3.

00130. As TAWC agreed in the Stipulation in that Docket:

> 8. The General Assembly revised Tenn. Code Ann. § 65-5-103 in 2013 to allow tariff riders that recover certain costs without convening a general rate case proceeding so long as specific criteria are met, including but not limited to the Authority making a finding that such tariff riders are in the public interest prior to their approval.[9]

Based upon the Stipulation by TAWC and the Consumer Advocate in Docket No. 13-00130, the Authority found that the tariff rider expenses and investments submitted in that Docket were consistent with the specific criteria established by the General Assembly and that the tariff riders recovering those expenses and investments were in the public interest. Chattanooga seeks the application of precisely these same principles and requirements to the proposed *revised* tariff rider submitted in Docket No. 14-00121. ***By its Motion to dismiss, it is TAWC that seeks to avoid the requirements for tariff riders recognized and applied in Docket No. 13-00130.***

C. Convening of a Contested Case Is Necessary to Resolve Chattanooga's Assertions that TAWC's *Revised* Tariff Rider Does Not Comply With Applicable Legal Standards and Is Not In the Public Interest.

TAWC obviously does not contend that the Authority's approval of the tariff riders at issue in Docket No. 13-00130 constituted approval of *future revisions* to those tariff riders. Instead, TAWC recognizes by its Petition and supporting filings in Docket No. 14-00121 that TAWC must show both that the expenses and investments sought to be recovered in its proposed *revised* tariff rider meet the specific criteria established by the General Assembly and that the proposed *revised* tariff rider is in the public interest.

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[9] Stipulation filed January 10, 2014, in Docket No. 13-00130, at p. 3 (attached as Exhibit 1).

The Chattanooga Complaint sets forth "in clear and logical form" Chattanooga's allegations that TAWC's proposed *revised* tariff rider violates Tenn. Code Ann. § 65-5-103(d) by seeking to recover expenses and investments not authorized by the criteria for alternative regulatory methods established by the General Assembly. The Complaint also alleges that the proposed *revised* tariff rider is not in the public interest. The Complaint contains clear and specific statements of facts that support those allegations and is fully compliant with the Authority's Rules.[10]

As TAWC admitted in the Stipulation in Docket No. 13-00130, the Authority must determine whether the proposed *revised* tariff rider complies with the specific criteria established by the General Assembly for such alternative regulatory methods, and the Authority must determine whether the proposed *revised* tariff rider is in the public interest. The Chattanooga Complaint raises important legal and factual issues concerning the Authority's required findings that cannot be resolved without convening of a contested case.

III. CONCLUSION

For the reasons set forth in the Complaint and as further explained herein, Chattanooga respectfully requests that the Authority grant the City's requests that the Authority (i) initiate a contested case to hear the objections of the City of Chattanooga to the tariffs proposed by TAWC in Docket No. 14-00121; (ii) consolidate this case with Docket No. 14-00121; (iii) order the suspension of the tariffs proposed in Docket No. 14-00121 pending a hearing; and (iv) permit appropriate discovery and other proceedings consistent with applicable law and the Rules of the Authority.

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[10] *See* Rule 1220-1-1-.05(1). Of course, TAWC's Motion to dismiss raises no issue with the specificity of the allegations in the Chattanooga Complaint.

Respectfully Submitted,

CITY OF CHATTANOOGA

By: /s/ Wade Hinton by FLH w/ permission

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By: _____

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing pleading was emailed and was served upon the following person(s) via ☐ hand delivery or ☑ email and United States first class mail with proper postage applied thereon to ensure prompt delivery:

Vance Broemel
Wayne Irvin
Assistant Attorney General
Office of the Tennessee Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207

Melvin Malone
Valeria Gomez
Butler Snow LLP
150 3rd Avenue South, Suite 1600
Nashville, TN 37201

This 17th day of December, 2014.

By:_____

EXHIBIT 1
filed electronically in docket office on 01/10/14

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF TENNESSEE AMERICAN WATER COMPANY FOR APPROVAL OF A QUALIFIED INFRASTRUCTURE INVESTMENT PROGRAM, AN ECONOMIC DEVELOPMENT INVESTMENT RIDER, A SAFETY AND ENVIRONMENTAL COMPLIANCE RIDER, AND PASS-THROUGHS FOR PURCHASED POWER, CHEMICALS, PURCHASED WATER, WHEELING WATER COSTS, WASTE DISPOSAL, AND TRA INSPECTION FEE	)	**DOCKET NO. 13-00130**

STIPULATION

Tennessee American Water Company ("Tennessee American" or "Company") and Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate") (collectively the "Parties"), constituting all of the parties to the above-captioned Docket, have conferred and agree as follows:

1. Tennessee American is a wholly-owned subsidiary of American Water Works Company, Inc., which is the largest water holding company in the United States, providing water and wastewater services to sixteen (16) million people in thirty-five (35) states and two (2) Canadian Provinces.

2. Tennessee American provides residential, commercial, industrial and municipal water service, including public and private fire protection service, to Chattanooga and surrounding areas, including approximately 75,840 customers.

3. Tennessee American is a public utility in Tennessee and its water supply business and rates are subject to regulation and supervision by the Tennessee Regulatory Authority pursuant to Chapters 4 and 5 of Title 65 of the Tennessee Code Annotated.

4. On October 4, 2013, Tennessee American filed a Petition seeking the Authority's approval of a Qualified Infrastructure Investment Program Rider ("QIIP"), an Economic Development Investment Rider ("EDI"), a Safety and Environmental Compliance Rider ("SEC"), and Production Cost and Other Pass-Throughs Rider ("PCOP") (collectively the "Tariffs"). This Petition was filed requesting recovery of costs pursuant to Tenn. Code Ann. § 65-5-103(d) (2013), which was modified by 2013 Pub. Acts, ch. 245, § 5 (effective Apr. 19, 2013).

5. On October 17, 2013, the Consumer Advocate filed a Petition to Intervene in this proceeding which was granted by Authority order dated October 23, 2013. No other person has sought or been granted party status in this proceeding.

6. Since the filing of Tennessee American's Petition, the parties to this proceeding have engaged in discovery, informal information exchanges, and extensive communication. In addition to the information provided by Tennessee American's witnesses with their testimony, Tennessee American has responded to data requests from the Authority's Staff and from the Consumer Advocate. Representatives of Tennessee American and the Consumer Advocate have also spent a significant amount of time discussing the various aspects of Tennessee American's Petition and Tariffs.

7. Tennessee American and the Consumer Advocate agree that, if Tennessee American's tariff riders for the QIIP, EDI, SEC, and PCOP contain the stipulated provisions set forth in Attachments A, B, C, and D, respectively, all of which are attached hereto and incorporated herein by reference, and if the Authority Directors approve the QIIP, EDI, SEC, and

PCOP tariff riders in this Docket that incorporate such stipulated provisions, then the Consumer Advocate will not oppose Tennessee American's Petition seeking approval of the Tariffs as amended by this Stipulation.

8. The General Assembly revised Tenn. Code Ann. § 65-5-103 in 2013 to allow tariff riders that recover certain costs without convening a general rate case proceeding so long as specific criteria are met, including but not limited to the Authority making a finding that such tariff riders are in the public interest prior to their approval.

9. The Consumer Advocate's agreement to not oppose Tennessee American's Petition and Tariffs as amended by this Stipulation should not be construed as a finding by the Consumer Advocate that these tariff riders are in the public interest. The Consumer Advocate takes no position on that issue in this proceeding.

10. The Company has confirmed that the Tariffs will not include the recovery of legal fees associated with regulatory proceedings before the Authority seeking the approval of the Tariffs or regulatory proceedings related to periodic filings with the TRA as provided by the Tariffs.

TENNESSEE AMERICAN WATER COMPANY

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Junaid Odubeko (BPR No. 23809)
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CONSUMER ADVOCATE AND PROTECTION DIVISION

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

Gary M. VerDouw
Director of Rates, Central Division
American Water Company
727 Craig Road
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Gary.VerDouw@amwater.com

Melvin J. Malone
Junaid Odubeko
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This the 10th day of January, 2014.

Joe Shirley

EXHIBIT 2

BEFORE THE TENNESSEE REGULATORY AUTHORITY

EXCERPT OF TRANSCRIPT OF AUTHORITY CONFERENCE

Monday, April 14, 2014

APPEARANCES:

For the Consumer Advocate:	Mr. Joe Shirley Mr. Hal Novak
For TAWC:	Mr. Melvin Malone Mr. Gary M. Verdouw
For TRA Staff:	Ms. Sharla Dillon Ms. Jean Stone Mr. Jimmie Hughes

Reported By:
Christina A. Meza, LCR, RPR, CCR

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(The aforementioned Authority Conference came on to be heard on Monday, April 14, 2014, beginning at 1:00 P.M., before Chairman James Allison, Vice Chairman Herbert Hilliard, Director Kenneth C. Hill, Director Robin Bennett, and Director David F. Jones. The following is an excerpt of the proceedings that were had, to-wit:)

MS. DILLON: Next we have Section 5, Directors Hill, Hilliard, and Allison.

Docket No. 13-00130, Tennessee American Water Company; petition of Tennessee American Water Company for approval of a qualified infrastructure investment program, an economic development investment rider, a safety and environmental compliance rider, and pass-throughs for purchased power, chemicals, purchased water, wheeling water costs, waste disposal, and TRA inspection fee; hear and consider petition.

CHAIRMAN ALLISON: We'll now reconvene the public hearing in Docket No. 13-00130. This matter was duly noticed by the hearing officer on April 2nd, 2014, and is being conducted in accordance with the Uniform Administrative Procedures Act. I will ask the parties to come forward and, once established at the table, to identify themselves starting left to right.

