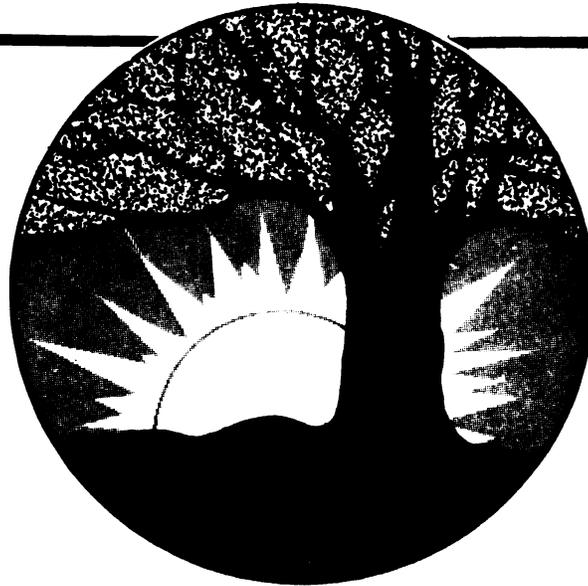


PERFORMANCE AUDIT

Tennessee Regulatory Authority

August 2007



John G. Morgan
Comptroller of the Treasury



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John G. Morgan
Comptroller

August 30, 2007

The Honorable Ron Ramsey
Speaker of the Senate
The Honorable Jimmy Naifeh
Speaker of the House of Representatives
The Honorable Thelma M. Harper, Chair
Senate Committee on Government Operations
The Honorable Mike Kernell, Chair
House Committee on Government Operations
and
Members of the General Assembly
State Capitol
Nashville, Tennessee 37243

Ladies and Gentlemen:

Transmitted herewith is the performance audit of the Tennessee Regulatory Authority. This audit was conducted pursuant to the requirements of Section 4-29-111, *Tennessee Code Annotated*, the Tennessee Governmental Entity Review Law.

This report is intended to aid the Joint Government Operations Committee in its review to determine whether the authority should be continued, restructured, or terminated.

Sincerely,

John G. Morgan
Comptroller of the Treasury

JGM/dlj
06-025

State of Tennessee

Audit Highlights

Comptroller of the Treasury

Division of State Audit

Performance Audit
Tennessee Regulatory Authority
August 2007

AUDIT OBJECTIVES

The objectives of the audit were to determine the impact of statutory organizational changes mandated since the prior performance audit; to determine the authority's progress in addressing the prior performance audit finding regarding the timely issuance of final orders; to determine the authority's process for addressing contested case requests; to evaluate the system for distributing CapTel equipment and any policies and procedures associated with this program; to summarize and assess information documenting the authority's compliance with the requirements of Title VI of the Civil Rights Act of 1964; and to recommend possible alternatives for legislative or administrative action that might result in more efficient and effective operation of the authority.

FINDINGS

The TRA Has Improved Its Timeliness in Publishing Written Final Orders

At authority conferences, the directors of the Tennessee Regulatory Authority make decisions regarding a variety of issues related to utility regulation. The decision of the directors is effective on the date it is made, but the written order is the final and conclusive stage of the process. Until the written order is issued, the docket cannot be closed, the order cannot be appealed, and the hearing process is not over. The March 2002 performance audit found that the Tennessee Regulatory Authority was not issuing orders in a timely manner following director action. A review during the current audit found that the TRA's timeliness has improved since the last audit, with the average number of days between director action and final order publication declining for each fiscal year reviewed (page 12).

Tennessee's Civil Penalty Limits for Gas Pipeline Violations Should Be Increased to Reflect the U.S. Office of Pipeline Safety's Requirements

While the federal government is primarily responsible for developing, issuing, and enforcing pipeline safety regulations, the federal pipeline safety statutes provide for states to assume the intrastate regulatory, inspection, and enforcement responsibilities, under an annual certification. To qualify for certification, a state must adopt the minimum federal regulations, and may adopt additional or more stringent regulations as long as they are not incompatible with federal regulations. A state must also provide for injunctive and monetary sanctions substantially the same as those authorized by the federal pipeline safety statutes. Currently, Tennessee's civil penalties are substantially below federal penalties for pipeline safety

violations. The most recent U.S. Department of Transportation (USDOT) evaluation of Tennessee's gas pipeline safety program was conducted October 11, 2005, and covered the program period January 1, 2004, through December 31, 2004. The evaluation, which was very positive overall, stated that Tennessee's Underground Utility Damage Prevention legislation needed to be further improved by the adoption of injunctive relief and civil penalties substantially the same as provided for in the federal requirements (page 14).

The General Assembly May Wish to Consider Reassessing the Organizational Structure of the TRA

As a result of legislation passed in 2002, a fourth director was added to the Tennessee Regulatory Authority. To offset the cost of the new director's salary, this legislation abolished the executive secretary position and transferred the duties of that position, which included supervising and hiring administrative staff of the agency, to the sitting chairman. This change in organizational structure may have had unintended negative effects. Based on discussions with staff, this organizational change has caused confusion, frustration, and communication problems. Because the chairmanship of the TRA changes annually, the focus or agenda of the authority may also change annually. Staff must readjust each year to a new management style, which could result in changing job priorities, fears concerning job security, and concerns that work prepared in response to a request from one director may not align with the goals of the current chairman. If staff are focused on the chairman's reaction and the effect on their jobs, they may be hampered in providing the technical expertise and unbiased, objective work products needed to aid the TRA directors in their decision making. In addition to the effect on staff, the chairman must begin dealing with personnel issues, which may detract from time needed to focus on decisions affecting consumers and entities regulated by the TRA (page 15).

Current Rules and Regulations and Policies and Procedures for the TDAP/CapTel Program Need Revision

The Tennessee Regulatory Authority's current practice when distributing TDAP/CapTel equipment is not consistent with its rules and regulations regarding the processing of applications. According to TRA Rule 1220-4-10-.04(2), one eligibility requirement for applicants to receive assistive telecommunications equipment is having "a significant hearing, hearing and visual, or speech impairment, as verified by a physician licensed to practice in Tennessee." However, the application form for receiving assistive telecommunications equipment states that an applicant's eligibility must be certified by a Tennessee-licensed medical provider, such as a doctor, nurse, audiologist, speech pathologist, etc. Certifications can also be completed by a licensed social worker, rehabilitation counselor, or assistive center director. Therefore, in addition to allowing verification by licensed medical providers other than physicians, the application also allows verification by individuals who may or may not be qualified to examine applicants and deliver a diagnosis of their condition. An auditor review of 50 randomly selected files found that only 28% (14 of 50) of those certifications were made by physicians (page 17).

