FARRIS, MATHEWS, BRANAN
BOBANGO & HELLEN PLC

ATTORNEYS AT LAW

618 Church Street, Suite 300
Nashville, TN 37219

(615) 726-1200 telephone
(615) 726-1776 facsimile

MEMPHIS DOWNTOWN
One Commerce Square, Suite 2000
Memphis, TN 38103

(901) 259-7100 telephone
(901) 259-7150 facsimile

MEMPHIS EAST
530 Oak Court Drive, Suite 345
Memphis, TN 38117

(901) 762-0530 telephone
(901) 683-2553 facsimile

William W. Farris
Harlan Mathews
Homer Boyd Branan, III
John A. Bobango [1,2]
Tim Wade Hellen
Edwin Dean White, III
Charles B. Welch, Jr.
John Michael Farris [2]
D. Edward Harvey
Eugene Stone Forrester, Jr.
Dedrick Brittenum, Jr.
Barry F. White
Robert F. Miller
Robert A. McLean [5]
Anita I. Lotz
Jerry W. Taylor
Michael B. Chance
Mark E. Beutelschies [1]

Steven C. Brammer
Richard H. Booth
Robert D. Hyde [4]
Michael T. Evangelisti
Kimberly Harris Jordan
Garrett M. Estep [3]
Montgomery B. Sernel
Paul C. Peel
Jon F. Minkoff

[1] also licensed in Arkansas
[2] also licensed in Florida
[3] also licensed in Kentucky
[4] also licensed in Mississippi
[5] Tennessee R31 Listed Mediator

Of Counsel
Henry H. Hancock
Marye Helen Owen

'00 APR 3 PM 1 59

EXECUTIVE SECRETARY

April 3, 2000

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

VIA HAND DELIVERY

Re: APLICATION OF MEMPHIS NETWORX, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATION SERVICES AND JOINT PETITION OF MEMPHIS LIGHT GAS & WATER DIVISION, A DIVISION OF THE CITY OF MEMPHIS, TENNESSEE ("MLGW") AND A&L NETWORKS-TENNESSEE, LLC ("A&L") FOR APPROVAL OF AGREEMENT BETWEEN MLGW AND A&L REGARDING JOINT OWNERSHIP OF MEMPHIS NETWORX, LLC.
DOCKET NO. 99-00909

Dear Mr. Waddell:

Enclosed for filing, please find an original plus thirteen (13) copies of Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association's objections to the Rebuttal Testimony of J. Maxwell Williams, Ward Huddleston, Jr., Wade Stinson, and John McCullough, and their Motion to Strike. Copies are being served on the parties of record.

If you have any questions or concerns with regard to this filing, please do not hesitate to contact me.

Very truly yours,
FARRIS, MATHEWS, BRANAN BOBANGO & HELLEN, P.L.C.

Charles B. Welch, Jr.

CBW:ccw
Enclosure
CC: Carolyn Marek
Dean Deyo
Stacey Burks
G:\JFM\Networx (99-00909)\Waddell Letter TCTA 3.29.00.doc

POSTED 4-4-00a

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: **APPLICATION OF MEMPHIS NETWORX, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATION SERVICES AND JOINT PETITION OF MEMPHIS LIGHT GAS & WATER DIVISION, A DIVISION OF THE CITY OF MEMPHIS, TENNESSEE ("MLGW") AND A&L NETWORKS-TENNESSEE, LLC ("A&L") FOR APPROVAL OF AGREEMENT BETWEEN MLGW AND A&L REGARDING JOINT OWNERSHIP OF MEMPHIS NETWORX, LLC.**	**DOCKET NO. 99-00909**

TIME WARNER TELECOM OF THE MID-SOUTH, L.P.'S, TIME WARNER COMMUNICATIONS OF THE MID-SOUTH'S, AND THE TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION'S OBJECTIONS TO THE REBUTTAL TESTIMONY OF J. MAXWELL WILLIAMS AND MOTION TO STRIKE

Come now, the Intervenors, Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South ("Time Warner Communications"), and the Tennessee Cable Telecommunications Association ("TCTA"), and respectfully submit the following objections to the rebuttal testimony of J. Maxwell Williams filed on the behalf of Memphis Light Gas & Water ("MLG&W"). The Intervenors move that the objectionable portions of the testimony be stricken, as they are violative of Tenn. Code Ann. § 4-5-313.

SPECIFIC OBJECTIONS

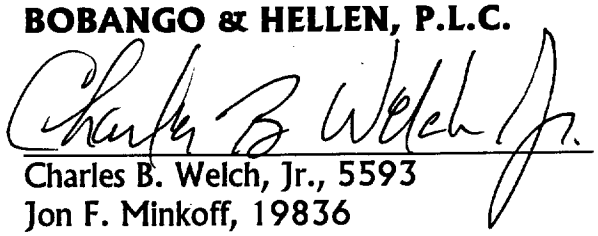
OBJECTION NUMBER 1: MLG&W asked its witness: "Do you have any general comments regarding Mr. Barta's testimony?" (Rebuttal Testimony of J.

Maxwell Williams, p. 2.) A: "Yes. I find it curious that the TCTA has intervened and taken such an active role in this proceeding in light of the fact that they have responded to our data request indicating that they are not aware of any of their members who have affiliates who are competitive local exchange carriers (CLECs) or otherwise regulated by the TRA. The TRA does not regulate cable service. The only way that Memphis Networx operations would compete with cable is if another cable carrier leased facilities from Memphis Networx to provide cable service. The TCTA appears to be trying to create the perception of interest in protecting the MLGW electric rate payers from providing subsidies to Memphis Networx, however, in reality, their intervention is designed to impede competition. The legislature has declared that public policy and the TRA should promote competition. Therefore, the Application and Joint Petitions should be approved."

The Intervenors object to Mr. Williams' response because it is not relevant to any issue addressed in this docket, it is speculation and conjective, and its sole purpose is that of argument. Please see Objection No. 1 to Mr. McCullough's Rebuttal Testimony. The Intervenors move to strike Mr. Williams' testimony based upon the objections as stated in the referenced Objection.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN, BOBANGO & HELLEN, P.L.C.



Charles B. Welch, Jr., 5593
Jon F. Minkoff, 19836
Attorneys for Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association
618 Church Street, Suite 300
Nashville, Tennessee 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing **OBJECTIONS TO THE REBUTTAL TESTIMONY OF J. MAXWELL WILLIAMS AND MOTION TO STRIKE** on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid or by hand delivery, as designated below, this the 3rd day of April, 2000.

