

**IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE**

---

TENNESSEE CABLE	)	
TELECOMMUNICATIONS	)	
ASSOCIATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DOCKET NO. 07-2145-III
	)	
ELECTRIC POWER BOARD OF	)	
CHATTANOOGA,	)	
	)	
Defendant.	)	
	)	

---

**DEFENDANT ELECTRIC POWER BOARD OF CHATTANOOGA'S  
MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

---

Pursuant to Tennessee Rule of Civil Procedure 26.03, Defendant Electric Power Board of Chattanooga (“EPB”) hereby submits its Memorandum in Support of Motion for Protective Order. EPB’s motion seeks an order quashing the discovery requests served by the Tennessee Cable Telecommunications Association (“TCTA”) on EPB<sup>1</sup> and prohibiting further discovery in this case. TCTA has asserted, and this Court has ruled, that TCTA’s only claim in this case is for review of the state Comptroller’s written analysis of EPB’s plan to provide cable and Internet services. Although TCTA has asserted only a claim under T.C.A. § 7-52-609, under the Court’s ruling, this case is an action for judicial review of the final decision of an administrative agency, and must be governed by the Tennessee Uniform Administrative Procedures Act (the “UAPA”). As such, the Court must confine itself to the agency record, in this case the record before the

---

<sup>1</sup> These discovery requests include the First Set of Interrogatories and Request for Production of Documents Submitted on Behalf of the TCTA, attached as Exhibit A to EPB’s Motion for Protective Order.

state Comptroller, and discovery is not permitted. In the alternative, because the Court currently has before it EPB's Motion for Judgment on the Pleadings Based Upon Ripeness, Failure to Exhaust Administrative Remedies, and Standing, which argues that this Court lacks jurisdiction to hear TCTA's claims, in the interests of justice, this Court should stay all discovery pending the final determination of that motion.

**I. FACTUAL AND PROCEDURAL BACKGROUND.**

TCTA's Complaint in this action concerns EPB's plan to begin providing cable television and Internet related services pursuant to the authorization contained in Tenn. Code Ann. § 7-52-601 *et seq.* (the "Cable Act"). Under the Cable Act, municipal electric systems which intend to provide cable and Internet related services must comply with various procedural requirements, including submitting a detailed business plan to the Office of the Comptroller of the Treasury of the State of Tennessee ("Comptroller") for the Comptroller's review and comment. Tenn. Code Ann. § 7-52-602. The Cable Act directs the Comptroller to "provide a written analysis of the feasibility of the proposed business plan" to the municipality within 60 days. *Id.* If the Comptroller does not provide the written analysis within 60 days, the municipality may proceed with the remaining procedural requirements, which include conducting a public hearing and obtaining approval of the municipal legislative body. *Id.*

Pursuant to the provisions of the Cable Act, on August 17, 2007, EPB submitted a Fiber Optic Broadband Business Plan to the Comptroller which set forth EPB's detailed business plan to provide cable and Internet services within "the EPB service area." (Complaint, ¶¶ 5-7, Ex. 1, p. 1.) EPB is in the process of building a fiber optic communications network for its electric system operations. This network is projected to generate substantial quantitative and qualitative benefits to EPB's electric system of nearly \$300 million. (Complaint, ¶ 7, Ex. 1, pp. 2-3.) EPB

also proposes to use the fiber network to provide cable television and high speed Internet access within its service area. *Id.* (Complaint, ¶ 7, Ex. 1, pp. 2-3.)

Pursuant to the provisions of Tenn. Code Ann. § 7-52-602, the Comptroller provided a written analysis of the feasibility of EPB's business plan to the Mayor of the City, Ron Littlefield, the Members of the City Council, and EPB by letter dated August 21, 2007.<sup>2</sup> (Complaint, ¶ 8, Ex. 2, p. 1.) Thereafter, on September 5, 2007, EPB conducted a public hearing on the provision of cable/Internet services as required by statute. (Complaint, ¶ 9.) On September 21, 2007, EPB held its regular monthly meeting and approved the Plan by Resolution 2007-19. (*Id.* ¶ 10.) On the same day, TCTA filed suit in this Court seeking a declaratory judgment that EPB has violated the Cable Act. (*Id.*, ¶ 24.)

TCTA does not dispute that EPB has complied with the all of the necessary procedural requirements of the Cable Act, including submitting its detailed business plan to the Comptroller. (*Id.* ¶¶ 5-8.) Rather, TCTA claims that EPB has violated the Cable Act because, in TCTA's view, EPB's plan "underestimates anticipated operating costs while over-estimating gross revenue." (*Id.* ¶ 18.) TCTA's theory is that EPB's cable and Internet operations will not produce sufficient revenue and, at some point in the future, EPB will "inevitably" choose to address this shortfall by violating the Cable Act's prohibition against subsidization of cable operations with electric system revenues. (Complaint, ¶ 20.)