The Law Prohibiting Conflict-of-Interest Disclosures by Career Service Employees Needs Reassessment

The current law that prohibits state agencies from requiring financial and conflict-of-interest disclosures by career service employees appears inconsistent with an Executive Order issued by the Governor and also appears to contradict other statutory language. Legislation passed in 1997 and codified as Section 8-50-506, *Tennessee Code Annotated*, states that career service employees cannot be required to submit a disclosure statement or any financial disclosure statement unless the employee or a member of the employee's immediate family has a financial interest with a value of more than \$5,000 which would constitute a conflict of interest or a potential conflict of interest under

state law or policy. The February 2006 Division of State Audit Financial and Compliance audit of the TRA found that the authority's conflict-of-interest policy did not comply with the state law regarding career service employees. TRA addressed that finding, and TRA's procedures no longer conflict with the requirements of Section

8-50-506. However, other directives from the Governor (Executive Order 3) and the General Assembly (Section 12-4-101, *Tennessee Code Annotated*) regarding ethics and conflicts of interest provide guidance that appears to conflict with Section 8-50-506 (page 19).

OBSERVATION AND COMMENT

The audit also discusses the following issue: the process for accepting or denying consumer advocate petitions needs improvement (page 9).

ISSUES FOR LEGISLATIVE CONSIDERATION

The General Assembly may wish to consider the following:

- Increasing the civil penalties for gas pipeline safety violations to levels that are substantially the same as federal levels. Such a revision could encourage increased compliance with pipeline safety standards and could also help ensure that Tennessee receives the maximum federal funding available from the U.S. Pipeline and Hazardous Materials Safety Administration.
- Reassessing the organizational structure of the TRA. Reinstating the executive secretary position is one potential option that might improve the continuity of management style and the reporting structure for administrative staff.
- Reviewing Section 8-50-506 to determine whether statutory changes are needed to better help state agencies identify potential conflicts of interest and achieve and maintain ethical business dealings. Allowing executive branch agencies to require career service employees to complete conflict-of-interest disclosure statements (that would also address personal relationships) seems appropriate given the current concerns regarding ethics and the need for the public to have confidence in the credibility of Tennessee state government at all levels.

Performance Audit Tennessee Regulatory Authority

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Performance Audit Tennessee Regulatory Authority

INTRODUCTION

PURPOSE AND AUTHORITY FOR THE AUDIT

This performance audit of the Tennessee Regulatory Authority was conducted pursuant to the Tennessee Governmental Entity Review Law, *Tennessee Code Annotated*, Title 4, Chapter 29. Under Section 4-29-228, the Tennessee Regulatory Authority was scheduled to terminate June 30, 2007. On June 12, 2007, the General Assembly passed Public Chapter 547, which extended this and other entities in the 2007 Sunset cycle that had not yet been heard, for one year or until a public hearing can be held. The Comptroller of the Treasury is authorized under Section 4-29-111 to conduct a limited program review audit of the authority and to report to the Joint Government Operations Committee of the General Assembly. The audit is intended to aid the committee in determining whether the Tennessee Regulatory Authority should be continued, restructured, or terminated.

OBJECTIVES OF THE AUDIT

The objectives of the audit were

1. to determine the impact of statutory organizational changes mandated since the prior performance audit;
2. to determine the authority's progress in addressing the prior performance audit finding regarding the timely issuance of final orders;
3. to determine the authority's process for addressing contested case requests;
4. to evaluate the system for distributing CapTel equipment and any policies and procedures associated with this program;
5. to summarize and assess information documenting the authority's compliance with the requirements of Title VI of the Civil Rights Act of 1964; and
6. to recommend possible alternatives for legislative or administrative action that might result in more efficient and effective operation of the authority.

SCOPE AND METHODOLOGY OF THE AUDIT

The activities of the Tennessee Regulatory Authority were reviewed for the period January 2001 through June 2006, with a focus on fiscal years 2004 through 2006. The audit was

conducted in accordance with the standards applicable to performance audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States and included

1. review of applicable legislation, rules and regulations;
2. examination of files, documents, electronic dockets, and policies and procedures, as well as attendance at several TRA conferences; and
3. interviews with agency officials, agency employees, staff of the Consumer Advocate and Protection Division in the Attorney General's office, and staff of the Department of Commerce and Insurance's Division of Consumer Affairs.

HISTORY AND STATUTORY RESPONSIBILITIES

In 1995, the General Assembly passed legislation to create the Tennessee Regulatory Authority, a governing body to regulate utilities in the state of Tennessee. The authority's mission is "to promote the public interest by balancing the interests of consumers and providers while facilitating the transition to a more competitive environment." As a result of legislation passed in 2002, leadership of the authority changed from three directors to four directors. The fourth director slot was funded by eliminating the executive secretary position, formerly responsible for directing all TRA personnel. The four directors, appointed in July 2002 to serve a six-year term, were Director Sara Kyle, appointed by the Speaker of the House; Director Pat Miller, appointed by the Speaker of the Senate; Director Ron Jones, appointed by a consensus of the Governor, Lieutenant Governor, and Speaker of the House; and Director Deborah Tate, who was appointed by the Governor and has since left the TRA for the Federal Communications Commission, where she was sworn in January 3, 2006. On May 30, 2006, the Governor appointed Eddie Roberson to fill this position. Each year the directors elect a chairman, whose term begins July 1 and who assumes the personnel responsibilities of the former executive secretary position.

Pursuant to Section 65-1-101(g), *Tennessee Code Annotated*, beginning July 2008, the terms of the directors will temporarily change in an effort to stagger the terms. The terms of the director appointed by the Governor and the director appointed by consensus will expire June 30, 2011. The terms of the directors appointed by the Speaker of the Senate and the Speaker of the House of Representatives will expire June 30, 2014. All subsequent appointments will return to six-year terms but will remain staggered.

As of September 2006, according to the Tennessee Regulatory Authority's website, public utilities under the authority's jurisdiction included 3 electric companies, 7 gas companies, 15 water and/or wastewater companies, and 566 telephone companies (including resellers, pay-phone providers, inter-exchange carriers, incumbent local-exchange service providers, and competing local-exchange carriers).

The directors conduct the business of the authority through regularly scheduled authority conferences. The official minutes of the conferences show every action taken by the authority and are available to the public for inspection. Pursuant to Section 65-4-104, *Tennessee Code*

Annotated, the authority is responsible for making rules for utility operations, for approving utility rates, and for regulating gas safety standards. The Authority also has power to decide the granting of operational authority and to adjudicate conflicts and controversies arising from utility operations. The authority's expenses are covered wholly by the industries it regulates, with a small portion coming from the federal government. For fiscal year 2006, the authority had 81 staff positions, and revenue and expenses of \$7,636,100.

ORGANIZATION

The Authority has numerous divisions, illustrated in the organization chart on page 4.