D. Billye Sanders, Esquire
Waller Lansden et al.
511 Union Street, Suite 2100 -Served via hand delivery
P.O. Box 198966
Nashville, TN 37219-8966

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Avenue, Suite 1600 -Served via U.S. mail
P.O. Box 198602
Nashville, TN 37219-8062

Guy M. Hicks, Esquire
BellSouth Telecommunications, Inc.
Suite 2101 -Served via U.S. mail
333 Commerce Street
Nashville, TN 37201-8062

John Knox Walkup, Esquire
Wyatt, Tarrant & Combs
511 Union Street, Suite 1500 -Served via hand delivery
Nashville, TN 37219-1750

R. Dale Grimes, Esquire
Bass, Berry & Sims, P.L.C.
2700 First American Center -Served via U.S. mail
Nashville, TN 37238

Charles B. Welch, Jr.

G:\JFM\Networx (99-00909)\objections to rebuttal testimony of Stinson.doc

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: **APPLICATION OF MEMPHIS NETWORX, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATION SERVICES AND JOINT PETITION OF MEMPHIS LIGHT GAS & WATER DIVISION, A DIVISION OF THE CITY OF MEMPHIS, TENNESSEE ("MLGW") AND A&L NETWORKS-TENNESSEE, LLC ("A&L") FOR APPROVAL OF AGREEMENT BETWEEN MLGW AND A&L REGARDING JOINT OWNERSHIP OF MEMPHIS NETWORX, LLC.**	**DOCKET NO. 99-00909**

TIME WARNER TELECOM OF THE MID-SOUTH, L.P.'S, TIME WARNER COMMUNICATIONS OF THE MID-SOUTH'S, AND THE TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION'S OBJECTIONS TO THE REBUTTAL TESTIMONY OF WARD HUDDLESTON, JR. AND MOTION TO STRIKE

Come now, the Intervenors, Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South ("Time Warner Communications"), and the Tennessee Cable Telecommunications Association ("TCTA"), and respectfully submit the following objections to the rebuttal testimony of Ward Huddleston, Jr., filed on the behalf of Memphis Light Gas & Water ("MLG&W"). The Intervenors move that the objectionable portions of the testimony be stricken, as they are violative of Tenn. Code Ann. § 4-5-313.

SPECIFIC OBJECTIONS

OBJECTION NUMBER 1: MLG&W asked its witness: "During the course of discovery in this proceeding, Memphis Networx circulated some updated financial

documents. Do you wish to supplement your application with these documents?" (Rebuttal Testimony of Ward Huddleston, Jr., p. 2.) A (in pertinent part): "I believe Time Warner and the Tennessee Cable Telecommunications Association are opposed to the open access strategy of Memphis Networx, that is to provide fair and unrestricted access to any internet service provider or other content provider. This is the same concern raised in congressional hearings regarding the AOL/Time Warner merger, since Time Warner has refused to provide open access to other content providers."

The Intervenors object to this answer because it is not responsive to the question asked, and because it is not relevant to any issue in this docket. Accordingly, the Intervenors move that the pertinent portions of Mr. Huddleston's testimony be stricken.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN, BOBANGO & HELLEN, P.L.C.

Charles B. Welch, Jr., 5593
Jon F. Minkoff, 19836
Attorneys for Time Warner
Telecom of the Mid-South, L.P.,
Time Warner Communications of
the Mid-South, and the Tennessee
Cable Telecommunications Association
618 Church Street, Suite 300
Nashville, Tennessee 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing **OBJECTIONS TO THE REBUTTAL TESTIMONY OF WARD HUDDLESTON, JR. AND MOTION TO STRIKE** on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid or by hand delivery, as designated below, this the 3rd day of April, 2000.

D. Billye Sanders, Esquire
Waller Lansden et al.
511 Union Street, Suite 2100 -Served via hand delivery
P.O. Box 198966
Nashville, TN 37219-8966

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Avenue, Suite 1600 -Served via U.S. mail
P.O. Box 198602
Nashville, TN 37219-8062

Guy M. Hicks, Esquire
BellSouth Telecommunications, Inc.
Suite 2101 -Served via U.S. mail
333 Commerce Street
Nashville, TN 37201-8062

John Knox Walkup, Esquire
Wyatt, Tarrant & Combs
511 Union Street, Suite 1500 -Served via hand delivery
Nashville, TN 37219-1750

R. Dale Grimes, Esquire
Bass, Berry & Sims, P.L.C.
2700 First American Center -Served via U.S. mail
Nashville, TN 37238

Charles B. Welch, Jr.

G:\JFM\Networx (99-00909)\objections to rebuttal testimony of Huddleston.doc

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: **APPLICATION OF MEMPHIS NETWORX, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATION SERVICES AND JOINT PETITION OF MEMPHIS LIGHT GAS & WATER DIVISION, A DIVISION OF THE CITY OF MEMPHIS, TENNESSEE ("MLGW") AND A&L NETWORKS-TENNESSEE, LLC ("A&L") FOR APPROVAL OF AGREEMENT BETWEEN MLGW AND A&L REGARDING JOINT OWNERSHIP OF MEMPHIS NETWORX, LLC.**	**DOCKET NO. 99-00909**

TIME WARNER TELECOM OF THE MID-SOUTH, L.P.'S, TIME WARNER COMMUNICATIONS OF THE MID-SOUTH'S, AND THE TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION'S OBJECTIONS TO THE REBUTTAL TESTIMONY OF WADE STINSON AND MOTION TO STRIKE

Come now, the Intervenors, Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South ("Time Warner Communications"), and the Tennessee Cable Telecommunications Association ("TCTA"), and respectfully submit the following objections to the rebuttal testimony of Wade Stinson filed on the behalf of Memphis Light Gas & Water ("MLG&W"). The Intervenors move that the objectionable portions of the testimony be stricken, as they are violative of Tenn. Code Ann. § 4-5-313.

SPECIFIC OBJECTIONS

OBJECTION NUMBER 1: MLG&W asked its witness: "Please summarize your testimony." (Rebuttal Testimony of Wade Stinson, p. 2.) A (in pertinent part):

"MLGW's existing infrastructure will be made available to Memphis Networx through arms-length negotiations ... MLGW's personnel have been involved in appropriate planning and investigation as to the formulation of the telecommunications venture. The expenses will be allocated to the Telecommunications Division as appropriate, upon approval of this application and Joint Petition by the TRA."

The Intervenors object to Mr. Stinson's testimony because it provides an opinion without any foundation and requires a legal conclusion. Accordingly, the Intervenors move to strike the pertinent portions of his testimony.

OBJECTION NUMBER 2: MLG&W asked its witness: "Mr. McCullough responded to some of the correspondence in Mr. Barta's exhibits, however, he deferred to you on others. Lets start with Exhibit WJB-2 which sets forth Mr. Barta's concerns regarding Memphis Networx's use of MLGW's existing infrastructure." (Rebuttal Testimony of Wade Stinson, p. 3.) A (in pertinent part): "Although the September 29, 1999 memo says that Entergy project has reached 'crunch time', the crunch was obviously Entergy's perception, because none of the fiber discussed in this memo has been deployed."