TCTA has admitted, and this Court has found in its ruling, that the only claim upon which TCTA could proceed in this Court would be one for review of the Comptroller's written

---

<sup>2</sup> Contrary to Plaintiffs assertion, the Cable Act does not provide the Comptroller with "approval authority" over municipal utilities' cable/Internet service plans. Tenn. Code Ann. § 7-52-602 (the Comptroller simply provides "a written analysis of the feasibility of the proposed business plan to the chief legislative body of the municipality"). *See also* EPB's Motion for Reconsideration.

feasibility analysis of EPB's business plan. (TCTA Resp. to EPB's 10/26/07 Mot. to Dismiss, pp. 7-8; Court 1/8/08 Mem. Op. and Order, pp. 4-5.)

On February 22, 2008, EPB filed a Motion for Judgment on the Pleadings Based Upon Ripeness, Failure to Exhaust Administrative Remedies, and Standing. EPB's motion argues that EPB should be granted judgment on the pleadings and TCTA's Complaint should be dismissed as a matter of law for the following reasons: (i) TCTA has admitted, and this Court has found in its ruling, that TCTA's claim is one for review of the Comptroller's action in this case, which is subject to the UAPA. Because TCTA has failed to exhaust its administrative remedies under the UAPA, this Court lacks subject matter jurisdiction; (ii) TCTA's sole cause of action seeks to have this Court enter a ruling regarding a *speculated* illegality that *may* happen after the implementation of EPB's Plan, and therefore TCTA's claim is not ripe; and (iii) the Cable Act grants a right of action only to franchisees serving in the defendant municipality's service area. TCTA is not a franchisee, and cannot establish the necessary elements for representational standing. EPB's Motion for Judgment on the Pleadings will come before the Court for hearing on March 7, 2008.<sup>3</sup>

## II. LAW AND ARGUMENT

Tennessee Rule of Civil Procedure 26 sets forth the general rules governing the scope and limits of the use of discovery tools in civil actions in this State. Most relevant to the instant case is Rule 26.03, which provides for the entry of protective orders upon a showing of good cause. More specifically, Rule 26.03 provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance,

---

<sup>3</sup> On March 7, the Court will also hear EPB's Motion to Reconsider the Court's previous ruling as to venue.

embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had . . . .

The decision to issue and the scope of a protective order limiting case discovery lies within the sound discretion of the trial judge. *Brown v. Brown*, 863 S.W.2d 432 (Tenn. Ct. App. 1993). Upon exercise of that discretion, the Court may issue an order that the requested discovery not be had at all. Tenn. R. Civ. P. 26.03 (2006).

**A. Pursuant to the Provisions of the Uniform Administrative Procedures Act, This Court's Review is Limited to the Record Before the Comptroller.**

As this Court has previously ruled, and as TCTA has admitted, the sole claim asserted by TCTA seeks review of the actions taken by the Comptroller. (TCTA Resp. to EPB's 10/26/07 Mot. to Dismiss, pp. 7-8; Court 1/8/08 Mem. Op. and Order, pp. 4-5.) The Comptroller qualifies as an "agency" under the UAPA. Tenn. Code Ann. § 4-5-102 (defining "agency" as each state board, commission, committee, department, officer, or any other unit of state government authority or required by any statute or constitutional provision to make rules or determine contested cases); *United Inter-Mountain Tel. Co. v. Pub. Serv. Co.*, 555 S.W.2d 389, 391 (Tenn. 1977) (holding the legislative intent that the UAPA apply to all administrative boards and agencies is unmistakably clear). As such, all claims challenging the validity of the Comptroller's decisions must be brought pursuant to the UAPA. *See, e.g., Baptist Hosp. v. Tennessee Dept. of Health*, 982 S.W.3d 339, 341 (Tenn. 1998). The mandatory nature of the UAPA, and TCTA's refusal to avail itself of the administrative remedies provided therein, is just one of the reasons that TCTA's claims must fail, as is thoroughly discussed in EPB's Motion for Judgment on the Pleadings Based Upon Ripeness, Failure to Exhaust Administrative Remedies, and Standing. However, even without regard to the inherent flaws surrounding TCTA's claims, the applicability of the UAPA renders the discovery requests propounded by TCTA improper.