Office of the Chairman

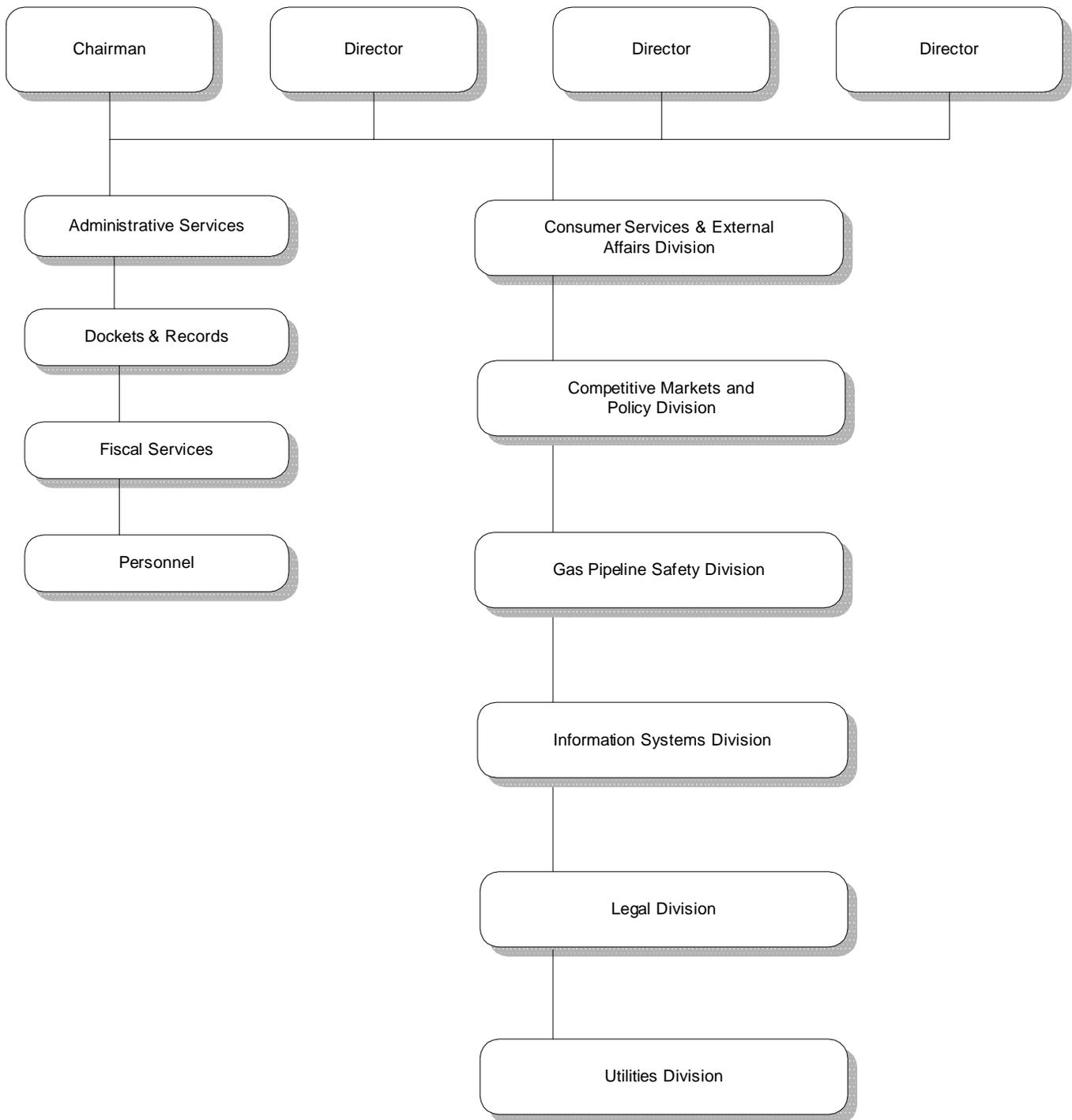
The Office of the Chairman serves as the chief administrative officer of the TRA with the power and duty to conduct ordinary and necessary business of the TRA. To meet these responsibilities, the office maintains four administrative sections:

- Dockets and Records, which prepares and calls the docket of items to be heard at each conference, prepares and distributes conference agendas, and maintains the official full and correct record of all proceedings;
- the Personnel Office, which is responsible for payroll, benefits, and training;
- Fiscal Services, where purchases, collections, and transactions are recorded; and
- Administrative Services, which is responsible for property management, security, and inventory of equipment and supplies.

Consumer Services and External Affairs Division

The Consumer Services and External Affairs Division is responsible for monitoring the quality of services provided by regulated utilities and enforcing the rules and regulations of the authority. A major responsibility of the division is to investigate and mediate consumer complaints involving regulated utilities. The division also acts as the consumer outreach office for the Authority by developing and implementing programs to educate the public on utility issues.

**Tennessee Regulatory Authority
Organizational Chart
July 2006**



Programs Under the Consumer Services and External Affairs Division

Program	Description
Do-Not-Call	The Do-Not-Call Register consists of landline and cell phone numbers of Tennessee residential telephone subscribers who have elected not to receive telephone solicitations. Although there are a few exceptions, the law basically prohibits those attempting to sell consumer goods and services by telephone from calling numbers that appear on the register.
Do-Not-Fax	The Do-Not-Fax Program is a consumer protection initiative established to provide relief to Tennessee citizens from unwanted fax advertisements.
Relay Center Services	As a service to Tennessee's deaf, deaf-blind, hard-of-hearing, and hearing and speech-impaired community, the Tennessee Relay Center provides free, statewide assisted telephone service to those with speech, hearing, and visual impairments. The relay service, which is operated under contract by MCI and is regulated by the TRA, links conversations between people who use text telephones or telebraille devices and people who use standard telephones.
TDAP/CapTel	<p>The Telecommunications Devices Access Program (TDAP) is designed to distribute appropriate telecommunications devices so that persons who are deaf, deaf and blind, severely hard of hearing, severely hard of hearing and vision-impaired, or severely speech-impaired may effectively use basic telephone service. The TRA implemented and manages this program.</p> <p>CapTel (Captioned Telephone) is a telephone service that allows users to speak, read captions, and hear as they maintain business and personal telecommunications.</p>
Link-up and Lifeline Telephone Assistance Programs	These programs assist low-income citizens by reducing telephone service costs.

Source: Tennessee Regulatory Authority website.

Consumer Services Telecommunications Investigations Fiscal Years 2001-2005

	2001	2002	2003	2004	2005
Slamming Complaint Investigations	361	344	305	238	162
Do-Not-Call Complaint Investigations	930	656	515	501	378
Do-Not-Fax Complaint Investigations	—	—	—	1,206	1,599

Source: Tennessee Regulatory Authority annual reports.

**TDAP Distribution
Fiscal Years 2001-2005**

	2001	2002	2003	2004	2005
TDAP Devices Distributed	1,354	1,324	1,508	1,487	1,547
Number of Residents Receiving Equipment	1,162	926	1,076	1,141	1,285
TDAP Device Cost	\$206,839	\$174,862	\$178,789	\$197,318	\$318,224

Source: Tennessee Regulatory Authority annual reports.