The Intervenors object to Mr. Stinson's testimony because it is speculative. The Tennessee Rules of Evidence require witnesses "to have evidence which supports a finding that the witness has personal knowledge of the matter." See Tenn. R. Evid. 602(a). Because Mr. Stinson provides no such evidence, Intervenors move to strike this testimony.

OBJECTION NUMBER 3: MLG&W asked its witness: Please comment on a March 10, 1999 memo from Joel Halvorson to Wade Stinson. (Rebuttal Testimony of Wade Stinson, p. 6.) A (in pertinent part): "This type of information is routinely made available to telecommunications providers interested in or involved in deploying facilities in Shelby County. "

The Intervenors object to this testimony on grounds that Mr. Stinson is not qualified to give such opinions. Mr. Stinson states that, "I became Vice President of Construction and Maintenance in 1998. I joined MLGW in 1978 as a Junior Engineer and also served as an Assistant Manager, Gas Distribution; Manager, Gas Distribution; Manager, Hickory Hills Service Center; and Manager of Personnel." On its face, this background does not qualify Mr. Stinson as an expert in telecommunications facilities. See Tenn. R. Evid. 701-702. Accordingly, the Intervenors move to strike the pertinent parts of his testimony.

OBJECTION NUMBER 4: MLG&W asked its witness: "Please comment on WJB Exhibit 6 which is a memo from Allen Long to Michael Kissell and Wade Stinson." (Rebuttal Testimony of Wade Stinson, p. 9.) A: "Allen Long is a Supervisor of Distribution Engineering for MLGW. This memo is dated September 15, 1999, which is before the Operating Agreement was signed. We were therefore still in the planning stages for the telecom venture. Being a layman and not a lawyer, he was curious as to why the plan was not leveraging MLGW assets. Mr. Long has not been directly involved in the telecom venture and was merely expressing his opinions. MLGW construction crews have not run service drops nor

done any of the other things that Mr. Long would suggest as a possibility in the next to last paragraph of Exhibit WJB-6. "

The Intervenors object to Mr. Stinson's testimony because it is speculative. The only person who can answer why Mr. Long asked the questions in the subject memo is Mr. Long himself. Accordingly, the Intervenors move to strike Mr. Stinson's testimony.

OBJECTION NUMBER 5: MLG&W asked its witness: "Please respond to Mr. Barta's allegation that there was an attempt by MLGW to restrict access to information which is set forth on page 13, lines 17-36 through page 14, lines 1-8." (Rebuttal Testimony of Wade Stinson, p. 9.) A: "First, I think it is important to note that this is an e-mail that came from my files, and the only reason that the intervenors have access to this e-mail is because MLGW gave it to them pursuant to a public records request. It is not unusual for private companies engaged in competitive activities to want to keep their competitively sensitive documents out of the hands of their competitors. Certainly, Time Warner, NextLink and BellSouth have the same concerns regarding their own records. This is evidenced by their involvement in designing a protective order that would keep their confidential documents away from the premises of MLGW. **Although I may have been sympathetic to those concerns, I can honestly say that no list of sensitive information was compiled and no documents were moved from MLGW to A&L or Memphis Networx to prevent disclosure of sensitive information.** As stated in MLGW and A&L's response to the data request from TCTA, "Max" (Max Williams, General Counsel of MLGW) and MLG&W's other legal counsel

were not aware of this e-mail until the review of documents in responding to John Farris' December 1999 public records request. "Ricky" (Ricky Williams [sic], Counsel for A&L) was not aware of this e-mail until the data request by TCTA was made."

The Intervenors object on grounds that Mr. Stinson's response is not relevant. Industry concern about disclosing proprietary and competitively-sensitive documents is not an issue addressed in this docket. Likewise, the Intervenors' motivation for drafting a protective order is not relevant. Accordingly, the Intervenors move to strike Mr. Stinson's testimony in response to the said question (excluding the bolded text), based upon the stated objections.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN, BOBANGO & HELLEN, P.L.C.

Charles B. Welch, Jr., 5593
Jon F. Minkoff, 19836
Attorneys for Time Warner
Telecom of the Mid-South, L.P.,
Time Warner Communications of
the Mid-South, and the Tennessee
Cable Telecommunications Association
618 Church Street, Suite 300
Nashville, Tennessee 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing **OBJECTIONS TO THE REBUTTAL TESTIMONY OF WADE STINSON AND MOTION TO STRIKE** on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid or by hand delivery, as designated below, this the 3rd day of April, 2000.

D. Billye Sanders, Esquire
Waller Lansden et al.
511 Union Street, Suite 2100
P.O. Box 198966
Nashville, TN 37219-8966
-Served via hand delivery

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Avenue, Suite 1600
P.O. Box 198602
Nashville, TN 37219-8062
-Served via U.S. mail

Guy M. Hicks, Esquire
BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, TN 37201-8062
-Served via U.S. mail

John Knox Walkup, Esquire
Wyatt, Tarrant & Combs
511 Union Street, Suite 1500
Nashville, TN 37219-1750
-Served via hand delivery

R. Dale Grimes, Esquire
Bass, Berry & Sims, P.L.C.
2700 First American Center
Nashville, TN 37238
-Served via U.S. mail

Charles B. Welch, Jr.

G:\JFM\Networx (99-00909)\objections to rebuttal testimony of Stinson.doc

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: **APPLICATION OF MEMPHIS NETWORX, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATION SERVICES AND JOINT PETITION OF MEMPHIS LIGHT GAS & WATER DIVISION, A DIVISION OF THE CITY OF MEMPHIS, TENNESSEE ("MLGW") AND A&L NETWORKS-TENNESSEE, LLC ("A&L") FOR APPROVAL OF AGREEMENT BETWEEN MLGW AND A&L REGARDING JOINT OWNERSHIP OF MEMPHIS NETWORX, LLC.**	**DOCKET NO. 99-00909**

TIME WARNER TELECOM OF THE MID-SOUTH, L.P.'S, TIME WARNER COMMUNICATIONS OF THE MID-SOUTH'S, AND THE TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION'S OBJECTIONS TO THE REBUTTAL TESTIMONY OF JOHN MCCULLOUGH AND MOTION TO STRIKE

Come now, the Intervenors, Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South ("Time Warner Communications"), and the Tennessee Cable Telecommunications Association ("TCTA"), and respectfully submit the following objections to the rebuttal testimony of John McCullough filed on the behalf of Memphis Light Gas & Water ("MLG&W"). The Intervenors move that the objectionable portions of the testimony be stricken, as they are violative of Tenn. Code Ann. § 4-5-313.

SPECIFIC OBJECTIONS

OBJECTION NUMBER 1: MLG&W asked its witness: "Would there be an incentive for Time Warner to subsidize its competitive telecom services company with assets from its regulated monopoly cable television operations?" (Rebuttal

Testimony of John McCullough, p. 4.) A: "Yes. Mr. Barta's statements regarding incentives to subsidize would apply to Time Warner in that the Time Warner entities, I believe, are ultimately owned by the same parent and cross subsidy of the telecom operation by cable assets would enable Time Warner to shift cost to the monopoly service and away from the competitive service."