MR. MALONE: Good morning. Melvin Malone with Butler Snow on behalf of Tennessee American Water Company.

MR. VERDOUW: Gary Verdouw, central division director of rates for Tennessee American Water Company.

MR. SHIRLEY: Joe Shirley with the Consumer Advocate and Protection Division.

MR. NOVAK: Hal Novak with the Consumer Advocate and Protection Division.

CHAIRMAN ALLISON: Since this is a public hearing, I will ask is there anyone here who wishes to make a comment regarding this matter?

(No response.)

CHAIRMAN ALLISON: That includes folks with us on the telephone. Is there anybody on the phone who wants to make a comment on this matter?

UNIDENTIFIED SPEAKER: First of all, we can't hear anything except an electrical buzz.

CHAIRMAN ALLISON: Please identify yourself.

UNIDENTIFIED SPEAKER: I hear nothing, but an electrical buzz.

MS. VIOLETTE WALTER: I echo that. This is Violette Walter. We can hear the lady who

introduces the articles, and then after that it's all an electrical buzz. If someone put their phone on mute, maybe we should have everyone take it off.

CHAIRMAN ALLISON: We will do our best to speak directly into the microphone as loudly as we can. Can you hear me any better now?

UNIDENTIFIED SPEAKER: That's much better.

UNIDENTIFIED SPEAKER: Yes. Thank you.

CHAIRMAN ALLISON: We'll do our best, and I'll ask the Advocate and the witnesses to pull your mic right up against your mouth and do the best you can. We are apparently splitting the signal so many times, it's getting pretty weak going out.

Does anybody want to speak to this matter, other than our electronic problems?

(No response.)

CHAIRMAN ALLISON: Please let the record reflect that no one has sought recognition. Do we have any preliminary matters that we need to address in this matter?

MR. MALONE: Yes, Mr. Chairman, in the manner in which we would like to submit this matter, but I don't want to get ahead of the Authority. The

parties -- in light of the stipulation that we submitted, the parties would like to forgo opening and closing statements, as well as witness summaries, and to have the request that the prefiled testimony, exhibits, discovery, the stipulation, and the items administratively noticed be admitted into the record.

Each of the witnesses that submitted testimony, including Mr. Deron Allen on the phone, are here, but we would propose that Gary Verdouw summarize the stipulation in lieu of any of the other witnesses testifying and answer any questions that the agency might have.

CHAIRMAN ALLISON: Hold on just a minute here.

(Pause.)

CHAIRMAN ALLISON: So if I understood you correctly, the parties -- everyone involved here is willing to waive opening and closing statements and the presentation of witnesses? I'm looking to our general counsel to tell me that that's okay and that we can accept the prefiled evidence based on that?

MS. STONE: Yes, sir.

CHAIRMAN ALLISON: We are all set then. No objections?

MR. SHIRLEY: None, Your Honor.

CHAIRMAN ALLISON: Given that, how do you wish to proceed, Mr. Malone?

MR. MALONE: Mr. Chairman, we wish for the witness Gary Verdouw be sworn and provide a summary of the petition and the stipulation.

GARY M. VERDOUW,

called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MALONE:

Q. Mr. Verdouw, did you have prefiled testimony to be filed in this matter?

A. Yes, I did. I had -- I've submitted direct testimony, rebuttal testimony, and supplemental testimony in this proceeding.

Q. Do you have any corrections to that testimony?

A. No, I do not.

Q. If I ask you the same questions today that are in your prefiled testimony, would your answers be the same?

A. Yes, they would.

MR. MALONE: Your Honor, I submit the witness for his summary and then any questions.

CHAIRMAN ALLISON: Proceed.

THE WITNESS: Thank you very much. Good afternoon, everyone. Tennessee American filed this case docketed as Docket No. 13-00130 on October 4th, 2013. That included all of our support, including testimony, work papers, tariffs, and exhibits which was the basis for our case.

Tennessee American worked with the TRA staff and the Tennessee Consumer Advocate and Protection Division staff both formally and informally to respond to all data requests and questions. Tennessee American worked hard in its filing to provide as much information as possible and to follow the intent of the legislation of House Bill 191 in filing this case. As part of that, Tennessee American and the CAPD representatives met to discuss settlement of this case.

As the CAPD filed its testimony on December 20th, settlement talks continued before and after. I filed rebuttal testimony in this case on December 30, 2013 that resolved some of the few open issues that we had to settling the case. We continued to meet with the Consumer Advocate right up to the filing of the stipulation which was made on Friday, January 10th, 2014.

As a result of our hearing with the

TRA on January 13th, 2014, I submitted supplemental testimony to the TRA for this case on January 17th, 2014. The supplemental testimony that was submitted laid out the differences from our original filing on October 4th, 2013 to the stipulation filed on January 10th, 2014. And there were eight differences from our original filing to the stipulation that was filed on January 10th.

First, an interest calculation was determined on any over or under differences on any reconciliations that had to be done as part of this filing.

Second, inclusion of accumulated deferred income tax as relative to investments was added to the calculation.

Third, an inclusion of accumulated depreciation relative to the investments was added to the calculation.

Fourth, there was a correction of a rounding error in the pretax rate of return.

Fifth, the inclusion of a forfeited discounted rate in the calculation of revenue was added.

Sixth, recovery of incremental TRA fee via the reconciliation process was established and made

clear.

Seventh, establishes a provision to recognize any over or under recovery of the authorized rate of return.

And, finally, the eighth item was just a clarification of the reconciliation process in order to make the reconciliation process as smooth as possible for all parties concerned.

Since the filing of my supplemental testimony on January 17th, the company has made two additional filings in this case. On March 25th, 2014, we filed revised tariff sheets with the only thing changed on those sheets was the calculation for the production costs and other pass-throughs. And on April 1st, summary schedules showing all riders in the PCOP calculation were filed.

I speak for Tennessee American when I say that I appreciate the Consumer Advocate's willingness to meet with us early and often to settle this case. I believe the settlement is in -- that is one that follows the intent of House Bill 191 and will benefit the consumers of Tennessee American in smaller increases and less frequent rate filings.

With that, I'm open to any questions that you may have of the case.

CHAIRMAN ALLISON: Is there any cross-examination by the Consumer Advocate?

MR. SHIRLEY: No, Your Honor, no cross-exam.

CHAIRMAN ALLISON: Fellow directors, questions?

VICE CHAIRMAN HILLIARD: No questions Mr. Chairman, but in looking at this, I think this is a win-win for Tennessee American Water and for the consumers.

DIRECTOR HILL: Mr. Chairman, in -- if I may, Mr. Verdouw, in the stipulation is there any of the usual boilerplate language that we get from the CAD and from the companies when they do a stipulation that said that this does not set any precedent, because we are setting precedent today? Is there any such language in this settlement?

MR. MALONE: Mr. Director, there is -- the CAD may wish to speak to this, but there is no such language in this stipulation.

DIRECTOR HILL: How unusual for a stipulation from the CAD not to have that. Thank you very much. Because we are setting precedent today, gentlemen. Thank you.

CHAIRMAN ALLISON: Any more questions

for the witness?

(No response.)

CHAIRMAN ALLISON: Mr. Verdouw, you are still subject to re-call, so I ask you not to discuss your testimony with anyone until you are excused from the proceeding.

Do we have any other witnesses today?

MR. MALONE: Mr. Chairman, all the witnesses that filed testimony are here and available, but we think that given the stipulation and Mr. Verdouw's summary, that, unless the agency has questions for those particular witnesses, having their testimony moved into the record is sufficient.

MR. SHIRLEY: And we concur with that, Your Honor. And I would also like to note that Mr. Novak, the Consumer Advocate's witness, is also here and available should there be any questions for him.

CHAIRMAN ALLISON: Is there any objection to moving all the prefiled testimony from both parties into the record?

MR. MALONE: No objection.

MR. SHIRLEY: No.

CHAIRMAN ALLISON: That's done then.

You've waived closing arguments. I

believe we're ready for deliberations, unless there's something else here that I've missed. I will pause for a minute to give you an opportunity to speak up.

(No response.)

CHAIRMAN ALLISON: If not, fellow directors, are you ready to deliberate?

VICE CHAIRMAN HILLIARD: Yes, Mr. Chairman.

DIRECTOR HILL: Yes, Mr. Chairman, and I would like for the record to show that whatever the TRA decides, it is not based upon a stipulation per se between two parties, but it is the decision of the directors.

CHAIRMAN ALLISON: I want to start before I get into the formal motion or whatnot, to compliment the parties on the way this has been conducted. I guess we had a little misstart, I guess is the right word, back in January, and I appreciate the responsiveness to that. And I genuinely appreciate the cooperation of the Consumer Advocate and the company. And I also want to compliment the TRA staff who was heavily involved in making sure this thing did fit within the parameters of the newly enacted provision.

Those of you-all on the phone, please

mute your phone unless you're speaking. We're hearing it sounds like children and people coughing and people bumping and everything else.

What's the instructions for muting?

MR. JIMMIE HUGHES: A lot of it is upstairs. I don't know. Each phone is different on muting.

CHAIRMAN ALLISON: So you'll just have to figure out how to do it, but please mute your phones, if you can.

DIRECTOR HILL: Mr. Chairman, if they cannot do that, could they be taken off the call and they could call back again?

CHAIRMAN ALLISON: The difficulty in that is identifying who is making the racket.

DIRECTOR HILL: We might have to clear the whole thing.

CHAIRMAN ALLISON: Might have to.

Please work with us as much as you can.