The UAPA sets forth limited statutory grounds for a court's reversal or modification of an agency's decision:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) (A) Unsupported by evidence that is both substantial and material in the light of the entire record . . . .

Tenn. Code Ann. § 4-5-322(h); *see also City of Memphis v. Civil Serv. Comm'n*, 216 S.W.3d 311, 316 (Tenn. 2007). However, a court's review of an agency's decision is not de novo, but rather **the court must confine itself to the record developed before the agency**. Tenn. Code Ann. § 4-5-322(g) ("The review shall be conducted by the court without a jury and shall be confined to the record."); *Metropolitan Government of Nashville & Davidson County v. Shack*, 554 S.W.2d 601, 604 ("It is clear from the language of the statute that the review provided in the chancery court is in no sense a broad, or de novo, review. **Review is confined to the record made before the agency . . . .**") (emphasis added). Such limited review is necessary to avoid a violation of the separation of powers mandated by the Tennessee Constitution. Tenn. Const. Art. II, § 2. The General Assembly has conferred the duty to review the municipal utility's business plan on the Comptroller, an agency with technical expertise in municipal finance. There is simply no indication in the Cable Act that any review of the Comptroller's action would involve de novo proceedings in Chancery Court. To do so would be to invite the Court to substitute its

judgment for that of the technical experts at the agency. Neither the Cable Act, the UAPA, nor the Tennessee Constitution envision such a scheme.

As such, it is clear that, even if this action may proceed despite TCTA's failure to exhaust administrative remedies, the Court's scope of review is limited to the record before the Comptroller. TCTA's discovery requests seek matters outside the scope of the record before the Comptroller, and are therefore not reasonably calculated to lead to the discovery of admissible evidence. As such, the discovery requests are improper and EPB's Motion for Protective Order should be granted.

**B. In the Alternative, TCTA's Discovery Requests Are Also Prohibited by Tenn. Code Ann. § 27-8-101.**

Even though TCTA's complaint contains no claim for relief by common law writ of certiorari, the only other conceivable basis for a challenge to the Comptroller's actions would be an action for common law writ of certiorari. As in the case of a challenge under the UAPA, the Court's review under an action for writ of certiorari is limited to the administrative record, and the discovery requests propounded by TCTA would clearly be improper in such an action.

Similar to the scope of review pursuant to the UAPA, courts performing review under writs of certiorari are limited to the record before the agency whose determination is being challenged. *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983) ("Generally, under common law certiorari, the scope of review is limited to the record to determine as a question of law whether there is any material evidence to support the agency's findings."); *Flautt & Mann v. Council of the City of Memphis*, No. W2004-01188-COA-R3-CV, 2005 Tenn. App. LEXIS 235, \*32 (April 22, 2005) ("[r]eview under the common law writ of certiorari is generally limited to the record made before the lower tribunal or board.")<sup>4</sup> "On the issue of whether material

---

<sup>4</sup> Pursuant to Local Rule 26.04(b), copies of each unreported Tennessee decision and all decisions from a court of

evidence exists to support the decision of the lower tribunal or board, the reviewing court is prohibited from receiving new or additional evidence.” *Flautt*, 2005 Tenn. App. LEXIS 235 at \*32-33. Because the discovery sought by TCTA goes beyond the scope of what may be properly considered pursuant to common law writ of certiorari, the requests are not reasonably calculated to lead to the discovery of admissible evidence, and EPB’s Motion for Protective Order should be granted.

**C. This Court Should Stay All Discovery Pending a Ruling on EPB’s Motion for Judgment on the Pleadings.**

Since EPB has filed a Motion for Judgment on the Pleadings Based Upon Ripeness, Failure to Exhaust Administrative Remedies, and Standing, which argues that this Court lacks jurisdiction to hear TCTA’s claims, in the interest of justice, this Court should prohibit any discovery from proceeding until such time as an order is entered for that Motion. It is obvious that, even if EPB’s Motion for Judgment on the pleadings was denied, the discovery sought by TCTA extends vastly beyond the narrow confines of the record before the Comptroller, who is not even a party in this case and seeks information that cannot possibly be relevant to the challenge to the Comptroller’s action on the record before him. In exercising its sound discretion regarding whether to grant a protective order, courts should not only consider the fact that the information sought cannot be relevant to a challenge to the Comptroller’s actions, but should also balance one party’s need for information (here nonexistent) against the burden that would be imposed upon a party required to respond to discovery seeing non-relevant information (here obviously large). There is no need for discovery in order to resolve EPB’s Motion for Judgment on the Pleadings, as the language of Tenn. R. Civil P. 12.03 prohibits consideration of matters outside the pleadings. *Id.* (“[i]f, on a motion for judgment on the pleadings, matters outside the

---

another state or federal jurisdiction are collectively attached hereto as Exhibit 1.

pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .”). On the other hand, the injury that would result to EPB should it be required to expend the time and resources necessary to respond to TCTA’s discovery requests in a case that should be dismissed on the pleadings is apparent and not insubstantial.