The Intervenors object to MLG&W's question because it is not relevant to any issue addressed in this docket. The parties have agreed to, and the TRA Directors have approved of, a list of nine (9) issues. The Tennessee Rules of Evidence provide that relevant evidence means evidence "having any tendency to make the existence of any fact **that is of consequence to the determination of the action** more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401 (emphasis added); State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). Additionally, it is important to note that the Time Warner entities are not subject to the cross-subsidization provisions of Tennessee Code Annotated § 7-52-402, or any other similar provision of state or federal law, which applies only to municipally owned electric companies such as MLG&W. MLG&W's question fails to relate to any one of the docket's issues, and, accordingly, the question is irrelevant.

Furthermore, the Intervenors object on grounds that Mr. McCullough's answer is based solely upon speculation and conjecture. His answer is only unsubstantiated opinion; no foundation establishes that Mr. McCullough has personal knowledge of or experience with Time Warner Telecom, Time Warner

Communications, or any other Time Warner entity. In fact, Mr. McCullough admits that he does not even know if Time Warner Telecom and Time Warner Communications are owned by the same parent company. Rule 602 of the Tennessee Rules of Evidence states that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In conclusion, the Intervenors move to strike the question and the testimony in response thereto, based upon the stated objections.

OBJECTION NUMBER 2: MLG&W asked its witness: "Has the TRA adopted any rules, regulations or policies that would prevent Time Warner from subsidizing its telecom operations with its monopoly cable operations?" (Rebuttal Testimony of John McCullough, p. 4.) A: "Not to my knowledge."

The Intervenors object to MLG&W's question because it is not relevant to the issues in this docket. See, Tenn. R. Evid. 401. The application of TRA rules, regulations, and/or policies to Time Warner's business operations has no relevance whatsoever to any issue in this proceeding. The Intervenors move to strike the question and the testimony in response thereto, based upon the stated objection.

OBJECTION NUMBER 3: MLG&W asked its witness: "Please comment on Mr. Barta's testimony regarding the need for a formal set of terms and conditions governing affiliate transactions between Memphis Networx and MLGW." (Rebuttal Testimony of John McCullough, p. 4.) A: "Mr. Barta appears to be saying that if we do what we say we are going to do in our testimony an responses to the data requests, then no formal set of terms and conditions governing affiliate transactions

need be adopted by the Authority. However, Mr. Barta states that he does not believe that MLGW plans to implement these procedures, based upon his review of numerous documents. The documents that he cites involve various preliminary discussions regarding the telecommunications project, which do not represent MLGW's ultimate decision regarding the form of the telecommunication venture. Mr. Barta has reviewed these documents out of context and has made unreasonable conclusions regarding them. On November 8, 1999 MLGW and A&L Networks-Tennessee, LLC entered into the umbrella agreement and Operating Agreement which were attached as Exhibit M to the supplemental filing on January 11, 2000, and Exhibit E to the application in this docket, respectively. These are the documents that govern the relationship between MLGW and A&L and described the joint venture. Many things were discussed prior to entering into the operating agreement and the umbrella agreement however, these agreements and the testimony in this docket set forth the current plan and concept for the venture."

The Intervenors object to MLG&W's question because of its improper form. In order to assist the finders of fact, it is proper for counsel to ask witnesses specific questions which require a specific response. Counsel fails to ask a question, but instead provides an invitation for a narrative which could be directed to any issue raised in Mr. Barta's testimony.

Secondly, the Intervenors object to Mr. McCullough's answer because he fails to give factual support for his opinion. Rule 602(a) of the Tennessee Rules of Evidence state that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of

the matter." Mr. McCullough does not address the documents to which he refers, he does not explain how Mr. Barta misappropriated the documents' proper context, and he does not discuss why Mr. Barta's conclusions are unreasonable. Accordingly, the Intervenors move to strike the question and the testimony in response thereto, based upon the stated objections.

OBJECTION NUMBER 4: MLG&W asked its witness: "Will Memphis Networx have unrestricted access to MLGW personnel?" (Rebuttal Testimony of John McCullough, p. 6.) A: "Absolutely not. Memphis Networx has its own employees. None of them are common employees with MLGW. MLGW has used its own resources to determine whether it wanted to become involved in the telecommunication venture, what form that would take and to takes [sic] steps to protect its investment in the proposed venture. These are proper expenses of MLGW which have been allocated to the electric division and will be transferred to the telecommunication division upon TRA approval."

The Intervenors object to Mr. McCullough's answer on grounds that it is unresponsive to MLG&W's question. The question's focus is whether MLG&W restricts personnel from working for or on behalf of Memphis Networx. Mr. McCullough's response does not address such restrictions. Instead, Mr. McCullough deflects the question's focus by discussing MLG&W's alleged allocations which have not yet been properly designated.

Furthermore, even if Mr. McCullough's answer is responsive to the question asked, it is not apparent from his background that he is qualified to answer the question. See Tenn. R. Evid. 602(a). Mr. McCullough's responsibilities at

MLG&W include "budget, rates, financial management, cashier, payroll, general accounting, bond issues, and investments." (Rebuttal Testimony John McCullough, P. 1.) These job responsibilities do not, on their face, indicate that Mr. McCullough has knowledge about or experience with the issue of whether Memphis Networx will have unrestricted access to MLGW personnel.

The Intervenors move to strike Mr. McCullough's testimony in response to the said question, based upon the stated objections.

OBJECTION NUMBER 5: MLG&W asked its witness: "Has MLGW deployed facilities on behalf of Memphis Networx without receiving proper approval from the TRA?" (Rebuttal Testimony of John McCullough, p. 7.) A: "No."

The Intervenors object to and move to strike all of Mr. McCullough's testimony in response to the said question, based upon the same grounds as given in Objection No. 4. Specifically, his apparent lack of knowledge about MLG&W's construction schedule make him unqualified to answer this question.

OBJECTION NUMBER 6: MLG&W asked its witness: "Mr. Barta states that he is disturbed by 'the companies' efforts to restrict disclosure of information and material that would permit an objective review of its operations and affiliate transactions.' Please respond to this." (Rebuttal Testimony of John McCullough, p. 8.) A: "MLGW has not sought to restrict such disclosure. The memos that Mr. Barta sites in his exhibits are excerpts from approximately 5,000 pages of documents that MLGW produced pursuant to a public records request from John Farris, counsel for TCTA and Time Warner and from responses to discovery requests in this proceeding. Certainly, any private company such as Memphis

Networx, A&L, Time Warner or Nextlink is concerned about their proprietary and competitively sensitive documents being disclosed to the public. This is evidenced by the fact that the counsel for Time Warner and Nextlink proposed additional language for the protective agreement filed in this docket to insure any proprietary responses to our data requests were kept out of the offices of MLGW and the public files. Mr. Barta's statements appear to be intended to raise unfounded and negative innuendos toward the applicant and joint petitioners."