Given my comments -- and, again, I thank all the parties and the staff for their efforts in this. I find the amended petition and specifically the tariffs filed on March 25, 2014 meet the requirements of Tennessee Code Annotated Section

65-5-103. I have reviewed the filings and evidence presented in this docket, along with the review of the calculations for the qualified infrastructure investment program, economical development investment rider, safety and environmental compliance, and the production cost and other pass-through rider, and find them reasonable.

I find that the three proposed investment riders not only allow the timely recovery of costs of necessary infrastructure, but also will aid in avoiding or delaying expensive rate cases. Further, the recovery of expenses -- of expense changes via the pass-through mechanism from year to year should also aid in delaying or avoiding rate cases.

Accordingly, I find the amended petition to be in the public interest. According to evidence presented, the three investment riders will result in a 1.08 percent increase to consumers' bills while implementation of the PCOP rider will reduce customers bills by 1.15 percent during the first year. In total, consumers will experience an initial decrease in their monthly bills of 0.07 percent.

Accordingly, I move the amended tariff submitted on March 25, 2014, be approved to become effective April 15, 2014.

VICE CHAIRMAN HILLIARD: I second and vote aye.

DIRECTOR HILL: I heartily vote aye.

CHAIRMAN ALLISON: Thank you very much.

Yes, Mr. Malone?

MR. MALONE: Mr. Chairman, if I might, if the panel will indulge me, on behalf of Tennessee American, we too would like to commend the TRA staff in the way that they worked with the parties in this case. A lot of supporting documentation, a lot of discovery a lot of tying loose ends up and the Authority's staff could not have been more accessible and more helpful in this process.

And also we would like to commend the Consumer Advocate Division in the way they worked with the company. These cases might not always end this way, but they have a better opportunity of ending this way when you work with folks the way that they did at the Consumer Advocate's office. So on behalf of the company, we would like to say thank you to the TRA and thank you to the Consumer Advocate's office as well.

CHAIRMAN ALLISON: Thank you.

You are excused.

DIRECTOR HILL: Mr. Chairman, if I may

have a point of privilege. I will say to Tennessee American Water Company, the CAD, and the staff, you did a yeoman's job -- a mighty job of getting it done. Also today the National Association of Water Companies is meeting in -- with the commissioner summit at the Hermitage Hotel, and they came to Nashville based upon the legislation that we have just acted upon. They wanted to see how it was going to be put together and how it would be used and they see it as pilot legislation for the rest of the country.

It is not only for water companies and wastewater companies, but it's also for gas companies and, where applicable, electricity companies. And so this is a start in a different direction and we understood that. We're all in new territory, at least we are in this state, but we're being watched by everybody else right now.

So that's always a good place to be in, Mr. Chairman, to have our state in that position of leadership. So thank you-all for working with us.

CHAIRMAN ALLISON: Thank you, Dr. Hill.

(Conclusion of requested transcript.)

REPORTER'S CERTIFICATE

I, Christina A. Meza, Licensed Court Reporter, Registered Professional Reporter, Certified Court Reporter, and Notary Public for the State of Tennessee, hereby certify that I reported the foregoing proceedings at the time and place set forth in the caption thereof; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I FURTHER CERTIFY that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office this 15th day of April, 2014.

_____

CHRISTINA A. MEZA, LCR, RPR, CCR
AND NOTARY PUBLIC FOR THE STATE
OF TENNESSEE

LCR No. 164 Expires 6/30/2014

Notary Commission Expires 6/22/2015

2005 WL 3193684
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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

OFFICE OF THE ATTORNEY GENERAL, Consumer Advocate and Protection Division
v.
TENNESSEE REGULATORY AUTHORITY.

No. M2003-01363-COA-R12-CV. | July 9, 2004 Session. | Nov. 29, 2005.

Appeal from the Tennessee Regulatory Authority, No. 03-00060.

Attorneys and Law Firms

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J. Richard Collier, Jean A. Stone, and Randal Gilliam, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

R. Dale Grimes, Brian Roark, Guy M. Hicks, and Joelle Phillips, Nashville, Tennessee, for the appellee, BellSouth Telecommunications, Inc.

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

OPINION

WILLIAM C. KOCH, JR., P.J., M.S.

***1** This appeal involves the Tennessee Regulatory Authority's consideration of a tariff filed by BellSouth Telecommunications, Inc. A group of competing telecommunications providers and the Consumer Advocate and Protection Division of the Office of the Attorney General filed petitions to suspend the proposed tariff and to open a contested case proceeding because the tariff was discriminatory and anti-competitive. The Authority considered the proposed tariff and the requests for a contested case proceeding at three conferences. After BellSouth amended the tariff to meet several of the objections of its competitors and the Consumer Advocate and Protection Division, the Authority, by divided vote, declined to suspend the tariff or to convene a contested case proceeding and permitted the revised tariff to take effect. On this appeal, the Consumer Advocate Division and the competing telecommunications providers assert that the Authority erred by refusing to open a contested case proceeding regarding their objections to the revised tariff. They also insist that the Authority's approval of the tariff is not supported by substantial and material evidence. We have determined that the Authority abused its discretion by refusing to open a contested case proceeding to resolve the contested issues regarding whether the revised tariff was discriminatory and anti-competitive.

I.

On January 3, 2003, BellSouth Telecommunications, Inc. (BellSouth) filed a tariff with the Tennessee Regulatory Authority (Authority) to introduce its "Welcoming Reward Program." The purpose of this program was to encourage certain businesses[1] who were not existing BellSouth customers to obtain their basic local business service from BellSouth. The tariff, as originally filed, offered qualifying businesses a $100 per line/per location bonus in return for the business's agreement to enter into a twelve-month service contract. The tariff also authorized BellSouth to impose a charge on customers who terminated their contract before its expiration. BellSouth envisioned that this program would last from February 3, 2003 through May 2, 2003.

[1] To qualify for this program, a business must be located in the Chattanooga, Knoxville, Memphis, or Nashville metropolitan calling regions and must not have an aggregate annual billing exceeding $36,000 at the time of enrollment.

Approximately three weeks later, a coalition of four competing telecommunications providers[2] filed a petition

requesting the Authority to suspend the "Welcoming Reward Program" tariff and to open a contested case proceeding. BellSouth's competitors objected to the "Welcoming Reward Program" because (1) it discriminated between BellSouth's new and existing business customers, (2) it required customers to enter into long-term service contracts, and (3) it did not clearly define the conditions on their ability to resell the program. On January 31, 2003, BellSouth filed a lengthy written response to the competitors' objections. On the same day, the Consumer Advocate and Protection Division of the Office of the Attorney General (CAPD) petitioned to intervene. In addition to the issues raised by BellSouth's competitors, the CAPD asserted that the tariff "could" (1) create a "price squeeze"[3] and (2) inappropriately inflate consumer acquisition costs.

[2] The coalition included Access Integrated Networks, Inc., Cinergy Communications Company, Xspedius Communications, and AT & T Communications of the South Central States, Inc. All these companies are members of Competitive Carriers of the South, Inc. (CompSouth), a coalition of competing local exchange companies.

[3] A traditional "price squeeze" involves a defendant who, as a monopolist, supplies the plaintiff at one level (e.g., wholesale), competes with the plaintiff at another level (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to their common customers. *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 418 (1st Cir.2000). In more common parlance, a "price squeeze" refers to a circumstance in which the combination of high wholesale prices and low retail prices makes it difficult for a wholesale customer to compete with its supplier at the retail level.

***2** The Authority first addressed the competitors' petitions to suspend BellSouth's "Welcoming Reward Program" tariff at its February 3, 2003 conference. Procedural ambiguity reigned. The Authority permitted all parties to make oral presentations explaining their respective positions. BellSouth insisted that the issues being raised by the CAPD and its competitors were "wrong as a matter of law" and that these "bare allegations shouldn't be enough to derail and delay this tariff." For their part, the CAPD and BellSouth's competitors insisted that the "Welcoming Reward Program" was discriminatory on its face, that it violated the Authority's resale requirements, and that it was not a promotional tariff because it required customers to enter into a long-term service agreement.

Following a lengthy colloquy between the directors and the parties, Director Ron Jones asked whether the Authority had sufficient facts to address the issues being raised or whether there was "some question of fact that would warrant going to a [contested case] proceeding at this point as opposed to taking all the comments under advisement...." The answers of both the CAPD and BellSouth's competitors were equivocal.[4] Thereafter, BellSouth, "[i]n the spirit of compromise and conciliation," recommended that the Authority allow its "Welcoming Reward Program" to go into effect while it took the issues raised by the CAPD and the competitors under advisement. The Authority decided to move this issue to the end of its agenda after Director Jones and Chairman Sara Kyle split over whether to accept BellSouth's offer.

[4] The lawyer representing the CAPD had already observed: "I think that there could be, especially with regard to some of the issues, for example, with respect to whether there's a price squeeze or not.... There could be other areas, but that's one that leaps to my mind." The lawyer representing BellSouth's competitors admitted that the Directors could go back to their offices and make the calculations regarding the price squeeze claim and that the issue regarding differentiating between new and existing customers was a "question of law and policy." However, he added "I would think you would want a little more research on the legal and policy implications of what it would mean to start treating new customers different than existing customers and how that might affect other dockets."

When the Authority returned to the "Welcoming Reward Program," its staff and the parties stated that they had been discussing a compromise of sorts. The compromise involved the immediate approval of a temporarily modified version of the tariff[5] that would remain in effect while the Authority addressed the concerns about the original tariff. There was, however, significant ambiguity regarding the details of the revised tariff and the procedure that the Authority would use to address the issues regarding the original tariff.[6] The lawyers representing the CAPD and BellSouth's competitors also informed the Authority that they lacked the authority to accept the compromise at that time.