Economic Analysis and Policy Division

The mission of this division is to provide economic research, analysis, and advice to the directors and staff of the TRA. The division’s responsibilities include

- investigating and formulating recommendations on cost, pricing, rate design, allegations of anticompetitive practices, and other economic issues;
- identifying and analyzing market trends, including monitoring and evaluating the impact of TRA decisions on market outcomes;
- reviewing applications for approval of mergers, acquisitions, and the issuance of new financial instruments by public utilities;
- providing auxiliary functions to other divisions by providing analysis and correspondence on economic matters;
- monitoring federal legislation and the natural gas, electric, and telecommunications policies of the Federal Energy Regulatory Commission and the Federal Communications Commission; and
- performing market analysis and investigations, research, and other functions relative to all TRA regulated industries.

Gas Pipeline Safety Division

The federal Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60101 et seq. requires the U.S. Secretary of Transportation to establish minimum federal safety standards for the transportation of gas and hazardous liquid and pipeline facilities. The Secretary is further authorized to delegate to an appropriate state agency the authority to prescribe safety standards and enforce compliance with such standards over jurisdictional gas and hazardous liquid facilities. The Tennessee Regulatory Authority (TRA) has been designated as the appropriate state agency for the State of Tennessee.

The TRA has safety jurisdiction over all natural gas distribution operators in Tennessee. These operators collectively operate more than 33,800 miles of intrastate pipelines and serve over 1.1 million customers.

The Gas Pipeline Safety Division employs a chief and five engineers, who inspect facilities and construction sites, review documents, investigate incidents, and issue violations of non-compliance. Section 65-28-108, *Tennessee Code Annotated*, provides a civil penalty not to exceed \$10,000 for each violation for each day the violation persists, up to a maximum of \$500,000. The division encourages the prevention of third-party damages to natural gas and other underground facilities, the single leading cause of accidents, through the enforcement of Tennessee's Underground Utility Damage Prevention Act. The division educates local law enforcement agencies, who are responsible for enforcing the act, and other entities via a program called "Dig Safely."

Information Systems Division

The Information Systems Division's goal is to procure, develop, implement, and manage information systems technology in support of the TRA's objectives.

The division has developed three software systems that are used on a daily basis by TRA staff: the Do Not Call system developed in 2000 that maintains consumer information on the Do Not Call Register; the Docket Management system developed in 2002 that maintains electronic versions of the TRA's regulatory dockets; and the Case Management system developed in 2004 that captures a journal-style view of a docket from creation to closing.

Legal Division

The Legal Division is responsible for providing in-house counsel to the directors and the TRA. Attorneys from this division also represent the TRA and directors in their official capacities before the Chancery Courts, the Tennessee Court of Appeals, the Tennessee Supreme Court, the federal courts, the Federal Communications Commission, and the Federal Energy Regulatory Commission.

Members of this division serve as hearing officers in contested cases and prosecutors in enforcement actions before the TRA. Division staff are also responsible for bill analysis as requested by the Legislative Fiscal Review Committee, assist in drafting rules to be promulgated by the TRA, and prepare orders reflecting actions of the directors in specific cases.

Utilities Division

The Utilities Division assists the authority in establishing and implementing policy regarding Tennessee's gas, water, sewer, electric, and telephone companies to result in fair and responsible regulation for all utility companies and consumers in the state.

A diversified team consisting of engineers, accountants, rate specialists, and research analysts is employed to provide technical and financial expertise to ensure the statutory

responsibilities and rules of the authority are fulfilled. The division provides research for companies wanting to provide utility services in Tennessee, and companies already serving the state are routinely investigated as to the rates, terms, and conditions of services provided to consumers.

REVENUES AND EXPENDITURES

Statement of Revenues by Source For the Fiscal Year Ending June 30, 2006

Source	Amount	Percent of Total
State	\$7,327,300	96%
Federal	308,800	4%
Other	0	0%
Total Revenue	\$7,636,100	100%

Statement of Expenditures by Account For the Fiscal Year Ending June 30, 2006

Account	Amount	Percent of Total
Payroll	\$5,322,400	70%
Operational	2,313,700	30%
Total Expenses	\$7,636,100	100%

Estimated Revenues For the Fiscal Year Ending June 30, 2007

Source	Amount	Percent of Total
State	\$8,001,400	96%
Federal	350,000	4%
Other	3,400	0%
Total Revenue	\$8,354,800	100%

OBSERVATION AND COMMENT

THE PROCESS FOR ACCEPTING OR DENYING CONSUMER ADVOCATE PETITIONS NEEDS IMPROVEMENT

The mission of the Tennessee Regulatory Authority (TRA) is to promote the public interest by balancing the interests of utility consumers and providers. According to the TRA, it fulfills this mission through consumer assistance and regulatory oversight of utility operations and market conditions. Pursuant to Section 65-4-118(b)(1), *Tennessee Code Annotated*, the Consumer Advocate and Protection Division (CAPD) of the Office of the Attorney General and Reporter

has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the [Tennessee regulatory] authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act . . .

The CAPD's ability to carry out its duty is hindered, however, because the TRA does not always grant the CAPD's petitions that the TRA initiate an investigation, convene a contested case, or allow the CAPD to intervene in a case before the TRA. (Pursuant to Section 65-4-117, the TRA has the authority to "investigate, upon its own initiative, or upon complaint in writing, any matter concerning any public utility . . .") In addition, the CAPD's ability to obtain information independently to support its petitions is limited.

The CAPD can obtain information from publicly filed documents, such as those on file with the TRA or the Federal Communications Commission. According to Section 65-4-118(b)(2), *Tennessee Code Annotated*, the CAPD may also petition the TRA, after notice to the affected utility, to obtain information from the utility. However, the CAPD must state with particularity the information sought and the type of proceeding that may be initiated if the information is obtained. Additionally, the CAPD may request information from the TRA staff, and, if the staff have the requested information, they are to provide it within 10 days. Attorney General Opinion 95-044 reinforces this statute by opining that the CAPD does not have the authority to conduct an audit of a utility. The opinion states that the CAPD is simply not empowered to acquire information by audit or any other method not specified by the General Assembly.

Review of Dockets

In order to determine the TRA's decisions regarding the CAPD's petitions, and the timeliness of those decisions, we obtained listings (from the TRA Legal Division and the CAPD) of the CAPD's petitions filed with the TRA. We also reviewed online dockets for any filings

made by the CAPD during calendar years 2001-2005. The review identified 40 dockets, 29 of which we analyzed (see Table 1).

Table 1
Average Days Between CAPD Filing Date and TRA Decision
By Calendar Year*

Year	Days
2001	38
2002	14
2003	27
2004	90
2005	102
Average	53

* Analysis based on 29 dockets. Of the 40 dockets identified, 4 lacked information needed to calculate the time between the CAPD filing date and the accept or denial date. Another 4 dockets were not applicable (i.e., because the CAPD was only submitting comments rather than petitioning to intervene, because a company withdrew its initial filing, or because the docket was closed after newer dockets with the same issue were opened). Another 3 dockets involving interventions filed by the CAPD remained unaddressed by the TRA, which allowed three tariffs to take effect without consumer input.