The Intervenors object to MLG&W's question based upon the same grounds as given in Objection No. 3.

Furthermore, the Intervenors object to the response because it is not apparent that Mr. McCullough has personal knowledge from which he can address MLG&W's response to Mr. Farris' Public Records Act request. His lack of knowledge is made clear by his answer's gross inaccuracy. MLG&W did not produce five thousand (5,000) pages in response to Mr. Farris' 1999 Public Records Request as alleged by Mr. McCullough. On the contrary, it has been approximated that MLG&W produced only one thousand (1,000) pages of documents.

In addition, the Intervenors object on grounds that Mr. McCullough's response is not relevant. Private industry concerns about disclosing proprietary and competitively-sensitive documents is not an issue addressed in this docket. Likewise, the Intervenors' motivation for drafting the Protective Order is not relevant.

Lastly, objection is raised based upon the fact that his response is speculative. Mr. McCullough states that "Mr. Barta's statements appear to be intended to raise

unfounded and negative innuendoes toward the applicant [sic] and joint petitioners [sic]." On the contrary, Mr. Barta's numerous comments speak for themselves; his testimony is thoroughly documented with supporting evidence. If McCullough intends to take issue with all of Mr. Barta's comments, he must give the factual basis supporting his opinion. Mr. Barta will be subject to cross examination at the hearing of this case. Mr. McCullough's opinion as to the meaning of Mr. Barta's testimony is unnecessary, irrelevant and immaterial.

The Intervenors move to strike Mr. McCullough's testimony in response to the said question, based upon the stated objections.

OBJECTION NUMBER 7: MLG&W asked its witness: "Please respond to the statement regarding the meeting notes on page 14, lines 10-18 of Mr. Barta's testimony." (Rebuttal Testimony of John McCullough, p. 9.) A: "It is my understanding that the notes referenced on page 14 of Mr. Barta's testimony were prepared by an intern from ADL during a brainstorming meeting set up by ADL, at which I was present, which occurred in July of 1999. I believe the notes represent the random thoughts that occurred at the meeting. There was never any discussion as to 'slipping' the budget through the Board. The December date appears to reference the date that the City Counsel passed the budget. Our expenditures, like all capital expenditures, were included as line items in the approved budget. Obviously, the author of the notes did not know the parties given the misspelling of their names, and did not fully understand some of the issues being discussed."

The Intervenors object to Mr. McCullough's answer based upon lack of foundation. See Tenn. R. Evid. 602(a). Although the witness states that he was

present at the meeting, he admits that he does not know who prepared the notes. Mr. McCullough's speculates about the author's level of familiarity with the parties and the subject matter, and, therefore, his opinion is not based upon personal knowledge. The Intervenors move to strike Mr. McCullough's testimony in response to the said question.

OBJECTION NUMBER 8: MLG&W asked its witness: "Has MLGW complied with the provisions of TCA § 7-52-402-405?" (Rebuttal Testimony of John McCullough, p. 10.) A: "With respect to TCA § 7-52-402, MLGW is not providing the services directly. MLGW has formed a Telecommunications Division within the Electric Division in order to separate and allocate costs attributable to its investment in Memphis Networx, telecommunications joint venture. As stated earlier, we have obtained approval from the comptroller from an interdivisional loan, however no funds have been advanced under the loan as we are awaiting TRA approval. With respect to TCA § 7-52-403(b), as indicated above, MLGW is not providing the service directly. However, it is my understanding that Memphis Networx does not plan to provide communication services in the territories of incumbent local exchange carriers with less than 100,000 access lines, except as may be allowed by state or federal law. With respect to TCA § 7-52-404-tax equivalent payments, payments will be based upon revenues that we receive from our ownership interest in Memphis Networx. Again, MLGW is not providing the services directly. MLGW will continue to comply with Tennessee statutes that proscribe transfers from municipal utilities to the city for in-lieu-of-tax payments. Memphis Networx will pay all applicable franchise fees. With respect to TCA § 7-

52-405, MLGW will charge Memphis Networx the highest rate it charges to any person or entity for a comparable pole attachment. MLGW will also charge Memphis Networx any applicable rights-of-ways fees, charges or payments required by state or local law that it would charge to any other company. Consequently, MLGW has complied with and/or will comply with TCA § 7-52-402-405 as situations arise that require compliance."

The Intervenors object to the question and the testimony in response thereto, on grounds that it requires a legal conclusion. A witness such as Mr. McCullough is not permitted to draw conclusions of law when testifying. See Tenn. R. Evid. 701 and 702. In this docket, the TRA is examining whether the Applicant and Joint Petitioners have and/or will comply with TCA §§ 7-52-402 - 405. Their compliance is a determination to be made solely by the Directors of the TRA. It is the Authority's role to consider the facts properly admitted into the record and to decide, as a matter of law, whether the Applicant and Joint Petitioners' actions have, and will continue to, comply with the subject sections of the Code. Thus, it is impermissible for McCullough to state the legal conclusion that MLG&W has complied with all applicable law. Accordingly, the Intervenors move to strike the question and all testimony in response thereto, based upon the stated objection.

OBJECTION NUMBER 9: MLG&W asked its witness: "What conditions, rules and/or reporting requirements, if any, are necessary to insure compliance by MLGW and Memphis Networx with the provisions of TCA § 7-52-402-405?" (Rebuttal Testimony of John McCullough, p. 11.) A: "I do not believe that any

condition rules or reporting requirements are necessary to insure compliance by MLGW and Memphis Networx with the provisions of TCA § 7-52-402-405. I am not a lawyer, however, it is my understanding that some of these provisions are not within the TRA's jurisdiction to enforce. For example, the comptroller must approve our interdivisional loan and we have to make tax equivalent payments to the City of Memphis. In any event, regardless of the enforcing entity, these requirements are in Tennessee statutes and MLG&W intends to comply with the law. If we do not comply with provisions that the TRA has jurisdiction to enforce, this agency has the power to investigate, ask for voluntary compliance and/or issue a show-cause order. We think that this is sufficient to insure compliance."

The Intervenors move to strike the question and all testimony in response thereto, based upon the same grounds as stated in Objection No. 8.

OBJECTION NUMBER 10: MLG&W asked its witness: "What conditions, rules, or reporting requirements, if any, are necessary to insure applicant's and petitioners' compliance with the prohibition against anti-competitive practice provision of TCA § 7-52-103(d)?" (Rebuttal Testimony of John McCullough, p. 11-12.) A: "As stated above, TCA § 7-52-103(d) is the law. MLGW intends to comply with the law. To the extent that the TRA has regulatory authority over our compliance with the law, the TRA has the authority to do investigations and issue show-cause orders, etc., if they believe we are violating the law and order us to comply with it. We believe that is sufficient."

The Intervenors move to strike the question and all testimony in response thereto, based upon the same grounds as stated in Objection No. 8.