[5] To avoid the suspension of its original tariff, BellSouth had apparently offered to reduce the length of the service contract its customers would be required to sign from twelve to three months. Its competitors were skeptical about "the idea of giving away essentially three months [of] free service."

[6] The Authority's staff stated that the proposal envisioned that a contested case proceeding would be opened with regard to BellSouth's original "Welcoming Reward Program" tariff in which the Directors would be given an opportunity to address the issues raised by the CAPD and BellSouth's competitors.

The Authority and the parties then turned their attention to the procedural posture of the current proceeding. After a lengthy discussion among the directors, their staff, and the lawyers representing BellSouth's competitors and the CAPD, Chairman Kyle stated that the Authority was still trying to determine whether to open a contested case proceeding with regard to the complaints regarding BellSouth's original "Welcoming Reward Program." She also stated that she believed that the Authority "need[ed] time to analyze and decide if a contested case is warranted." Accordingly, she moved that the proposed compromise plan be permitted to go into effect and that "this matter be placed back on the docket for February 18th in order to decide whether a contested case is warranted." Director Deborah Taylor Tate concurred with Chairman Kyle; however, Director Jones did not. An order embodying the Authority's decision at its February 3, 2003 conference was entered on February 14, 2003.

***3** On February 4, 2003, the day following the hearing, BellSouth filed a revised "Welcoming Reward Program" tariff reflecting its understanding of the temporary modifications that the Authority had agreed to on February 3, 2003. Unfortunately, BellSouth's understanding of the agreed-upon modifications did not jibe with the Authority's.[7] On February 11, 2003, both the CAPD and BellSouth's competitors filed briefs discussing their objections to BellSouth's original "Welcoming Reward Program" and again requesting the Authority to open a contested case proceeding to consider the "serious legal and regulatory issues" regarding BellSouth's original and revised tariff. In its February 14, 2003 response to these briefs, BellSouth asserted that the CAPD and its competitors had "demonstrated no basis to convene a contested case" and that the Authority should "exercise its discretion and decline to convene a contested case in this matter."

[7] BellSouth's modified tariff filed on February 4, 2003 required subscribers to sign a twelve-month contract but permitted them to cancel the contract within ninety days of its execution with no termination liability. However, the Authority's February 14, 2003 order reflected a far different understanding of the proposed modification discussed at the February 3, 2003 conference. It recited that the majority of the directors voted "[t]o accept a revision to the *Tariff* such that subscribing customers could terminate their agreement with BellSouth under the *Tariff* after ninety (90) days without termination liability...."

The Authority revisited BellSouth's "Welcoming Reward Program" at its February 18, 2003 conference. Neither the directors nor the parties spent much time discussing the need to convene a contested case hearing. Instead, they first addressed the discrepancy between BellSouth's revised tariff filed on February 4, 2003 and the Authority's February 14, 2003 order. Then the parties restated their positions regarding the original "Welcoming Reward Program" at some length. The discussions focused chiefly on the "resale" aspects of the original tariff and the requirement that customers sign a long-term contract. During this discussion, it was evident that both Chairman Kyle and Director Tate were urging BellSouth to make additional concessions to satisfy the objections of the CAPD and its competitors.[8]

[8] At one point, Director Tate pointedly told BellSouth, "if you aren't willing to modify the tariff, you know, then you maybe put me in a position for a motion for reconsideration and to vote a different direction, and that I think that we have precedent ... to stop the effective date of a tariff and/or to suspend the tariff and move for a contested case. You know, I don't know what other options there may be."

Eventually, BellSouth offered to file yet another revised tariff to address the issues regarding whether the "Welcoming Reward Program" was a short-term or long-term promotion and whether the promotional discount offered in the tariff would be available for resale. Director Tate insisted that the revisions be filed immediately. On February 20, 2003, Chairman Kyle directed BellSouth to submit its revised tariff by February 21, 2003 and directed CAPD and BellSouth's competitors to file their responses by February 25, 2003. Director Jones objected to permitting BellSouth's modified "Welcoming Reward Program" to go into effect without first deciding whether to open a contested case proceeding.

On February 21, 2003, BellSouth filed a revised "Welcoming Reward Program" tariff containing significant alterations intended to meet the objections raised by the CAPD and its competitors. BellSouth extended the duration of the program to make it a long-term promotion. It required customers to maintain

the contract through the fourth subsequent billing period and provided that they would receive the $100 per line credit during the fourth or fifth subsequent billing period. Finally, the revised tariff provided that both the underlying service and the bill credit would be made available to resellers at the Authority's required wholesale discount.

***4** The response of the CAPD and BellSouth's competitors was tepid. The CAPD continued to argue that most of the issues it had raised in the earlier proceedings had not been resolved and requested the Commission to convene a contested case proceeding to evaluate these issues. BellSouth's competitors asserted that the revised tariff did not address BellSouth's discrimination between new and existing customers and argued that "BellSouth is using its market and financial power in a concerted effort, not to make money, but to put its competitors out of business." The competitors also requested a contested case hearing.[9] In its February 28, 2003 response to these comments, BellSouth reiterated its opposition to convening a contested case hearing and insisted that the resale provisions in its revised tariff were precisely what its competitors had requested during the February 18, 2003 conference.

[9] The attorney representing the competitors noted that "[s]urely, the fifty-plus pages of filings that have already been made in this case and the hours of oral argument at the last two TRA conferences are sufficient to demonstrate, if nothing else, that these are serious matters which the agency is obliged to consider."

BellSouth's revised "Welcoming Reward Program" was back before the Authority on March 3, 2003. While BellSouth's competitors characterized the revised tariff as a "substantial improvement" over the original tariff, both the competitors and the CAPD insisted that the revised tariff did not address the issue of discriminating between new and existing customers[10] or the unreasonable limitations of the resale of the promotion and that it did not resolve the potential of a price squeeze. The CAPD also questioned the continuing requirement of long-term service contracts with termination penalties. Following a lengthy discussion, the dispute narrowed to (1) the CAPD's request that BellSouth revise the tariff to make it clear that resellers could sell the program to all new business customers, not just to new customers who had been BellSouth customers, and (2) the competitors' request that they be permitted to resell the program not only to their new customers but also to their existing customers. While BellSouth agreed to the revision suggested by the CAPD, it declined to agree to modify the tariff to permit resellers to offer the program to existing customers.

[10] While the original concern had been BellSouth's discrimination between its new and existing customers, its competitors now insisted that they should be permitted to resell the promotion to their own customers as well as to new customers.

Noting that the parties "had ample opportunity to present arguments for and against convening a contested case," Director Tate moved to deny BellSouth's competitors' petition to suspend the "Welcoming Reward Program" tariff and to open a contested case proceeding. She also moved to waive the application of Tenn. Comp. R. & Regs. 1220-4-1-.04 (2003)[11] and allow the revised tariff to go into effect immediately. Chairman Kyle concurred with Director Tate. Director Jones disagreed. In a written dissent filed on April 25, 2003, Director Jones observed that "the majority injudiciously prevented the attachment of ... [the rights and protections associated with contested cases] while simultaneously deciding the merits of the petitioners' claims...."

[11] Tenn. Comp. R. & Regs. 1220-4-1-.04 requires that tariffs containing changes in rates must be filed with the Authority thirty days before their effective date unless the Authority waives any portion of the time limit for good cause shown.

II.

The version of the "Welcoming Reward Program" ultimately approved by the Authority ended by its own terms on May 30, 2003. Because the tariff is no longer in effect, there is no relief this court can provide either to the CAPD or to BellSouth's competitors with regard to this particular program.[12] The fact that we can provide no judicial relief to the CAPD or BellSouth's competitors with regard to the "Welcoming Reward Program" raises a substantial question of mootness which must be addressed at the outset.

[12] In fact, the "Welcoming Reward Program" tariff had expired approximately two months before the record on appeal was filed with this court and almost three months before the first appellate brief was filed.

***5** The requirements for litigation to continue are essentially the same as the requirements for litigation to begin. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n,* No. M1998-00985-COA-R3-CV, 2001 WL 72342, at *5 (Tenn.Ct.App. Jan. 30, 2001) (No Tenn. R.App. P. 11 application filed). A case must remain justiciable throughout the entire course of the litigation, including any appeal. *State v. Ely,* 48 S.W.3d 710, 716 n. 3 (Tenn.2001); *Cashion v. Robertson,* 955 S.W.2d 60, 62-63 (Tenn.Ct.App.1997). A case is not justiciable if it does not involve a genuine, existing controversy requiring the adjudication of presently existing rights. *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186, 193 (Tenn.2000); *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d 615, 616 (Tenn.Ct.App.1998).

A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. *McCanless v. Klein,* 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *County of Shelby v. McWherter,* 936 S.W.2d 923, 931 (Tenn.Ct.App.1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County,* 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d at 616. Determining whether a case is moot is a question of law. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n,* 2001 WL 72342, at *5; *Orlando Residence, Ltd. v. Nashville Lodging Co.,* No. M1999-00943-COA-R3-CV, 1999 WL 1040544, at *3 (Tenn.Ct.App. Nov. 17, 1999) (No Tenn. R.App. P. 11 application filed).

When a case is determined to be moot and when it does not fit into one of the exceptions to the mootness doctrine, an appellate court should ordinarily vacate the judgment below and remand the case to the trial court with directions that it be dismissed. *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d at 617; *McIntyre v.. Traughber,* 884 S.W.2d 134, 138 (Tenn.Ct.App.1994). However, if the case falls into one of the recognized exceptions to the mootness doctrine, the appellate court has the discretion to reach the merits of the appeal in spite of the fact that the case has become moot. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* No. M2002-02555-COA-R3-CV, 2005 WL 1111192, at *3 (Tenn.Ct.App. May 10, 2005) *perm. app. denied* (Tenn. Oct. 17, 2005).