We determined that on average, there were 53 days between the CAPD filing date and the TRA’s decision to accept or deny the petition. Approximately 21% of petitions analyzed (6 of 29) were denied by the TRA. During this review, we noted that in several cases one director dissented in response to the majority’s decision to deny the CAPD petitions. The most recent, lengthy example relates to Atmos Energy, a large natural gas utility. The CAPD filed its initial petition on October 15, 2004, asking the TRA to initiate a show-cause proceeding to investigate the justness and reasonableness of Atmos Energy Corporation’s rates and issue a show-cause order directing Atmos to show cause why its rates should not be reduced. On March 14, 2005, the TRA panel denied the petition, with one director dissenting. (The official order was not published until January 3, 2006.) On September 15, 2005, the CAPD filed a second petition for an investigation. On November 7, 2005, (after several newspaper articles, a filing in support of the petition by a group of the utility’s customers, and similar complaints filed in other states) the TRA granted the petition to open an investigation. The official order was published on March 23, 2006. As of June 30, 2006, this case was still ongoing.

This is not the only case in which the TRA denied the CAPD’s petition. In November 2005, the state Court of Appeals ruled that the TRA failed to follow the requirements of then-existing law when it declined to convene a contested case regarding BellSouth’s “Welcoming Rewards Program” tariff. In December 2005, the Court of Appeals denied petitions by the TRA and BellSouth for a rehearing. The TRA and Bell South had argued that the CAPD and BellSouth’s competitors failed to present sufficient evidence to warrant the convening of a contested case proceeding. However, the court found that the filings, presentations, and arguments of the CAPD and BellSouth’s competitors provided ample basis for convening a contested case. In this decision, the court upheld that the CAPD and BellSouth’s competitors

1. presented particularized allegations alleging the illegality of the proposed tariff;
2. demonstrated specifically how they would be injured by the proposed tariff; and
3. that these matters had not been addressed by the TRA in earlier proceedings.

Conclusion

The threshold level for convening contested cases appears to vary among directors, and it does not appear feasible to develop an indicator that determines when one is necessary. However, it seems appropriate that the TRA give more serious consideration to petitions from the CAPD. The CAPD is charged by statute with the duty of representing the interests of Tennessee consumers but is also limited by statute in its ability to obtain information. In addition, the CAPD's petitions are to be approved by the Attorney General before being presented to the TRA, which presumably indicates that such petitions have been subjected to a credible, knowledgeable review before they are sent to the TRA. If the TRA focuses on procedural technicalities of petitions rather than substantive consumer protection issues, it could undermine public confidence that the TRA is meeting its mission to balance the interests of utility consumers and providers.

The TRA should judiciously utilize its discretion in reviewing all consumer advocate petitions, particularly those submitted by the CAPD. The TRA should avoid putting too much emphasis on the technical composition of a petition at the expense of preventing interested parties from pursuing valid issues of fact.

Auditor's Note

See Appendix 2 for the Tennessee Regulatory Authority's detailed response to the above Observation and Comment. We recognize and respect the TRA's authority regarding consumer advocate petitions and responses to such petitions. We do, however, believe that the cases cited in this report highlight a need for the TRA to seriously consider initiating an investigation or convening a contested case when requested by knowledgeable petitioners (such as the Office of the Attorney General and Reporter's Consumer Advocate and Protection Division) that provide relevant supporting documentation. Also, see Appendix 3 for the Office of the Attorney General and Reporter's comments to the Observation and Comment.

FINDINGS AND RECOMMENDATIONS

1. The TRA has improved its timeliness in publishing written final orders

Finding

At authority conferences, the directors of the Tennessee Regulatory Authority discuss items on the agenda and make decisions regarding a variety of issues related to utility regulation. Following the decision of the directors, legal staff prepare a written order and circulate it among the directors for their approval. The decision of the directors is effective on the date it is made, but the written order is the final and conclusive stage of the process. Until the written order is issued, the docket cannot be closed, the order cannot be appealed, and the hearing process is not over.

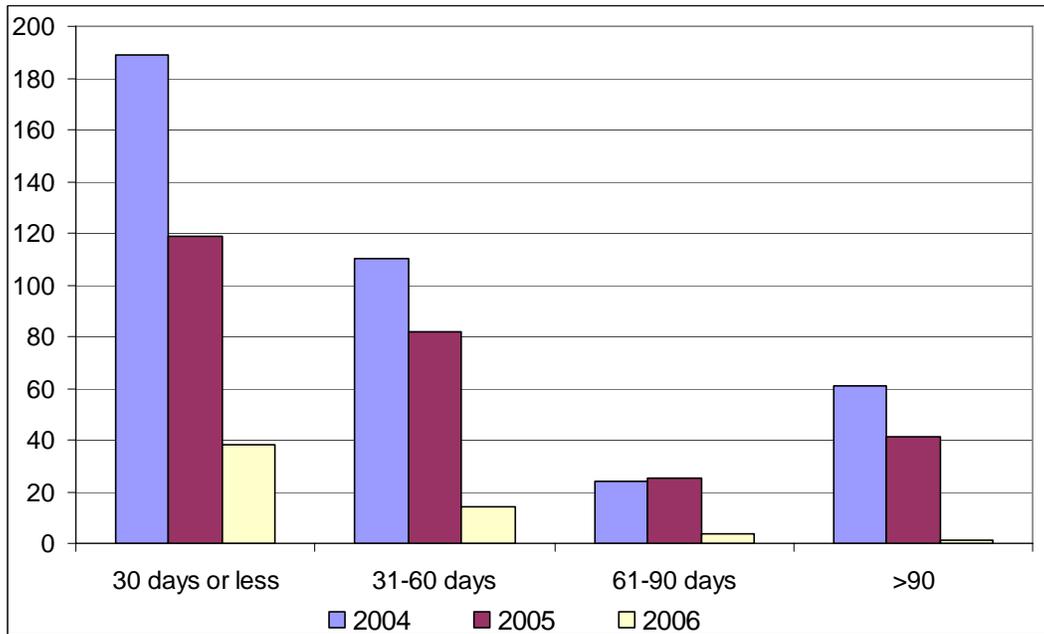
The March 2002 performance audit found that the Tennessee Regulatory Authority was not issuing orders in a timely manner following director action. The average number of days to issue a final order was 94 days in fiscal year 1999; 55 days in 2000; 61 days in 2001; and 86 days for the first seven months of 2002. In December 2001, the General Counsel outlined a five-step plan to institute a 30-day window to circulate orders among directors and 45 days for significant orders.