OBJECTION NUMBER 12: MLG&W asked its witness: "What conditions, rules or reporting requirements, if any, are necessary to insure Applicant's and Joint Petitioners' to comply, to extent applicable, with TCA § 65-5-208(c)?" (Rebuttal Testimony of John McCullough, p. 10.) A: "I am no lawyer, but I understand that there is some question about whether this provision is applicable to MLGW and Memphis Networx. If it is applicable to us, MLGW is already putting into place structure and practices that will safeguard against anti-competitive practices pursuant to TCA § 7-5-103(d) which should also satisfy TCA § 65-5-208(c). If more is required of use than that, and the TRA tells us what it is, then we will comply with it. Again, no condition, rules or reporting requirements are necessary because we intend to comply with the law and the TRA has the ability to investigate and order enforcement of the law."

The Intervenors move to strike the question and all testimony in response thereto, based upon the same grounds as stated in Objection No. 8.

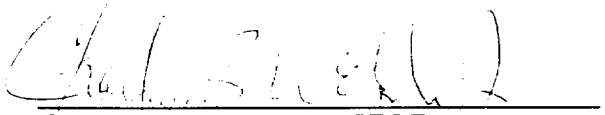
OBJECTION NUMBER 13: MLG&W asked its witness: "What measures has MLGW taken to prevent cross-subsidization of Memphis Networx?" (Rebuttal Testimony of John McCullough, p. 2.) A (in pertinent part): "We believe these safeguards are consistent with the safeguards approved by the TRA in The Chattanooga Electric Power Board Case (Docket No. 97-007488). Although I am not a lawyer, I understand that the FCC's Affiliate Transaction Rules (47 CFR § 32.27) and the structural separation provisions of 47 USC 272(d) [sic] are not applicable to MLGW and Memphis Networx, I have been advised that Exhibit A is consistent with the spirit of those provisions."

The response, as evidenced by the witnesses' qualifying remarks, represents rank heresay without any mention of its source. This is the type of hearsay, which is not admissible in a proceeding being conducted pursuant to the Uniform Administrative Act. Tenn. Code Ann. § 65-2-109 prohibits the TRA from admitting and give probative effect to any evidence that would not be accepted by reasonably prudent persons in the conduct of their affairs. See Consumer Advocate Division v. Tennessee Regulatory Authority, 1998 Tenn. App. LEXIS 428 (opinion attached). Without knowing the source of Mr. McCullough's legal advice, the reasonably prudent person would not accept Mr. McCullough's statements.

The Intervenors move to strike the question and all testimony in response thereto, based upon the stated grounds, as well as the same grounds as stated in Objection No. 8.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN, BOBANGO & HELLEN, P.L.C.



Charles B. Welch, Jr., 5593
Jon F. Minkoff, 19836
Attorneys for Time Warner
Telecom of the Mid-South, L.P.,
Time Warner Communications of
the Mid-South, and the Tennessee
Cable Telecommunications Association
618 Church Street, Suite 300
Nashville, Tennessee 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing **OBJECTIONS TO THE REBUTTAL TESTIMONY OF JOHN MCCULLOUGH AND MOTION TO STRIKE** on the parties listed below, by depositing copy of same in the U.S. Mail, postage prepaid or by hand delivery, as designated below, this the 3rd day of April, 2000.

D. Billye Sanders, Esquire
Waller Lansden et al.
511 Union Street, Suite 2100
P.O. Box 198966
Nashville, TN 37219-8966
-Served via hand delivery

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Avenue, Suite 1600
P.O. Box 198602
Nashville, TN 37219-8062
-Served via U.S. mail

Guy M. Hicks, Esquire
BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, TN 37201-8062
-Served via U.S. mail

John Knox Walkup, Esquire
Wyatt, Tarrant & Combs
511 Union Street, Suite 1500
Nashville, TN 37219-1750
-Served via hand delivery

R. Dale Grimes, Esquire
Bass, Berry & Sims, P.L.C.
2700 First American Center
Nashville, TN 37238
-Served via U.S. mail

Charles B. Welch, Jr.

G:\JFM\Networx (99-00909)\objections to rebuttal testimony of McCullough.doc

*1998 Tenn. App. LEXIS 428, **

CONSUMER ADVOCATE DIVISION, Petitioner/Appellant, VS. TENNESSEE REGULATORY AUTHORITY; NASHVILLE GAS COMPANY, Respondents/Appellees.

Appeal No. 01-A-01-9708-BC-00391

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

1998 Tenn. App. LEXIS 428

July 1, 1998, Filed

PRIOR HISTORY: [*1]

APPEALED FROM THE TENNESSEE REGULATORY COMMISSION AT NASHVILLE. No. 96-00977.

DISPOSITION: AFFIRMED AND REMANDED.

CORE TERMS: customer, advertising, staff, rate increase, rate of return, contested case, hearing officer, hearsay, spread, ex parte, decatherm, external, users, block, written order, interruptible, industrial, intervenor, tailblock, conclusions of law, findings of fact, statutory scheme, public utility, establishment, notice, substantive issues, reasonably prudent, natural gas, investigator, complicated

COUNSEL: For Petitioner/Appellant: JOHN KNOX WALKUP, Attorney General & Reporter. L. VINCENT WILLIAMS, Assistant Attorney General, Nashville, Tennessee.

For Tennessee Regulatory Authority, Respondent/Appellee: H. EDWARD PHILLIPS, III, Tennessee Regulatory Authority, Nashville, Tennessee.

For Nashville Gas Company, Respondent/Appellee: T. G. PAPPAS, JOSEPH F. WELBORN III, Nashville, Tennessee. JERRY W. AMOS, Greensboro, North Carolina.

For Associated Valley Industries, Intervening Appellant: HENRY WALKER, Nashville, Tennessee.

JUDGES: BEN H. CANTRELL, JUDGE, CONCUR: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, WILLIAM C. KOCH, JR., JUDGE.

OPINIONBY: BEN H. CANTRELL

OPINION: OPINION

This petition under Rule 12, Tenn. R. App. Proc., to review a rate making order of the Tennessee Regulatory Authority presents a host of procedural and substantive issues. We affirm the agency order.

I.

On May 31, 1996 Nashville Gas Company (NGC) filed a petition before the Tennessee Public Service Commission requesting a general increase in its rates for natural gas service. The proposed [*2] rates would produce an increase of $ 9,257,633 in the company's revenue.

The Consumer Advocate Division (CAD) of the State Attorney General's office filed a notice of appearance on June 6, 1996 and Associated Valley Industries (AVI), a coalition of industrial users of natural gas, entered the fray on August 20, 1996.

The Public Service Commission was replaced on July 1, 1996 by the Tennessee Regulatory Authority (TRA), a new agency created by the legislature. By an administrative order, TRA laid down the procedure by which it would accept jurisdiction of matters previously filed before the Public Service Commission, and the parties successfully navigated the uncharted waters of the TRA to get the case ready for a final hearing on November 13, 1996.