The courts have recognized several exceptions to the mootness doctrine. The three most common exceptions include: issues of great public importance,[13] issues affecting the administration of justice,[14] and issues capable of repetition yet evading review.[15] The courts invoke the "capable of repetition yet evading review" exception only where (1) there is a reasonable expectation that the official act that provoked the litigation will occur again, (2) there is a risk that effective judicial remedies cannot be provided in the event that the official act reoccurs, and (3) the same complaining party will be prejudiced by the official act when it reoccurs. A mere theoretical possibility that an act might reoccur is not sufficient to invoke the exception. Rather, there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* 2005 WL 1111192, at *4 (citing *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1184 (1982)).

[13] *E.g., State ex rel. McCormick v. Burson,* 894 S.W.2d 739, 742 (Tenn.Ct.App.1994); *Dockery v. Dockery,* 559 S.W.2d 952, 955 (Tenn.Ct.App.1977).

[14] *New Rivieria Arts Theatre v. State,* 219 Tenn. 652, 658, 412 S.W.2d 890, 893 (1967); *McIntyre v. Traughber,* 884 S.W.2d at 137.

[15] *Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 903 (Tenn.1987); *State ex rel. Dean v. Nelson,* 169 S.W.3d 648, 652 n. 4 (Tenn.Ct.App.2004); *Mayhew v. Wilder,* 46 S.W.3d 760, 778 (Tenn.Ct.App.2001).

***6** We have determined that this case fits within the exception to the mootness doctrine for issues that are capable of repetition but which will effectively evade judicial review. First, the comments of two of the directors in this case reflect their, and we presume the Authority's, settled intention to follow this procedure in the future with regard to tariffs filed by telecommunications companies. Second, should the Authority follow this sort of procedure with regard to future objections to relatively short-term tariffs, it is essentially inevitable that this court will be unable to review the Authority's decision until after the tariff has gone into effect and has probably expired. Third, in these circumstances, the interests of the CAPD and the competitors of the telecommunications company filing the tariff could be prejudiced by the procedure the Authority uses to consider their petition to stay the tariff and to conduct a contested case hearing. Accordingly, we have determined that the issues raised by the CAPD and BellSouth's competitors qualify as a matter capable of repetition yet evading review.

III.

The central issue in this case involves the Authority's decision to allow BellSouth's revised "Welcoming Reward Program" tariff to go into effect without first opening a contested case proceeding to address the complaints that the tariff was discriminatory and anti-competitive. The CAPD and BellSouth's competitors argue that the Authority abused its discretion by denying their petitions to suspend the tariff and to open a contested case proceeding. BellSouth and the Authority respond that a contested case proceeding was unnecessary and would have only delayed eligible business customers from being able to benefit from the program's lower rates. We have determined that the petitions filed by the CAPD and BellSouth's competitors raised factual and policy issues that should not have been resolved without a contested case proceeding.

A.

The mid-1990s witnessed a fundamental change at both the federal and state level with regard to the regulation of the telecommunications industry. The impetus for these changes was a desire to promote increased competition, to reduce regulation, and to encourage the rapid development of new telecommunications technologies. Tenn.Code Ann. § 65-4-123 (2004); *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 671 n. 21 (Tenn.Ct.App.1997). Accordingly, in addition to the traditional rate-making procedures, Tennessee's new Tennessee Regulatory Authority was empowered to utilize "alternative forms of regulation for telecommunications services and telecommunications services providers." Tenn.Code Ann. § 65-4-123. The most significant regulatory changes involved the procedures for setting or changing rates for existing or new telecommunications services.

Rate-making is essentially a legislative function that has been entrusted to the Authority. *Southern Bell Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm'n*, 202 Tenn. 465, 486, 304 S.W.2d 640, 649 (1957); *Consumer Advocate Div. v. Bissell*, No. 01A01-9601-BC-00049, 1996 WL 482970, at *4 (Tenn.Ct.App. Aug. 28, 1996) (No Tenn. R.App. P. 11 application filed); *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn.Ct.App.1992). Beginning in 1995, the process for setting and changing rates for new and existing telecommunications services was modified to provide greater flexibility, less oversight, and more self-determination to the competing telecommunications services providers. The new process envisions that telecommunications services providers will be able to change or add services or change rates without first obtaining the Authority's approval.

***7** The new process permits telecommunications services providers to file tariffs with the Authority defining the new or changed service or charge.[16] These tariffs must be filed well in advance of their proposed effective date to give notice of the provider's intentions to the Authority, the public, and other telecommunications services providers.[17] Unless the Authority suspends the tariff, it becomes effective automatically, and once it becomes effective, the tariff has the force of law and is binding on the provider and its customers. *GBM Commc'ns, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn.Ct.App.1986).

[16] Tenn.Code Ann. § 65-5-102(2004) empowers the Authority to require all public utilities to file these tariffs.

[17] For example, a tariff that changes an existing tariff must be filed thirty (30) days before its effective date unless the Authority waives all or part of the time. Tenn. Comp. R. & Regs. 1220-4-1-.04.

Merely filing a proposed tariff does not trigger a contested case proceeding. However, any interested person may object to the proposed tariff by filing a timely written complaint stating with some specificity the nature of the person's interest, the grounds for objecting to the proposed tariff, and the relief sought. Tenn. Comp. R. & Regs. 1220-1-2-.02(4) (2000); *see also* Tenn. Comp. R. & Regs. 1220-4-8-.09(a) (2003). The provider that filed the proposed tariff has a right to respond to the complaint. Tenn. Comp. R. & Regs. 1220-1-2-.02(4). Thereafter, the Authority has the discretionary authority to decide whether the complaint raises legal or factual issues that require a contested case proceeding or whether the tariff should be permitted to go into effect. Tenn.Code Ann. § 65-5-103 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4); *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn.1998). The Authority may also suspend the proposed tariff pending its decision regarding the need for a contested case proceeding. Tenn.Code Ann. § 65-5-101(c)(3) (Supp.2005); Tenn. Comp. R. & Regs. 1220-4-1-.06(5) (2003).

No statute or regulation prescribes how the Authority should decide whether to open a contested case proceeding with regard to a proposed tariff. The Authority may "investigate" the complaint to determine whether it has merit. Tenn.Code Ann. § 65-4-117(a)(1) (2004); Tenn. Comp. R. & Regs. 1220-4-8-.09(2)(b) (2003). Thereafter, the Authority may either enter an order dismissing the complaint or petition, Tenn. Comp. R. & Regs. 1220-1-2-.02(5), or it may open a contested case proceeding regarding the proposed tariff. If the Authority decides to open a contested case proceeding, it may also permit the person or persons who filed the complaint or petition challenging the tariff or other interested persons to intervene. Tenn.Code Ann. § 4-5-310 (2005); Tenn.Code Ann. § 65-2-107 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4).

The process used by the Authority to decide whether to open a contested case proceeding to review a proposed tariff is not itself a contested case proceeding. Accordingly, at least at this particular point in the process, the Authority is not required to follow the procedures in either Tenn.Code Ann. §§ 65-2-107 to -119 or Tenn.Code Ann. §§ 4-5-301 to -321 (2005). However, some questions exist regarding the application of these statutes to the judicial review of the Authority's decisions.

***8** The first question involves the court where judicial relief should be sought. Petitions for review are ordinarily filed in the Chancery Court for Davidson County "unless another court is specified by statute." Tenn.Code Ann. § 4-5-322(b)(1)(A). The Uniform Administrative Procedures Act itself provides for judicial review by different courts with regard to the final decisions of five agencies. For four of these agencies, the statute explicitly states that the decisions must arise from contested case proceedings .[18] However, the statute does not explicitly limit judicial review of the Authority's decisions to decisions arising from contested case proceedings. Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) provides that "[a] person who is aggrieved by *any final decision* of the Tennessee regulatory authority ... shall file any petition for review with the middle division of the court of appeals." (emphasis added).

[18] These include final decisions by the Department of Human Services, the Department of Children's Services, and the State Board of Equalization. Tenn.Code Ann. § 4-5-322(b)(1)(B)(i) & (iii). Also included are final decisions regarding the provision of special education services. Tenn.Code Ann. § 4-5-322(b)(1)(B)(ii). Proceedings involving special education services are deemed to be contested case proceedings. *Ogden v. Kelly,* 594 S.W.2d 702, 704 (Tenn.1980).

We must presume that the General Assembly intentionally omitted the "contested case" limitation with regard to appeals from the Authority's decisions. *Powell v. Blalock Plumbing & Elec. & HVAC, Inc.*, 78 S.W.3d 893, 897 (Tenn.2002); *State v. Godsey*, 60 S.W.3d 759, 778 (Tenn.2001). In the absence of the limitation, all appeals from the Authority's final decisions must be filed with this court whether or not they arise from a contested case proceeding. Accordingly, the Authority's decision to decline to stay or to open a contested case proceeding to review a proposed tariff is appealable directly to this court under Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii).

The second question involves the standard of review that should be used in cases of this sort. While the Tennessee Supreme Court determined in *Consumer Advocate Div. v. Greer* that the Authority had discretion to determine whether to convene a contested case proceeding to review a proposed tariff, it did not address how these discretionary decisions should be reviewed. It is not clear whether the court had in mind the common law "abuse of discretion" standard of review[19] or some other standard of review such as Tenn.Code Ann. § 4-5-322(h).

[19] Under the "abuse of discretion" standard of review, a decision-maker abuses its discretion "when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning and which causes an injustice to the complaining party." *Doe I ex rel. Doe I v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn.2005). We have also pointed out that a decision-maker abuses its discretion when the decision is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence. *Overstreet v. Shoney's, Inc* ., 4 S.W.3d 694, 709 (Tenn.Ct.App.1999).