It is for this reason that courts in Tennessee have regularly stayed discovery pending the determination of a dispositive motion. *See, e.g., Simmons v. State Farm Gen. Ins. Co.*, No. W2003-02643-COA-R3-CV, 2004 WL 2715341, at \*5 (Tenn. Ct. App. Nov. 24, 2004) (affirming trial court’s order staying discovery pending resolution of motion for summary judgment); *Burton v. Hardwood Pallets, Inc.*, No. E2001-00547-COA-R3-CV, 2001 WL 1589162, at \*6 (Tenn. Ct. App. Dec. 13, 2001) (affirming trial court’s order staying discovery pending resolution of motion for summary judgment); *Cobb v. Wilson*, No. 02A01-9811-CV-00308, 1999 WL 1097847, at \*2 (Tenn. Ct. App. Oct. 6, 1999) (affirming trial court’s order staying discovery pending resolution of Rule 12.02(6) motion to dismiss and stating, “[w]hile [the requested] information might be of evidentiary value, such discovery has no effect on the sufficiency of the complaint”); *Sweatt v. Conley*, No. 01A-01-9706-CH-00247, 1997 WL 749482, at \*6 (Tenn. Ct. App. Dec. 5, 1997) (affirming trial court’s order staying discovery pending resolution of Rule 12.02(6) motion to dismiss because “[t]he holding was appropriate given the nature of the pending motion”).

As a result, even if this Court should find that TCTA’s requests for discovery are not prohibited by either the UAPA or Tenn. Code Ann. § 27-8-101, EPB should not be required to respond to those discovery requests until this Court rules upon EPB’s Motion for Judgment on the Pleadings.

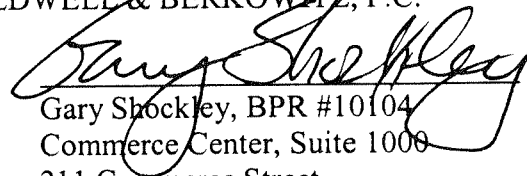
## CONCLUSION

For the foregoing reasons, EPB should be granted a protective order prohibiting TCTA from seeking discovery in this case. In the alternative, this Court should enter a protective order prohibiting discovery until such time as a ruling upon EPB's Motion for Judgment on the Pleadings Based Upon Ripeness, Failure to Exhaust Administrative Remedies, and Standing is entered.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, P.C.

By:



Gary Shockley, BPR #10104  
Commerce Center, Suite 1000  
211 Commerce Street  
Nashville, TN 37201  
(615) 744-5704  
(615) 726-5704 Facsimile

Joe A. Conner, BPR #012031  
Misty Smith Kelley, BPR #019450  
John M. Phillips, BPR #021639  
1800 Republic Centre  
633 Chestnut Street  
Chattanooga, TN 37450-1800  
(423) 752-4417  
(423) 752-9549 Facsimile

CHAMBLISS, BAHNER & STOPHEL, P.C.  
Frederick L. Hitchcock, BPR #005960  
T. Maxfield Bahner, BPR #001150  
William R. Hannah, BPR #016722  
Two Union Square, Suite 1000  
Chattanooga, TN 37402  
(423) 757-0222  
(423) 508-1222 Facsimile

*Attorneys for Defendant Electric Power Board of  
Chattanooga*

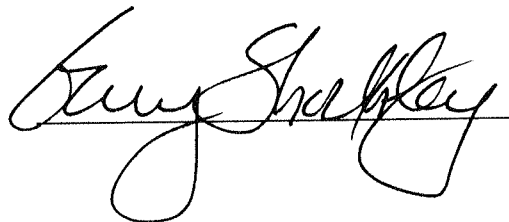
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following counsel for the parties in interest herein by hand delivery:

John M. Farris  
Charles B. Welch, Jr.  
James R. Hollin  
FARRIS MATHEWS BRANAN BOBANGO HELLEN & DUNLAP,  
P.L.C.  
618 Church Street, Suite 300  
Nashville, TN 37219

Mike Stewart  
WALLER LANSDEN DORTCH & DAVIS, LLP  
2700 Nashville City Center  
511 Union Street  
Nashville, TN 37219

This 3rd day of March, 2008.

A handwritten signature in cursive script, appearing to read "Amy Shelby", written over a horizontal line.