During the current audit, TRA directors and staff, as well as staff of the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter, raised concerns about the TRA's ability to publish timely written final orders. In response to these concerns and the prior audit finding, we reviewed all closed dockets for fiscal years 2004 through 2006 to determine the number of days between action taken by the directors and final order publication. We determined that the TRA's timeliness has improved since the last audit, with the average number of days between director action and final order publication declining for each fiscal year reviewed. See Table 2 and Chart 1.

Table 2
Average Number of Days Between Director Action and Final Order Publication

Fiscal Year	Average Days
2004	56
2005	47
2006	31

Chart 1
Number of Days Between Director Action and Final Order Publication
Fiscal Years 2004-2006



Recommendation

The TRA should continue to monitor the time it takes to prepare and issue written orders, to ensure that the process is timely in making information available to the public. This will allow any entity or member of the public to access the most up-to-date information regarding authority decisions to help promote consumer protection and industry competition.

Management’s Comment

We concur and will continue to use our best efforts to ensure that the TRA’s process of preparing and issuing written orders continues to be timely in making the information available to the public.

2. Tennessee's civil penalty limits for gas pipeline violations should be increased to reflect the U.S. Office of Pipeline Safety's requirements

Finding

While the federal government is primarily responsible for developing, issuing, and enforcing pipeline safety regulations, the federal pipeline safety statutes provide for states to assume the intrastate regulatory, inspection, and enforcement responsibilities, under an annual certification. To qualify for certification, a state must adopt the minimum federal regulations, and may adopt additional or more stringent regulations as long as they are not incompatible with federal regulations. A state must also provide for injunctive and monetary sanctions substantially the same as those authorized by the federal pipeline safety statutes. Currently, Tennessee's civil penalties are substantially below federal penalties for pipeline safety violations.

Federal pipeline safety laws authorize the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA) to pay out funds up to 50 percent of the cost of the personnel, equipment, and activities reasonably required for each state agency to carry out a safety program for intrastate pipeline facilities under a certification or agreement with the PHMSA with respect to the interstate pipeline facilities. Each state's annual grant allocation is based on a maximum of 100 performance points—50 points based on information provided in the state's annual certification/agreement attachments which document activities for the prior year and 50 points based on the annual state program evaluation. The PHMSA assigns weights to various performance factors reflecting program compliance, safety priorities, and national concerns identified by the PHMSA. One of these factors is the quality of state inspections, investigations, and enforcement/compliance actions.

The most recent U.S. Department of Transportation (USDOT) evaluation of Tennessee's gas pipeline safety program was conducted October 11, 2005, and covered the program period January 1, 2004, through December 31, 2004. The evaluation, which was very positive overall, stated that Tennessee's Underground Utility Damage Prevention legislation needed to be further improved by the adoption of injunctive relief and civil penalties substantially the same as provided for in the federal requirements. Pursuant to 49 *Code of Federal Regulations* Part 198.37(h), underground pipeline facility operators, excavators, and persons operating one-call notification systems who violate regulations are subject to civil penalties substantially the same as provided under pipeline safety laws located in 49 *United States Code* 60101 et seq., which allow for a civil penalty up to \$100,000 for each violation for each day the violation exists to a maximum total of \$1,000,000. In contrast, Tennessee civil penalties for violations related specifically to underground utility damage are only \$2,500. Furthermore, Tennessee's general violation penalties are also well below the federal level. Section 65-28-108, *Tennessee Code Annotated*, stipulates that any person violating gas pipeline safety regulations is subject to a civil penalty up to \$10,000 for each violation for each day the violation exists, to a maximum total of \$500,000.

According to the Chief of TRA's Gas Pipeline Safety Division, Tennessee is currently receiving its full portion of federal funding. However, it is possible the funding formula could change to require that states adopt the higher federal civil penalty range in order to receive full

funding. While there is no formal indication that the funding formula will change, TRA's most recent USDOT evaluation stated that excavation damage continues to be the single greatest cause of underground pipeline failures and recommended that Tennessee take action to expedite changes in its laws to prevent the loss of federal funding. Therefore, if the state's penalties are not increased, and the USDOT changes its funding formula to place greater emphasis on states having penalties that are substantially the same as federal civil penalties, Tennessee's program could lose a portion of its federal funding. Furthermore, more significant penalties could help improve the safety of gas pipelines by providing a stronger incentive to comply with standards and by acting as a greater deterrent to committing infractions of the Underground Utility Damage Prevention legislation.

Recommendation

The General Assembly may wish to consider increasing the civil penalties for gas pipeline safety violations to levels that are substantially the same as federal levels. Such a revision could encourage increased compliance with pipeline safety standards and could also help ensure that Tennessee receives the maximum federal funding available from the U.S. Pipeline and Hazardous Materials Safety Administration.

Management's Comment

We concur and, if requested by the General Assembly, the TRA will assist in drafting a bill increasing the civil penalties for gas pipeline safety violations in Tennessee to levels that are substantially the same as those imposed by the federal government.

3. The General Assembly may wish to consider reassessing the organizational structure of the TRA

Finding

As a result of legislation passed in 2002, a fourth director was added to the Tennessee Regulatory Authority. To offset the cost of the new director's salary, this legislation abolished the executive secretary position and transferred the duties of that position, which included supervising and hiring administrative staff of the agency, to the sitting chairman. This change in organizational structure may have had unintended negative effects.

Based on discussions with staff, this organizational change has caused confusion, frustration, and communication problems. Because the chairmanship of the TRA changes annually, the focus or agenda of the authority may also change annually. Staff must readjust each year to a new management style, which could result in changing job priorities, fears concerning job security, and concerns that work prepared in response to a request from one

director may not align with the goals of the current chairman. If staff are focused on the chairman's reaction and the effect on their jobs, they may be hampered in providing the technical expertise and unbiased, objective work products needed to aid the TRA directors in their decision making. In addition to the effect on staff, the chairman must begin dealing with personnel issues, which may detract from time needed to focus on decisions affecting consumers and entities regulated by the TRA.

Tennessee has several boards and commissions that have intermediaries who supervise and hire staff. For example, the Tennessee Wildlife Resources Agency (TWRA), which regulates hunting and fishing in the state, is run by a commission that does not direct the staff but does appoint an executive director who has this responsibility. Similarly, the Tennessee Education Lottery Corporation has a chief executive officer who is hired by the board to direct and supervise all administrative and technical activities and employ and direct such personnel as deemed necessary. It appears that the use of an executive director to supervise staff is also the consensus among TRA equivalents in surrounding states. Based on a review of 11 other states, 9 have an executive director who is responsible for supervising and hiring staff. None of the states reviewed assign the chairman full authority for supervising and hiring staff.