Tenn.Code Ann. § 4-5-322(h) is found in the statutes governing contested case proceedings. Accordingly, it might seem, at least on first reading, that Tenn.Code Ann. § 4-5-322(h) is not applicable in cases of this sort because the Authority did not conduct a contested case proceeding to determine whether it should open a contested case proceeding to review a tariff. However, Tenn.Code Ann. §§ 4-5-301 to -325, while directed primarily toward contested cases proceedings, contains procedural directions applicable to other types of proceedings.

We have already pointed out one example of Tenn.Code Ann. § 4-5-322's application to agency actions that are

not contested case proceedings. Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) requires that appeals from "any final decision" by the Authority must be appealed to this court. The standard of review in Tenn.Code Ann. § 4-5-322(h) is another example. Like Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii), the statutory standard of review in Tenn.Code Ann. § 4-5-322(h) is not explicitly limited to the review of decisions in contested case proceedings. It simply refers to "the decision of the agency." Accordingly, we have determined, that the proper standard of review for "petitions for review" filed in this court pursuant to Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) is the one found in Tenn.Code Ann. § 4-5-322(h). Therefore, we will review the Authority's decision to decline to stay or to open a contested case proceeding to review BellSouth's "Welcoming Reward Program" tariff using Tenn.Code Ann. § 4-5-322(h).[20]

[20] We also note that five specific review criteria in Tenn.Code Ann. § 4-5-322(h) are essentially specific manifestations of the sort of decision-making that would be considered an "abuse of discretion." Acting in violation of constitutional or statutory provisions [Tenn.Code Ann. § 4-5-322(h)(1)] would clearly constitute an "abuse of discretion," as would acting in excess of the decision-maker's statutory authority [Tenn.Code Ann. § 4-5-322(h)(2)], using an unlawful procedure [Tenn.Code Ann. § 4-5-322(h)(3)], or making a decision that is unsupported by the evidence [Tenn.Code Ann. § 4-5-322(h)(5)].

B.

***9** It is now well established that the Authority is not required to open a contested case proceeding whenever it receives a complaint or petition challenging a proposed tariff. The Tennessee Supreme Court has determined that the Authority may exercise its discretion to determine whether a contested case hearing is warranted. *Consumer Advocate Div. v. Greer*, 967 S.W.2d at 763. However, the court has yet to address the breadth of the Authority's discretion or the process the Authority may use to exercise its discretion. These questions are before us now.

Prior cases have recognized that the Tennessee General Assembly has given the Authority practically plenary power over the telecommunications services providers subject to its jurisdiction. *Consumer Advocate Div. v. Greer*, 967 S.W.2d at 762; *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d at 159. However, the Authority's discretion is not without limits. Any regulatory action the Authority takes must be the result of an express grant of authority by statute or must arise by necessary implication from an express grant of authority. *BellSouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 512 (Tenn.2002); *Tenn. Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn.1977). Thus, while the Authority's enabling statutes should be construed in the Authority's favor,[21] they should not be construed so broadly that they permit the Authority to exercise its power in a manner contrary to law. *Pharr v. Nashville C. & St. L. Ry.*, 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948); *BellSouth Telecoms., Inc. v. Tenn. Regulatory Auth.*, 98 S.W.3d 666, 668 (Tenn.Ct.App.2002). The Authority must comply with the statutes and constitutional provisions governing its procedures. *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 972 S.W .2d at 680.

[21] Tenn.Code Ann. §§ 65-2-121, 65-4-106 (2004).

No statute or regulation prescribes the factors for the Authority to consider when deciding whether to dismiss a complaint seeking a contested case proceeding regarding a proposed tariff. In two cases where the courts have reviewed the Authority's denial of a contested case proceeding, the grounds for the Authority's decision resembled grounds similar to those usually raised in a Tenn. R. Civ. P. 12.02 or Tenn. R. Civ. P. 12.03 motion. In one case, the Tennessee Supreme Court upheld the dismissal of a "vague and nonspecific complaint" that failed to state a claim in accordance with the Authority's pleading rules. *Consumer Advocate Div. v. Greer*, 967 S.W.2d at 763. In the second case, this court upheld the dismissal of a complaint raising issues that the Authority had already addressed. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, No. M1999-01170-COA-R12-CV, 2001 WL 575570, at *6 (Tenn.Ct.App. May 30, 2001) (No Tenn. R.App. P. 11 application filed). In both of these cases, the Authority was not required to resolve any disputed factual issues regarding the nature or effect of the challenged tariff, nor was it required to resolve new legal or policy questions. The complaints were subject to dismissal as a matter of law.

***10** This case presents an entirely different circumstance. Here, both the CAPD and BellSouth's competitors filed complaints that satisfied the Authority's specificity requirements.[22] The issues raised in the complaints when they were first filed,[23] particularly the issue regarding the discrimination between new and existing customers, had not been previously addressed by the Authority.

[22] Neither the Authority nor BellSouth claimed that the petitions challenging the "Welcoming Reward Program" tariff were so vague and ambiguous that a more definite statement was required. Tenn. Comp. R. & Regs. 1220-1-2-.03(4). Similarly, they did not assert that the petitions did not allege with sufficient specificity the grounds for seeking relief, the nature of the relief sought, and the Authority's jurisdiction to grant the requested relief.

[23] After BellSouth revised the "Welcoming Reward Program" tariff to make it a long-term promotion, the Authority determined that it had previously approved one-year service contracts for similar long-term promotions.

In this proceeding, the Authority went beyond simply determining whether the petitions filed by the CAPD and BellSouth's competitors raised meritorious issues regarding the proposed "Welcoming Reward Program" tariff. Two of the three directors considering the petitions, implicitly recognizing the validity of the petitioners' concerns, used the prospect of a contested case proceeding to induce BellSouth to revise the tariff to address the issues raised in the petitions. The ploy was partially successful. Three "negotiating" sessions with the Authority produced several revisions to the tariff that addressed three of the six issues raised by the CAPD and BellSouth's competitors. The three remaining issues involved: (1) the price discrimination between BellSouth's new and existing customers, (2) the restriction on the resellers' ability to offer the promotion to their existing customers, and (3) the requirement that customers enter into a one-year service contract. The CAPD and BellSouth's competitors continued to insist that these features of the proposed tariff were discriminatory and anti-competitive.

The two-director majority addressed these issues head on in their April 14, 2003 order by treating them as questions of law rather than as questions of fact. With no evidence in the record to support their conclusions, they concluded that the tariff's differentiation between new and existing customers was not discriminatory.[24] They based this conclusion on the representations of BellSouth's lawyers that new customers and existing customers were not similarly situated because of self-evident differences in "marketing costs" and "business opportunities." However, the record contained no evidence regarding the difference between the marketing costs incurred to attract new business customers and the marketing costs incurred to retain existing customers or the difference between the business opportunities with regard to new customers and the business opportunities with regard to retaining and expanding the services provided to existing customers. As far as the present record shows, the distinctions between new and existing customers relied upon by the Authority and BellSouth could very well be a distinction without a difference.

[24] While utilities must offer the same rates to "all persons alike under the same conditions and circumstances" they need not offer the same rates to persons who are dissimilar, "and any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge." *Southern Ry. Co. v. Pentecost*, 205 Tenn. 716, 725, 330 S.W.2d 321, 325 (1959).

The two-director majority did not address the fact that new customers who sign a service contract as a result of the "Welcoming Reward Program" become existing customers. Thus, following enrollment, the new customer-existing customer distinction disappears because all customers are existing customers. Both the CAPD and BellSouth's competitors pointed out that these "new" existing customers would be paying less for their telephone service than customers who contracted for the same service either before or after the promotion. They also assert that if the *Southern Ry. v. Pentecost* standard is applied to customers after they have contracted for service, the proposed tariff results in price discrimination between customers who are receiving the same service.

***11** Likewise, the two-director majority failed to address the complaints that the final version of the proposed "Welcoming Reward Program" tariff is anti-competitive because it prevents resellers from offering the program to their existing customers. BellSouth's competitors argued that BellSouth was using its market power to undermine its competitors by offering discounted rates while preventing its competitors from purchasing the same discounted service and offering it to their existing customers.[25] BellSouth's response was simply that its tariff placed the same restrictions on its competitors when they resold the program that BellSouth was placing on itself. Notwithstanding BellSouth's concession that the cost of providing the program to a reseller's new and existing customers would be the same, the Authority neglected to make specific findings regarding whether the restriction was anti-competitive.

[25] The lawyer representing BellSouth's competitors asserted: "Well, I should be able to buy the offer myself and resell it to my own customer, and, ironically, that's the only situation in which BellSouth doesn't want that customer. They will want him if they can serve him

> directly, but they don't want him if they have to serve him through a reseller."

Discretionary decisions must take the law and the facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn.1996); *DeLapp v. Pratt*, 152 S.W.3d 530, 538 (Tenn.Ct.App.2004). It was evident at the March 3, 2003 conference that the parties continued to disagree about whether the proposed "Welcoming Reward Program" tariff was discriminatory and anti-competitive and that the record contained no evidence upon which the Authority could resolve this dispute. Accordingly, we have determined that the Authority abused its discretion by dismissing the petitions to suspend the "Welcoming Reward Program" tariff and to convene a contested case proceeding without properly addressing factual issues raised by the complaints. The CAPD and BellSouth's competitors raised valid issues regarding the revised tariff's rate discrimination and potentially anti-competitive effects that warranted giving them an opportunity to make their case in the context of a contested case proceeding.[26]

[26] The Authority did not err by declining to open a contested case proceeding with regard to the claim that the tariff's requirement that customers enter a long-term service contract was unfair because the Authority had already approved this feature in other long-term promotions.