At a scheduled conference on December 17, 1996, the TRA orally approved a general rate increase for NGC, effective January 1, 1997, that would produce approximately $ 4,400,000 in new revenue. When a final order had not been filed by December 31, 1996, NGC began charging the rates orally approved at the conference on December 17. On February 19, 1997 TRA filed its written order adopting the oral findings of December 17, 1996. The order [*3] allowed the increased rates "for service rendered on and after January 1, 1997."

II. The Procedural Issues

a.

Was the TRA required to appoint an administrative law judge or hearing officer to conduct the hearing?

The Tennessee Administrative Procedures Act provides that a contested case hearing shall be conducted (1) in the presence of the agency members and an administrative judge or hearing officer or (2) by an administrative judge or hearing officer alone. Tenn. Code Ann. § 4-5-301 (a). The CAD asserts that the TRA's order in this case is void because the agency did not follow the mandate of this statute.

The TRA, however, is also governed by an elaborate set of procedural statutes. *See* Tenn. Code Ann § 65-2-101, et seq. Tenn. Code Ann. § 65-2-111 provides that the TRA may direct that contested case proceedings be heard by a hearing examiner, and we held in *Jackson Mobilphone Co. v Tennessee Public Service Comm.*, 876 S.W.2d 106 (Tenn. App. 1994), that the TRA's predecessor, the Public Service Commission, could conduct a contested case hearing itself or appoint a hearing officer. We think that decision is still good law and that it applies [*4] to the TRA.

b.

Did the TRA staff conduct its own investigation and improperly convey ex parte information to the TRA?

The CAD argues that the TRA violated two sections of the **UAPA** in the proceeding below: (1) the section prohibiting a person who has served as an investigator, prosecutor, or advocate in a contested case from serving as an administrative judge or hearing officer in the same proceeding, Tenn. Code Ann. § 4-5-303; and (2) the section prohibiting ex parte communications during a contested case proceeding, Tenn. Code Ann. § 4-5-304.

As to the first contention, there is nothing in the record that supports it. The Regulatory Authority members sat as a unit to hear the proof in the hearing below. We have held that they were entitled to do so. There is no proof that any of them had served as an investigator, prosecutor, or advocate in the same proceeding.

As to the second contention, it is based on the CAD's suspicion that members of the TRA staff had taken part in an investigation of NGC, had prepared a report for the Authority, and had, in fact, continued to communicate with NGC and relay that information to the Authority

members.

At the beginning of [*5] the hearing the Consumer Advocate moved to discover what he described as a report from the staff that augmented or boosted the position of one party or the other. He admitted that he did not know that such a report existed but that he believed it did, because of the past practice before the Public Service Commission.

The Authority chairman moved to deny the motion with the following explanation:

> I believe that as a director I have a right to have privileged communication with a member of my staff for the purpose of understanding issues and analyzing the evidence in the many complicated proceedings that this Agency has to hear. I reject your allegation that I have abdicated my responsibility as a decision maker. I rely on my staff expertise as the law permits me to do so. Therefore, I move that your motion be denied.

The Agency members unanimously denied the CAD's motion.

On this part of the controversy we are persuaded that the TRA was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to [*6] fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA. *See* Tenn. Code Ann. § 4-5-304(b). Otherwise, all support staff -- law clerks, court clerks, and other specialists -- would be of little service to the person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it.

The other part of the CAD's contention is more troubling. It contains an assertion that members of the TRA staff were passing along to the TRA evidence received from NGC. We would all agree that such ex parte communications are prohibited. *See* Tenn. Code Ann. § 4-5-304(a) and (c).

In support of his contention Consumer Advocate called the manager of the utility rate division who testified that he did an investigation of NGC under an audit. At that point the parties engaged in a general discussion about the Authority's prior ruling that the staff members' advice could not be discovered. A question about whether his advice was based on anything [*7] other than the facts in the record was excluded after an off-the-record discussion, and the witness was asked only one other question. He answered "yes" when asked if he had talked with the company or company officials since the time of the audit. There were no questions bearing on the nature of the conversations, or whether the witness received or disseminated any information pertinent to the NGC proceeding.

We cannot find on the basis of the evidence in this record that the Agency received any ex parte communications that were prejudicial to the CAD's position. We would add only one further point: that administrative agencies should ensure compliance with the Administrative Procedures Act.

c.

Did NGC unlawfully put its new rates into effect on January 1, 1997?

The CAD argues that since no written order had been entered allowing the rate increase, NGC had no authority to start charging the increased rates, and the TRA's February order

amounted to retroactive ratemaking.

The TRA has the power to fix just and reasonable rates "which shall be imposed, observed, and followed thereafter" by any public utility. Tenn. Code Ann. § 65-5-201. But the statutory scheme -- which [*8] is the same as it was during the existence of the Public Service Commission -- recognizes that a public utility may set its own rates, subject to the power given to the TRA to determine if they are just and reasonable. Tenn. Code Ann. § 65-5-203 (a). *See* Consumer Advocate Division v. Bissell, 1996 Tenn. App. LEXIS 528, No. 01-A-01-9601-BC-00049 (Tenn. App., Nashville, Aug. 26, 1996). The increased rates may be suspended for an outside limit of nine months while the TRA conducts its investigation, *id.*, but after six months the utility may, upon notice to TRA, place the increased rates into effect. Tenn. Code Ann. § 65-5-203(b)(1). The authority may require a bond in the amount of the proposed annual increase. *Id.*

In this case, NGC filed its petition on May 31, 1996. Because the Public Service Commission was replaced by the TRA on July 1, 1996, NGC refiled the petition on July 29, 1996. The CAD argues that the petition, therefore, had not been pending for the six months period that would allow NGC to put the rates into effect.

Under the circumstances of this case, however, we think that argument exalts form over substance. The TRA had heard the proof, and in an open meeting had announced its [*9] decision to allow part of the rate increase to go into effect on January 1, 1997. While a written order had not been entered, NGC notified the TRA that it would put the approved rates into effect on the date specified in the TRA's oral decision.

In our view, the increased rates had been pending since May. The hiatus between May and July was caused by a massive overhaul of the state regulatory machinery, and that fact cannot be attributed to NGC. So, under the statutory scheme, NGC had the power to put the approved rates into effect on January 1, 1997.

In addition, Tenn. Code Ann. § 65-2-112 says "Every final decision or order rendered by the authority in a contested case shall be in writing, or stated in the record . . . ." NGC could have used the TRA's oral decision as the basis for its action of putting the rates into effect. The decision had been "stated in the record" on December 17, 1996. We add this caveat, however. The statute goes on to say that either a written or oral decision "shall contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based." We do not express an opinion on whether the December 17 oral decision [*10] complies with that mandate. But we do agree that findings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. *See* Levy v. State Bd. of Examiners for Speech Pathology & Audiology, 553 S.W.2d 909 (Tenn. 1977).