State	Staff Administrator
Alabama	Commissioners as a whole
Arkansas	Executive Director
Florida	Executive Director
Georgia	Executive Director
Kentucky	Executive Director
Mississippi	Executive Director
Missouri	Executive Director
North Carolina	Executive Director
South Carolina	Executive Director
Texas	Executive Director
Virginia	Each separate division

Recommendation

The General Assembly may wish to consider reassessing the organizational structure of the TRA. Reinstating the executive secretary position is one potential option that might improve the continuity of management style and the reporting structure for administrative staff.

Management's Comment

We concur that the General Assembly may wish to consider reassessing the organizational structure of the TRA. Pursuant to Section 65-1-104(c)(2), the TRA will undertake

the establishment of internal management procedures to address continuity of management style and the reporting structure for administrative staff.

4. Current rules and regulations and policies and procedures for the TDAP/CapTel program need revision

Finding

The Tennessee Regulatory Authority's current practice when distributing TDAP/CapTel equipment is not consistent with its rules and regulations regarding the processing of applications.

Application Verification

According to TRA Rule 1220-4-10-.04(2), one eligibility requirement for applicants to receive assistive telecommunications equipment is having "a significant hearing, hearing and visual, or speech impairment, as verified by a physician licensed to practice in Tennessee." Based on our review of the current application as well as a file review, however, this does not appear to be the practice.

The application form for receiving assistive telecommunications equipment states that an applicant's eligibility must be certified by a Tennessee licensed medical provider, such as a doctor, nurse, audiologist, speech pathologist, etc. Certifications can also be completed by a licensed social worker, rehabilitation counselor, or assistive center director. Therefore, in addition to allowing verification by licensed medical providers other than physicians, the application also allows verification by individuals who may or may not be qualified to examine applicants and deliver a diagnosis of their condition.

We obtained a listing of all applications received between January 1, 2005, and December 31, 2005, and randomly selected 50 files that we reviewed for provider certification verification. Based on our analysis, only 28% of certifications (14 of 50) were made by physicians. See Table 3. Therefore, the majority of these applicants were approved for equipment by ineligible certifiers. As illustrated in Table 3, 60% of certifiers in the applications reviewed were audiologists. Three of these certifiers were Veterans Affairs audiologists who were not licensed to practice in Tennessee.

Table 3
File Review of Applications
Application Certifiers

Certifier	Number	Percent
Medical Doctor	14	28%
Audiologist	30	60%
Hearing Aid Dispenser	2	4%
Laboratory Personnel	1	2%
Licensed Practical Nurse	1	2%
Registered Nurse	1	2%
Speech and Language Pathologist	1	2%

Based on information obtained from the Telecommunications Device Access Program (TDAP) Director, the TRA held rulemaking hearings on November 8, 2004, to expand the rules to allow for other non-physician professionals to certify applications. As of July 5, 2006, the TRA and the Attorney General’s Office were in the process of editing the proposed rules.

Additional File Review Results

In addition to reviewing applications for certification of eligibility, we also reviewed the physical files for all contents specified in the policies and procedures, such as application approval, proper provider signatures, a copy of the database entry screen, copy of the equipment invoice, and whether the database content matched information in the physical file. All 50 applications were approved and received equipment. However, 6% of the applications (3 of 50) lacked the appropriate residency verification to ensure that only eligible Tennesseans receive equipment. No other major problems were noted, and the information in the physical files matched the information in the database.

Recommendation

The TRA needs to review its current rules and staff’s existing practice for application approval. The authority should determine whether a non-physician is qualified to make the eligibility determination needed and, if so, should modify the rule to include all qualified professions. Also, if the TRA wants staff to continue to approve applications certified by non-Tennessee licensed medical personnel, an exemption should be made within the rule.

Management’s Comment

We concur. The TRA promulgated updated rules which remove the language restricting certification by a Tennessee licensed physician and provide, instead, for a care giver licensed to practice in the state of Tennessee to certify individuals with a hearing loss. (TRA Rule 1220-4-10-.04 (2) states: A qualified applicant shall have a disability, as verified by a care giver licensed to practice in the state of Tennessee, such that the person cannot use the basic telephone network effectively without the use of an assistive communication device.) At the time of the audit, these

proposed rules were being reviewed by the Attorney General's Office. These rules have been approved by the Attorney General, have been filed with the Secretary of State, and will be effective February 18, 2007. The certification process noted in the report will be consistent with TRA rules on February 18, 2007. The TRA will ensure that a copy of the documentation used to verify Tennessee residency is placed in each application file.

5. The law prohibiting conflict-of-interest disclosures by career service employees needs reassessment

Finding

The current law that prohibits state agencies from requiring financial and conflict-of-interest disclosures by career service employees appears inconsistent with an Executive Order issued by the Governor and also appears to contradict other statutory language.

Legislation passed in 1997 and codified as Section 8-50-506, *Tennessee Code Annotated*, states that career service employees cannot be required to submit a disclosure statement or any financial disclosure statement unless the employee or a member of the employee's immediate family has a financial interest with a value of more than \$5,000 which would constitute a conflict of interest or a potential conflict of interest under state law or policy. The law also requires that career service employees notify their supervisor of any potential conflicts with assignments, and they are to be informed of the disclosure requirements in writing "upon hiring and annually thereafter." (Section 8-30-208 divides the state service [i.e., the executive branch] into an executive and a career service. The executive service includes members and chief executive officers of boards, commissions, agencies and authorities; department commissioners, deputy and assistant commissioners, and division directors, as well as their personal administrative or program management staff; the governor's office staff; and wardens/directors of correctional institutions and superintendents of mental health/mental retardation institutions. All other regular full-time positions in state service are considered career service employees.)

The February 2006 Division of State Audit Financial and Compliance audit of the TRA found that the authority's conflict-of-interest policy did not comply with the state law regarding career service employees. The audit also noted that the TRA did not have a process established regarding annual communications to career service employees of the legal requirements regarding conflicts of interest, nor did the authority's policy address these communications. At the time of that audit, the TRA's conflict-of-interest policy required each employee, regardless of status, to complete a conflict-of-interest statement listing any financial interest in a company regulated by the authority or that has a business relationship with the authority, and the statement must disclose any immediate family members who are employed by one of the companies regulated by the authority. The completion of a conflict-of-interest statement was required upon hiring and each January 1 thereafter. Most of the authority's employees are career service employees and, based on the legislation described above, they cannot be required to complete conflict-of-interest statements unless they, or their immediate family members, have financial

interests of more than \$5,000 in a company that is regulated by the authority or has a business relationship with the authority.

During the current performance audit of the TRA, we determined that the authority has addressed the aforementioned finding from the February 2006 Financial and Compliance audit. The TRA now requires annual disclosures from executive service employees and provides career service employees with a form detailing the conflict-of-interest legal requirements. This form requires career service employees to sign acknowledging that they understand these legal requirements.