IV.

As a final matter, both the Authority and BellSouth argue that the CAPD and the competing telecommunications services providers waived their right to challenge the procedure the Authority used to determine whether to convene a contested case proceeding. They insist that both the CAPD and the competing telecommunications services providers conceded during the March 3, 2003 conference that no further evidence was necessary to enable the Authority to act on the merits of their petitions challenging the "Welcoming Reward Program" tariff. We have determined that the Authority and BellSouth have misconstrued the remarks of the CAPD and BellSouth's competitors.

This proceeding amounted to a novel form of regulatory alternative dispute resolution. Two of the directors viewed it as a means to enable the parties to narrow or resolve their disagreements regarding BellSouth's "Welcoming Reward Program" tariff.[27] Such a proceeding is consistent with the broad and flexible grant of power to the Authority to regulate telecommunications services providers,[28] and parties to proceedings before the Authority, like BellSouth, the CAPD, and BellSouth's competitors, may agree to participate in such proceedings in lieu of a contested case proceeding. *See Team Design v. Gottlieb*, 104 S.W.3d 512, 517 (Tenn.Ct.App.2002) (pointing out that parties are free to settle their disagreements using virtually any mutually satisfactory procedure that is neither illegal nor contrary to public policy).

[27] One director commented at the close of the March 3, 2003 hearing that "I am ... for us coming to consensus rather than a lengthy, costly, and almost always time-consuming contested case hearing. Most of these issues aren't going to be resolved in a single hearing. We're in a continuum here ... [and] I'm hopeful that we will continue toward consensus building...."

[28] Tenn.Code Ann. § 65-4-123.

***12** Neither the CAPD nor BellSouth's competitors abandoned their request for a contested case hearing on their challenges to BellSouth's "Welcoming Reward Program" tariff. In every document they filed and in each of the three conferences during which the Authority considered the tariff, they requested an opportunity to discover and present evidence supporting their assertions that the tariff was discriminatory and anti-competitive. At the conclusion of the final conference on March 3, 2003, Director Jones asked the lawyers representing the CAPD and BellSouth's competitors, "[w]hat more is there to add to this dialogue?" Both responded that they had nothing further to add.[29]

[29] One lawyer responded, "[t]hree briefs is enough for me." The other lawyer stated: "I would not want to, I guess, compromise our ability to do discovery in this case if a case ... is eventually convened. With respect to the issue of whether or not a case should be ... convened ... we have probably gone beyond the pale on that particular issue."

The Authority and BellSouth would have us construe the lawyers' comments as signifying that the CAPD and BellSouth's competitors not only acquiesced in the decision-making process but also conceded that they had no further evidence to present with regard to their

challenges to the "Welcoming Reward Program" tariff. However, when taken in context, the lawyers' answers to Director Jones's question signified only that they had nothing more to offer with regard to the question of whether the Authority should open a contested case proceeding. Waivers of procedural rights should be not presumed from equivocal conduct or ambiguous statements. In the context of this particular proceeding, it would be unfair and inappropriate to conclude that the CAPD and BellSouth's competitors abandoned their requests for the contested case proceeding that they had been pursuing for over two months. Accordingly, we decline to find that either the CAPD or BellSouth's competitors waived their right to challenge the legal propriety of the Authority's decision-making process or its decision to deny their petitions to suspend the proposed "Welcoming Reward Program" tariff and to open a contested case proceeding regarding their complaint that the tariff was discriminatory and anti-competitive.

V.

In summary, we have concluded that the Authority abused its discretion when it declined to grant a contested case hearing regarding the challenges that BellSouth's "Welcoming Reward Program" tariff was discriminatory and anti-competitive. Therefore, the Authority's April 14, 2003 order dismissing the petitions to suspend the tariff and to open a contested case proceeding must be vacated in accordance with Tenn.Code Ann. § 4-5-322(h)(4), and the case must be remanded to the Authority for further proceedings consistent with this opinion. We tax the costs of this appeal to the Tennessee Regulatory Authority.

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

OFFICE OF The ATTORNEY GENERAL, CONSUMER ADVOCATE AND PROTECTION DIVISION
v.
TENNESSEE REGULATORY AUTHORITY.

No. M2004-01484-COA-R12-CV. | Assigned on Briefs Aug. 18, 2006. | Aug. 13, 2007.

Appeal from the Tennessee Regulatory Authority, No. 03-00625; Deborah Taylor Tate, Chairman.

Attorneys and Law Firms

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WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

OPINION

WILLIAM C. KOCH, JR., P.J., M.S.

***1** This appeal is a continuation of a dispute between the Tennessee Regulatory Authority and the Consumer Advocate and Protection Division of the Office of the Attorney General regarding the procedure used by the Authority to approve certain tariffs filed by BellSouth Telecommunications, Inc. without convening a contested case hearing. While an appeal from the Authority's denial of a contested case hearing with regard to BellSouth's first tariff was pending, BellSouth filed a second, substantially similar tariff. The Authority denied the Division's request to convene a contested case hearing regarding the second tariff based on its earlier refusal to convene a contested case hearing regarding the first tariff. The Division appealed. The Authority suggests that the appeal is moot in light of this court's decision vacating the Authority's approval of the first tariff. We have determined that this appeal should not be dismissed for mootness. We have also determined that the Authority erred by basing its decision to deny the Division's request for a contested case hearing regarding the second tariff on its earlier decision to decline a contested case hearing with regard to the first tariff. Our invalidation of the process the Authority used to approve the first tariff prevents the Authority from using the same process in future cases.

I.

In January 2003, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff with the Tennessee Regulatory Authority ("Authority") to introduce its "Welcoming Reward Program." The purpose of the program was to encourage certain businesses in urban areas to shift their telephone service to BellSouth. A group of BellSouth's competitors and the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") petitioned the Authority to suspend the "Welcoming Reward Program" and to convene a contested case proceeding regarding the proposed tariff. The parties soon found themselves involved in a protracted series of discussions, conferences, and colloquies which are more fully described in a prior opinion of this court.[1] Eventually, the Authority denied the CAPD's request for a contested case hearing and its accompanying petition to suspend the tariff,[2] and the CAPD appealed the matter to this court. Meanwhile, the Welcoming Reward Program ran its course.

[1] *Office of the Att'y Gen. v. Tenn. Regulatory Auth. (Welcoming Reward I),* No. M2003-01363-COA-R12-CV, 2005 WL 3193684 (Tenn.Ct.App. Nov. 29, 2005) (No Tenn. R.App. P. 11 application filed).

[2] The Authority was split on the matter. Chairman Sara

Kyle and Director Deborah Taylor Tate voted to deny the contested case hearing. Director Ron Jones dissented.

On December 3, 2003, while *Welcoming Reward I* was pending with this court, BellSouth filed a new tariff with the Authority. Essentially, BellSouth sought to re-create its previous Welcoming Reward Program with a new promotion that would run from January 2, 2004 through June 30, 2004.[3] Once again, the CAPD filed a motion to intervene and requested that the Authority convene a contested case hearing. BellSouth responded that, because the new Welcoming Reward tariff was, in almost all respects, the same as the first Welcoming Reward tariff and because the Authority had refused to convene a contested case hearing in that matter, the Authority should similarly decline to convene a contested case hearing regarding the new tariff. The Authority agreed with BellSouth, and on May 6, 2004, issued an order allowing the tariff to go into effect.[4] The CAPD filed an appeal with this court, and BellSouth timely filed a notice of appearance. The second Welcoming Reward Program also ran its course.

[3] The tariff, as revised, differed from the tariff in *Welcoming Reward I* in three relatively inconsequential respects: (1) the regions to which the tariff applied, (2) the amount of the rebate, and (3) the fact that customers needed to have only one telephone line to be eligible for the promotion.

[4] The composition of the Authority's voting panel was slightly different this time, but the Authority's vote was again split. Chairman Deborah Taylor Tate and Director Pat Miller voted to deny the contested case hearing. Director Ron Jones once again dissented, noting that the issues raised regarding the first Welcoming Reward tariff were still pending before this court.

***2** On July 9, 2004, this court heard oral argument in *Welcoming Reward I.* On September 4, 2004, upon the joint request of the Authority and the CAPD, we issued an order staying proceedings in the current case until the disposition of *Welcoming Reward I.* We delivered our opinion in *Welcoming Reward I* on November 29, 2005 in which we determined that (1) even though the Welcoming Reward promotion had already ended, the case was not moot because it presented issues capable of repetition but which would otherwise evade judicial review,[5] and (2) the Authority had abused its discretion by refusing to convene a contested case hearing in the matter.[6]

[5] *Welcoming Reward I,* 2005 WL 3193684, at *6.

[6] *Welcoming Reward I,* 2005 WL 3193684, at *9-12.

On March 13, 2006, the CAPD filed a motion to lift the stay in this matter. BellSouth and the Authority responded by requesting that we enter an order remanding the case to the Authority for proceedings consistent with our opinion in *Welcoming Reward I.* We requested that the CAPD reply to BellSouth's and the Authority's response, and on April 12, 2006, we lifted the stay.

II.

The Authority and BellSouth argue that this case is now moot and should, therefore, be dismissed. The CAPD responds that this case, like *Welcoming Reward I,* fits within an exception to the mootness doctrine. We agree with the CAPD.