III. The Substantive Issues

a. Hearsay

The CAD argues that some of the evidence offered by NGC's expert on the projected increase in company expenses was based on rank **hearsay**. We notice, however, that Tenn. Code Ann. § 65-2-109 allows TRA to admit and give probative effect to any evidence that would be accepted by reasonably prudent persons in the conduct of their affairs. The same statute relieves the TRA from the rules of evidence that would apply in a court proceeding.

The CAD does not address the question of whether the evidence it calls **hearsay** is, nevertheless, of the kind that would be relied on by reasonably prudent persons in the conduct of their affairs. NGC argues that the evidence was not **hearsay** because it was based on the company records that are kept in the ordinary course of business. *See* Tenn. R. Evid. 801, 803(6). We need not decide whether the proffered evidence [*11] was **hearsay**

because we are satisfied that the evidence was reliable and could be considered by the TRA. The TRA heard the objections to the evidence and the CAD's argument that its evidence on the same subject should have been received. The TRA chose NGC's evidence as more reliable. We find no fault with the TRA's decision on this issue.

b. Advertising

This is an issue on which the briefs of the principal parties seem to be speaking different languages. The following explanation is the best we can glean from the record. In 1984 the Public Service Commission adopted a rule that disallowed as a recoverable expense by a utility any "promotional or political advertising." The prohibition covered advertising for the purpose of encouraging any person to select or use gas service or additional gas service. It did not cover (among other things) advertising informing customers how to conserve energy or to reduce peak demand for gas, or advertising promoting the use of energy efficient appliances. *See* former Rule 1220-4-5-.45, Tenn. Regis.

In a 1985 proceeding involving a rate increase application by NGC, the Commission deviated from the rule and allowed advertising expenses up [*12] to .5% of revenues. In March of 1996 the Commission repealed 1220-4-5-.45 and proposed a new rule that would allow a utility to recover "all prudently incurred expenditures for advertising." Apparently the rule had not made it completely through the adoption procedure when the TRA heard this case below.

Nevertheless, based on proof of $ 1,486,000 in external advertising expenses, $ 800,000 in marketing personnel payroll and $ 300,000 in miscellaneous sales expenses, the TRA allowed the recovery of all but approximately half of the external advertising expenses. The CAD urged disallowance of all the related expenses except approximately $ 647,000 and NGC claims that the TRA erred in reducing the external operating expenses because there was no proof that they were imprudently incurred.

We think the TRA was justified in its conclusion on this issue. Based on the testimony in the record that the advertising expenses were incurred to meet competition, to add new customers on existing mains, and to get existing customers to use more gas, the TRA concluded that the rate payers benefited from at least part of the external advertising.

c. The Long Term Incentive Plan

The TRA [*13] allowed NGC to recover approximately one-half of the cost of its Long Term Incentive Plan. The CAD opposes the allowance of any of this expense on the basis that the plan encourages executives to seek growth through rate increases instead of through performance gains. According to the CAD, the plan does not promote improved service.

NGC offered evidence, however, that the plan had increased employee efficiency and had reduced the number of company employees per customer in Tennessee. The savings amounted to $ 7 million annually in wages and salaries. The same witness rebutted the CAD witness who testified that the plan encourages employees to seek rate increases rather than improved efficiency.

None of the parties to the appeal cited any authority governing the allowance of incentive payments in utility rate cases. The proof included some references to cases in other jurisdictions where that state's utility commission had allowed either 100% of the incentive payments or some fraction thereof. The consensus seems to be to look at each plan on a case by case basis and view each plan in the context of the utility's total compensation package.

We do not think the TRA erred in the treatment [*14] of the long term incentive plan in this case.

among various customer classes is quite another.

599 S.W.2d at 542.

* * *

Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence [*17] and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test -- nothing more, nothing less.

599 S.W.2d at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design -- on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE

Source: All Sources : States Legal - U.S. : Tennessee : **TN Federal and State Cases**
Terms: **uapa and hearsay** (Edit Search)
View: Full
Date/Time: Monday, April 3, 2000 - 1:58 PM EDT

d. Rate of Return

NGC requested a rate of return on equity in the range of 13% to 13.25%. The CAD requested an 11% rate of return and offered expert testimony showing that monthly compounding of the company's income would raise the rate of return to 11.60%. The TRA set a rate of return of 11.5%.

We fail to see how either side could make much of a case on appeal. The TRA's findings and conclusions are supported by evidence in the record that is both substantial and material. *See* Tenn. Code Ann. § 4-5-322(h). A proper rate of return is not a point on a scale, *Tennessee Cable Television Ass'n v. PSC*, 844 S.W.2d 151 (Tenn. App. 1992), it covers a fairly broad range, as indicated by the testimony of the competing experts in this case. We affirm the TRA's decision on this point.

We take no position on the issue of the compounding effect of the company's receipts. It is a concept that is new to us in utility regulation, and its merits need to be explored more thoroughly than they have been in this record.

IV. The Rate Design

The intervenor, AVI, challenges the part of the TRA's order that raised the "tailblock" rate [*15] for gas supplied to NGC's largest interruptible customers. The tailblock rate is the lowest rate charged per unit and it applies to usage of over 9,000 decatherms per month. n1 NGC's petition did not seek any increase in the rates falling in this category. The CAD's proof proposed that any changes be spread to all customer classes, but the intervenor sought an overall rate decrease. AVI's witness testified that industrial rates were set well above costs and should not be increased The TRA's order increased the tailblock rate from $ 0.21 per decatherm to $ 0.228 per decatherm. The TRA said in its order:

> After careful consideration of the testimony and exhibits of the parties, the Authority finds that the rate increase approved herein should be spread equally to all customers. It is the intent of the Authority to spread this increase to all ratepayers, including interruptible Sales customers, Transportation customers, and Special Contract customers, in order to minimize the overall impact of this rate change. In addition, the Authority concludes that the residential customer charge should be increased from $ 6.00 per month to $ 7.00 per month.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 There are three other blocks in the interruptible industrial category of users. Block one applies to usage of 1-1,500 decatherms per month; block two covers the 1,501-4,000 category; and block three applies to the 4,001-9,000 category.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*16]

We think the question of whether to spread the rate increase to all classes of users was within the discretion of the TRA. In *CF Industries v. Tenn. Pub. Serv. Comm.*, 599 S.W.2d 536 (1980), our Supreme Court said:

> Specifically, there is no requirement in any rate case that the Commission receive and consider cost of service data, or what such data, if in the record, are to be accorded exclusivity. It is self-evident that cost of service is of great significance in the establishment of rates but is of lesser value in arriving at rate design. A fair rate of return to the regulated utility is one thing; the establishment of rates

among various customer classes is quite another.

599 S.W.2d at 542.

* * *

Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence [*17] and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test -- nothing more, nothing less.

599 S.W.2d at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design -- on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE