

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

**MAY 22, 2000**

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

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**PRE-HEARING OFFICER'S ORDER EXPANDING INTERVENTION  
OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 1288 AND GRANTING CONSUMER  
ADVOCATE DIVISION'S PETITION TO INTERVENE**

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This matter is before the Tennessee Regulatory Authority ("Authority") upon the Application of Memphis Networkx, LLC (the "Applicant") for a Certificate of Public Convenience and Necessity to provide intrastate intraLATA local exchange telecommunications services in Tennessee. In conjunction with the Application, Memphis Light, Gas & Water Division, a division of the City of Memphis and A&L Networks-Tennessee, LLC ("Joint Petitioners") seek approval of the Operating Agreement of Memphis Networkx, pursuant to Tenn. Code Ann. § 7-52-103(d). At a regularly scheduled Authority Conference held on December 20, 1999, the Authority appointed General Counsel or his designee to serve as Pre-Hearing Officer in this matter

to render decisions on petitions for intervention, to hear preliminary matters prior to the Hearing and to set a procedural schedule to completion. After numerous pre-hearing conferences and two continuances, the Hearing in this matter was scheduled to begin on May 1, 2000.

On May 1, 2000, the parties requested a postponement of the commencement of the Hearing to permit the parties to continue settlement negotiations. The Directors permitted the parties to use May 1 to finalize their settlement negotiations. On May 2, 2000, the Applicant and Joint Petitioners and Time Warner Communications of the Mid-South, Time Warner Telecom of the Mid-South, L.P., the Tennessee Cable Telecommunications Association and NEXTLINK Tennessee, Inc. filed a settlement agreement entitled "Amended Application of Memphis Networx, LLC," which was signed by each of these parties. Although they were not signatories to the agreement, BellSouth Telecommunications, Inc. and the TDS Telecom Companies did not oppose the agreement.

The International Brotherhood of Electrical Workers, Local 1288 (the "IBEW") was not a party to the settlement agreement. Counsel for the IBEW stated that there remained issues outstanding between the IBEW and the Applicant and Joint Petitioners. After hearing comments from the parties, the Authority postponed the Hearing in this docket and remanded this matter back to the Pre-Hearing Officer. The Pre-Hearing Officer was directed to conduct a Status Conference for the purpose of: establishing a new procedural schedule; determining the current positions of the parties; and developing a framework for determining whether Authority Staff should assume the role of a party in

this action in order to present evidence and cross-examine witnesses on issues that were no longer supported by the Intervenor.

A Status Conference was convened on May 2, 2000 during which the parties presented their respective positions, in light of the "Amended Application," as to what the Intervenor's continued role would be relative to the Hearing. The Pre-Hearing Officer developed a procedural schedule to permit the parties to file an explanation of the "Amended Application" and its impact on the issues in this matter as well as to permit Authority Staff to obtain additional information from the Applicant and Joint Petitioners relative to the "Amended Application."

#### **IBEW's Request for Expanded Participation**

During the May 2, 2000 Status Conference, the Counsel for IBEW requested that, in light of continuance of the Hearing, the IBEW's role as an intervenor be expanded to permit it to present live witness testimony at the Hearing. Counsel for IBEW requested that he be allowed to call two witnesses from the IBEW in addition to conducting cross-examination of Alex Lowe and, perhaps, move deposition testimony into the record. Counsel for the IBEW stated such testimony would permit the IBEW to present evidence on issues approved by the Authority and issues specific to the IBEW.

On May 12, 2000, the Applicant and Joint Petitioners filed a request not to expand IBEW's role as an intervenor. The Applicant and the Joint Petitioners argue that because of its late intervention, the IBEW should not be permitted to expand the scope of this proceeding beyond the original issues approved by the Authority. The Applicant and the Joint Petitioners further argued that the limitations on the IBEW's participation to an opening statement and cross-examination of witnesses is sufficient to allow the IBEW to

present its case. On May 17, 2000, the IBEW responded to the arguments of the Applicant and the Joint Petitioners. In that response, the IBEW argued that it should be permitted to participate fully by presenting additional witnesses, conducting cross-examination of scheduled witnesses and addressing the original issues together with those issues raised in its Petition to Intervene.

The IBEW filed its Petition to Intervene on April 4, 2000. At a Pre-Hearing Conference held on April 5, 2000, the Pre-Hearing Officer granted the IBEW's petition and set forth limitations on the IBEW's participation based upon the proximity of the filing to the Hearing date of April 13 and 14. After reviewing filings by the IBEW and the Applicant and Joint Petitioners concerning the scope of the IBEW's cross-examination, the Pre-Hearing Officer entered an Order on April 27, 2000 setting forth the parameters of the IBEW's cross-examination of witnesses on specific issues. The granting of the IBEW's intervention and the limitations placed upon the IBEW's participation in the Hearing was governed by the procedural schedule, the list of issues and the hearing dates in place at the time the intervention was granted. Furthermore, other intervenors had identified via pre-filed testimony specific areas of regulatory concern created by the Application and Operating Agreement, and had asserted that they would be cross-examining certain witnesses of the Applicant and Joint Petitioners during their case regarding those areas of concern. At the May 2, 2000 Status Conference, those intervenors revealed that they would probably not be calling witnesses during the Hearing to address those areas of regulatory concern.

The Pre-Hearing Officer is of the opinion that the posture of this case has been altered significantly by the filing of the "Amended Application" and by the change of

position of certain intervenors concerning the areas of concern. These changes alone warrant expanding the role of the IBEW in the Hearing and therefore, the Pre-Hearing Officer grants the IBEW's request for expanded participation. Nevertheless, the Pre-Hearing Officer determines that it is not necessary for the IBEW to call more than one (1) witness from the IBEW to present direct testimony on its behalf during the Hearing. The IBEW shall file the pre-filed testimony of that witness no later than **2:00 p.m. on Tuesday, May 30, 2000**. The IBEW shall be permitted to file that testimony by facsimile copy, provided that all other parties to this action are likewise served on **May 30** by way of facsimile copy. In the event that the Applicant and/or Joint Petitioners desire to file testimony in rebuttal to the testimony of the IBEW, the Applicant and Joint Petitioners shall file such rebuttal testimony no later than **2:00 p.m., Tuesday, June 6, 2000**.

In addition thereto, the IBEW may call, for the purposes of direct or cross-examination, any witness previously listed by party. The scope of such cross-examination shall be as set forth in the Pre-Hearing Officer's Order of April 27, 2000. The IBEW shall file a list of the names of any previously listed witnesses it desires to cross-examine during the Hearing no later than **2:00 p.m. Friday, June 9, 2000**.

#### **Consumer Advocate Division's Petition to Intervene**

On May 5, 2000, the Consumer Advocate Division of the Office of the Attorney General ("Consumer Advocate") filed a Petition to Intervene in this docket. The Pre-Hearing Officer gave notice on May 11, 2000 to the parties to file objections or comments to the Consumer Advocate's Petition no later than May 16, 2000. The Applicant and Joint Petitioners filed a response to the Consumer Advocate's Petition on

May 12, 2000, stating that any intervention that would delay the proceeding, change the list of issues, or modify the protective order would not serve the interests of justice and would impair the orderly and prompt conduct of the proceedings. The Applicant and Joint Petitioners therefore requested that, if granted, the Consumer Advocate's intervention should be conditioned upon the Consumer Advocate being limited in participation to the previously developed issues list and protective order. No other party has filed a response or opposition to the Consumer Advocate's Petition to Intervene.

**Criteria for Permitting Intervention**

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

The Pre-Hearing Officer finds that the Consumer Advocate's Petition is timely filed and has been properly served; substantiates that the legal interests of the intervenor may be determined in this matter; and demonstrates that the interests of justice and the orderly and prompt conduct of this matter would not be impaired by allowing the intervention.

### **Criteria for Limiting Intervention**

Tenn. Code Ann. § 4-5-310(c) provides:

(c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Such conditions may include:

- (1) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
- (2) limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
- (3) requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

Due to the time of the filing of the Petition to Intervene, the Pre-Hearing Officer concludes that the participation of the Consumer Advocate should be limited pursuant to Tenn. Code Ann. § 4-5-310(c). Because extensive discovery has already been conducted in this matter, the Consumer Advocate will not be permitted to initiate discovery in this proceeding unless additional discovery is propounded by other parties. The Consumer Advocate may present evidence during the Hearing through the following methods: (1) the Consumer Advocate may present the direct testimony of one (1) witness on its behalf during the Hearing; (2) the Consumer Advocate may conduct cross-examination of any witnesses called by any party during the Hearing; and (3) Consumer Advocate may call for the purposes of direct or cross-examination any witness previously listed by a party. If the Consumer Advocate desires to present witness testimony during the Hearing under method (1) outlined above, as a condition thereto, the Consumer Advocate shall file the pre-filed testimony of such witness with the Authority no later than **2:00 p.m. on**

**Tuesday, May 30, 2000.** Copies of such pre-filed testimony must be served on all parties no later than **Tuesday, May 30, 2000.** The Applicant and Joint Petitioners shall file any testimony they desire to file in rebuttal to such testimony no later than **2:00 p.m. on Tuesday, June 6, 2000.** If the Consumer Advocate desires to call as a part of its case in chief any witnesses previously listed in this case, it must file a list of the names of those witnesses no later than **2:00 p.m. on Friday, June 9, 2000.**

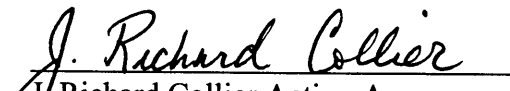
**IT IS THEREFORE ORDERED THAT:**

1. The role of the International Brotherhood of Electrical Workers, Local 1288, as an Intervenor in this proceeding, is expanded to include the presentation of live testimony at the Hearing from one (1) witness on behalf of the IBEW and the cross-examination of any witnesses previously listed by the parties in this matter as set forth in this Order. The IBEW shall comply with the filing requirements in this regard as set forth in this Order;
2. The Consumer Advocate Division is hereby given leave to intervene and participate in this proceeding as its interests may appear and receive copies of any notices, orders or other documents herein. The Consumer Advocate's participation shall be governed by the issues list and protective order as developed in this proceeding and is limited as set forth in this Order pursuant to Tenn. Code Ann. § 4-5-310(c). The Consumer Advocate shall be permitted to present live testimony from one (1) witness on its behalf during the Hearing and to cross-examine all witnesses called during the Hearing and any witnesses previously listed by the parties in this matter. The Consumer




Advocate shall comply with the filing requirements in this regard as set forth in this Order;

3. If the Applicant or Joint Petitioners desire to file testimony in rebuttal to the pre-filed testimony of the IBEW or the Consumer Advocate, they shall file their rebuttal testimony no later than **2:00 p.m. on Tuesday, June 6, 2000;**
4. If the IBEW or the Consumer Advocate intend to call, for the purposes of direct or cross-examination, any witness previously listed by a party, it shall file a list of the names of those witnesses no later than **2:00 p.m. on Friday, June 9, 2000;** and
5. Any party aggrieved by the decision of the Pre-Hearing Officer in this matter may file a Petition for Reconsideration with the Pre-Hearing Officer or a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days of the date of this Order.

  
J. Richard Collier Acting As  
Pre-Hearing Officer

ATTEST:

  
K. David Waddell, Executive Secretary