At this point, the second Welcoming Reward tariff has expired, and there is no relief that this court can provide to the CAPD with regard to that particular tariff. In *Welcoming Reward I,* we determined that virtually identical facts fit the "capable of repetition yet evading review" exception to the doctrine of mootness. *Welcoming Reward I,* 2005 WL 3193684, at *5-6. Courts invoke this exception only where (1) there is a reasonable expectation that the official act that provoked the litigation will occur again, (2) there is a risk that effective judicial remedies cannot be provided in the event that the official act reoccurs, and (3) the same complaining party will be prejudiced by the official act when it reoccurs. *See Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1183 (1982); *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* 182 S.W.3d 333, 339-340 (Tenn.Ct.App.2005).

The Authority argues that the facts of this case do not fit within the "capable of repetition yet evading review" exception to the mootness doctrine. It asserts that it now has the benefit of this court's decision in *Welcoming Reward I* and, therefore, that there can be no reasonable expectation that it will engage in similar conduct in the future. Certainly we presume that administrative agencies will act in accordance with the law. *See*

221 Tenn. 657, 677, 430 S.W.2d 345, 354 (1968); *Seawell v. Beeler*, 199 Tenn. 438, 443, 287 S.W.2d 54, 56 (1956). However, the Authority's argument that its decision to deny the CAPD's request for a contested case hearing in this case was appropriate solely because it was consistent with past precedent casts some cloud over the Authority's protestations that it has now abandoned the procedure we invalidated in *Welcoming Reward I.*

***3** In this case, the circumstances in *Welcoming Reward I* have repeated themselves almost exactly, and the three concerns we expressed regarding the initial case remain relevant now. First, the Authority has manifested an intent to follow in the future the procedure that it followed in both *Welcoming Reward I* and this case. Second, the short duration of the tariff at issue and ones like it make it almost impossible for this court to review similar decisions by the Authority until the tariffs have expired. Third, the Authority's procedure for determining whether or not to convene a contested case hearing could prejudice the interests of the CAPD. *See Welcoming Reward I*, 2005 WL 3193684, at *6. Accordingly, we have determined that this case fits within the exception to the mootness doctrine for issues that are capable of repetition but which will effectively evade judicial review.

III.

The CAPD argues that the Authority's refusal to convene a contested case hearing regarding the second Welcoming Reward tariff constituted an abuse of discretion. The Authority asserts that it properly relied upon its past procedure when it declined to open a contested case hearing.[7] We think the CAPD has the better argument.

[7] BellSouth did not address this issue in its brief before the court.

The Authority's determination regarding whether to open a contested case hearing in a matter is discretionary. Tenn.Code Ann. § 65-5-103 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4) (2003); *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn.1998). A party aggrieved by the Authority's refusal to convene a contested case hearing must file its appeal directly with this court. Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) (2005); *Welcoming Reward I*, 2005 WL 3193684, at *8. We review the Authority's decision to decline to stay or to open a contested case proceeding using the criteria set forth in Tenn.Code Ann. § 4-5-322(h) (2005); *Welcoming Reward I*, 2005 WL 3193684, at *8.[8] Therefore, we will reverse the Authority's decision to refuse to open a contested case hearing only if the Authority's action (1) violated constitutional or statutory provisions,[9] (2) was in excess of its statutory authority,[10] (3) utilized unlawful procedure,[11] (4) was arbitrary, capricious, or characterized by an abuse or clearly unwarranted use of discretion,[12] or (5) is unsupported by substantial and material evidence.[13]

[8] We have previously described many of these criteria as specific manifestations of conduct that, in other contexts, falls under the general rubric of an "abuse of discretion." *Welcoming Reward I*, 2005 WL 3193684, at *8, n. 20.

[9] Tenn.Code Ann. § 4-5-322(h)(1).

[10] Tenn.Code Ann. § 4-5-322(h)(2).

[11] Tenn.Code Ann. § 4-5-322(h)(3).

[12] Tenn.Code Ann. § 4-5-322(h)(4).

[13] Tenn.Code Ann. § 4-5-322(h)(5).

The Tennessee General Assembly has given the Authority essentially plenary power over the telecommunications services providers within its jurisdiction. *Consumer Advocate Div. v. Greer*, 967 S.W.2d at 762, and no statute or regulation prescribes specific factors the Authority must consider when deciding whether to dismiss a complaint seeking a contested case proceeding regarding a proposed tariff. *Welcoming Reward I*, 2005 WL 3193684, at *9. While the Authority's enabling statutes are to be liberally construed, Tenn.Code Ann. §§ 65-2-121, 65-4-106 (2004), the Authority's discretion cannot extend beyond the boundaries established by the statutes and constitutional provisions that govern its actions. *See BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 680 (Tenn.Ct.App.1997); *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 161-62 (Tenn.Ct.App.1992).

***4** The Authority asserts that it is entitled to rely on its

decisions in previous cases when it is deciding whether to convene a contested case hearing. Therefore, it argues that its decision not to convene a contested case hearing in this case cannot be an abuse of discretion because it had already determined in an earlier proceeding involving essentially the same issues that convening a contested case proceeding was not warranted. The Authority relies on *Consumer Advocate Division v. Tennessee Regulatory Authority*, No. M1999-01170-COA-R12-CV, 2001 WL 575570 (Tenn.Ct.App. May 30, 2001) (No Tenn. R.App. P. 11 application filed) to support its argument. Its reliance is misplaced.

In *Consumer Advocate Division v. Tennessee Regulatory Authority*, the CAPD and BellSouth were at odds over BellSouth's desire to charge customers for directory assistance in spite of a prior settlement agreement between the parties regarding the charges. The Authority determined that the CAPD had already litigated the same issues in two previous cases that were then pending on appeal and that the settlement agreement at issue before the Authority was not binding on the parties. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *1-3. After making its findings, the Authority declined to convene a contested case hearing. We affirmed the Authority's decision. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *6.

Our decision to uphold the Authority's actions in *Consumer Advocate Division v. Tennessee Regulatory Authority* was not premised merely upon the fact that the Authority had previously heard the issues presented in the case. Rather, we determined that the Authority did not abuse its discretion when it declined to convene a contested case hearing after it determined as a matter of law that the breach of contract claim before it failed to state a claim upon which relief could be granted and then determined that it had previously decided the remaining issues in the matter. *Consumer Advocate Div. v. Tenn. Regulatory Auth.*, 2001 WL 575570, at *6. We restated this reasoning in *Welcoming Reward I* when we noted that in the previous two cases in which the courts had reviewed the Authority's denial of a contested case hearing,[14] "the Authority was not required to resolve any disputed factual issues regarding the nature or effect of the challenged tariff, nor was it required to resolve new legal or policy questions. The complaints were subject to dismissal as a matter of law." *Welcoming Reward I*, 2005 WL 31936845, at *9.

[14] The two cases were *Consumer Advocate Division v. Tennessee Regulatory Authority* and *Consumer Advocate Division v. Greer*.

Welcoming Reward I, however, presented circumstances quite different from *Consumer Advocate Division v. Tennessee Regulatory Authority*. In the litigation surrounding the first Welcoming Reward tariff, we pointed out several missteps by two of the Authority's directors that resulted in the CAPD being prevented from having a full and fair hearing on its petition. We noted that two of the three directors used their ability to convene a contested case hearing as leverage to induce BellSouth to revise its tariff. The two directors also erroneously treated questions of fact as questions of law and, despite a lack of evidence in the record, concluded that BellSouth's tariff did not result in discriminatory prices. The two-director majority also failed to address the CAPD's assertion that certain aspects of the Welcoming Reward tariff were anti-competitive. *Welcoming Reward I*, 2005 WL 3193684, at *10-11. Taking all the circumstances into consideration, we determined that the Authority had abused its discretion by dismissing the petitions to suspend the tariff and by declining to convene a contested case hearing because it acted without proper consideration of the factual issues raised by the intervening complaints. *Welcoming Reward I*, 2005 WL 3193684, at *11.

***5** The Authority's only justification for refusing to convene a contested case hearing in this matter is that it had in the past considered a virtually identical request-the first Welcoming Reward tariff-and rejected it. Our decision in *Welcoming Reward I* pointed out that the Authority's procedure in that matter was riddled with error. Because the Authority's decision in *Welcoming Reward I* was vacated, the reversal of the Authority's order undermines any substantive or procedural reliance that the Authority otherwise might have been entitled to claim with regard to having already heard and decided the issues CAPD is seeking to raise in this proceeding. The Authority received no evidence and conducted no inquiry into the CAPD's claims that the tariff in this matter was discriminatory and anti-competitive. Instead, it adopted its findings in the prior proceedings involving the first Welcoming Reward tariff which were procedurally deficient. While it is true that the Authority did not have the benefit of our decision in *Welcoming Reward I* when it decided this case, the Authority cannot be allowed to transform its past abuse of discretion into binding precedent. We find that the Authority's refusal to convene a contested case hearing constituted an unwarranted use of its discretion.

IV.

As a final matter, the CAPD has asked us to clarify a footnote in our filed opinion in response to the petitions for rehearing in *Welcoming Reward I*, which referred to a new law affecting proceedings before the Authority arising after July 1, 2004.[15] Neither *Welcoming Reward I* nor this matter arose after July 1, 2004. Therefore, we decline to speculate as to the future application of a new law to a tariff that has not yet been filed. We tax the costs of this appeal in equal proportions to the Office of the Attorney General and the Tennessee Regulatory Authority.

[15] This footnote stated that "[t]his result could conceivably have been different had this proceeding taken place after July 1, 2004 because Tenn.Code Ann. § 65-5-101(c)(3)(C)(i) (2006 Supp.) would have required the complaining party to demonstrate a 'substantial likelihood of prevailing on the merits of its complaint....' " Opinion on Petition for Rehearing, *Office of the Atty. Gen. v. Tenn. Regulatory Auth.*, No. M2003-01363-COA-R12-CV, at n. 2 (Tenn.Ct.App. Dec. 21, 2005).

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