Although the TRA's procedures no longer conflict with the requirements of Section 8-50-506, other directives from the Governor and the General Assembly regarding ethics and conflict-of-interest appear to provide conflicting guidance. Executive Order 3, issued by Governor Bredesen on February 3, 2003, states that the maintenance of high standards of honesty, integrity, impartiality, and conduct by employees and agents of the State of Tennessee is essential to ensure the proper performance of government business and the maintenance of confidence by citizens in their government and that the avoidance of misconduct and conflicts of interest on the part of employees of the State of Tennessee is indispensable to the maintenance of these standards. While this order appears to strictly apply to executive service employees, the Governor specifically includes language related to career service employees. The Governor states that, with regard to career service employees, the Commissioner of Personnel is directed to promulgate any rules or regulations necessary to extend the requirements of this order to career service employees of the executive branch. This directive appears to conflict with Section 8-50-506.

Section 8-50-506 also appears to contradict Section 12-4-101, *Tennessee Code Annotated*, which disallows a person from supervising a contract when that person is indirectly interested, unless there is public disclosure of that interest, or when a person is directly interested. (A direct interest is defined as being the sole proprietor or a partner, or having a controlling interest.) Section 12-4-101 does not include a dollar amount as part of the definition of an indirect interest—it simply defines indirect interest as when there is an interest, but it is not direct. It appears that, under this statute, familial relationships in a contracted company could constitute an indirect interest, whereas familial relationships are overlooked in Section 8-50-506, unless there is a financial interest of more than \$5,000. If a career service employee is supervising a contract and has an indirect interest, thereby requiring disclosure under Section 12-4-101, such a disclosure could conflict with Section 8-50-506, which prohibits requiring disclosure unless there is a financial interest with a value of more than \$5,000.

Since Section 8-50-506 specifically limits both a disclosure statement and financial disclosure statement, state agencies may be at a disadvantage when attempting to ensure ethical business dealings. For example, while it appears reasonable to define the financial level requiring disclosure, completely prohibiting an agency from requiring disclosure of familial relationships seems ill-advised since a familial relationship could be more influential than a monetary investment.

Recommendation

The General Assembly may wish to consider reviewing Section 8-50-506 to determine whether statutory changes are needed to better help state agencies identify potential conflicts of interest and achieve and maintain ethical business dealings. Allowing executive branch agencies to require career service employees to complete conflict-of-interest disclosure statements (that would also address personal relationships) seems appropriate given the current concerns regarding ethics and the need for the public to have confidence in the credibility of Tennessee state government at all levels.

Management's Comment

We concur that requiring career service employees to complete conflict-of-interest disclosure statements seems appropriate given the current concerns regarding ethics and the need for the public to have confidence in the credibility of Tennessee state government at all levels. The TRA stands ready to assist the Legislature in any way it deems appropriate to reevaluate the requirements of who is required to submit conflict-of-interest disclosures.

RECOMMENDATIONS

LEGISLATIVE

This performance audit identified the following areas in which the General Assembly may wish to consider statutory changes to improve the efficiency and effectiveness of the authority's operations.

1. The General Assembly may wish to consider increasing the civil penalties for gas pipeline safety violations to levels that are substantially the same as federal levels. Such a revision could encourage increased compliance with pipeline safety standards and could also help ensure that Tennessee receives the maximum federal funding available from the U.S. Pipeline and Hazardous Materials Safety Administration.
2. The General Assembly may wish to consider reassessing the organizational structure of the TRA. Reinstating the executive secretary position is one potential option that might improve the continuity of management style and the reporting structure for administrative staff.
3. The General Assembly may wish to consider reviewing Section 8-50-506 to determine whether statutory changes are needed to better help state agencies identify potential conflicts of interest and achieve and maintain ethical business dealings. Allowing executive branch agencies to require career service employees to complete conflict-of-interest disclosure statements (that would also address personal relationships) seems appropriate given the current concerns regarding ethics and the need for the public to have confidence in the credibility of Tennessee state government at all levels.

ADMINISTRATIVE

The Tennessee Regulatory Authority should address the following areas to improve the efficiency and effectiveness of the authority's operations.

1. The TRA should continue to monitor the time it takes to prepare and issue written orders, to ensure that the process is timely in making information available to the public. This will allow any entity or member of the public to access the most up-to-date information regarding authority decisions to help promote consumer protection and industry competition.
2. The TRA needs to review its current rules and staff's existing practice for application approval. The authority should determine whether a non-physician is qualified to make the eligibility determination needed and, if so, should modify the rule to include

all qualified professions. Also, if the TRA wants staff to continue to approve applications certified by non-Tennessee licensed medical personnel, an exemption should be made within the rule.

3. The TRA should judiciously utilize its discretion in reviewing all consumer advocate petitions, particularly those submitted by the CAPD. The TRA should avoid putting too much emphasis on the technical composition of a petition at the expense of preventing interested parties from pursuing valid issues of fact.

Appendix 1

Title VI Information

All programs or activities receiving federal financial assistance are prohibited by Title VI of the Civil Rights Act of 1964 from discriminating against participants or clients on the basis of race, color, or national origin. In response to a request from members of the Government Operations Committee, we compiled information concerning federal financial assistance received by the Tennessee Regulatory Authority and the authority's efforts to comply with Title VI requirements. The results of the information gathered are summarized below.

For fiscal year 2006, the TRA received \$308,800 in federal funds from the U.S. Department of Transportation, to enforce the federal Pipeline and Hazardous Materials Safety Administration requirements. Estimated federal funding for fiscal year 2007 was \$350,000. As of June 30, 2006, the TRA had submitted its Title VI plan to the Division of State Audit as required.

The Title VI Coordinator is responsible for

- preparing the TRA's Title VI Implementation plan and plan updates;
- verifying that all aspects of the Title VI plan are being implemented;
- reviewing complaint reports and other documentation to determine if additional compliance efforts are needed;
- consulting with the TRA's directors to resolve complaints and findings of non-compliance with Title VI;
- serving as a liaison with other state personnel on the Title VI issues and concerns; and
- functioning as a source of information to help the TRA comply with applicable statutes and regulations.

The TRA accepts all complaints, written or verbal. In the event a complainant sets forth the allegations verbally and refuses to reduce such allegations to writing, the person to whom the complaint is made will reduce the elements of the complaint to writing. It is not necessary to know the identity of the complainant, as long as the information is sufficient to determine that the complaint is applicable to the programs of the Tennessee Regulatory Authority and that there is the possibility of a violation. The following information is obtained from the complainant:

1. Name, address, and telephone number.
2. The location and name of the entity delivering the service.
3. The nature of the incident that led the complainant to feel discrimination was a factor.
4. The basis of the complaint, i.e., race, color, or national origin.

5. Names, addresses, and telephone numbers of people who may have knowledge of the event.
6. The date(s) on which the alleged discriminatory event(s) occurred.

The TRA's Title VI coordinator reviews the complaint to determine whether the complaint will be referred to an appropriate federal agency or will be investigated by the TRA. Complaints to be investigated by the TRA should be handled within 90 days of receipt. TRA staff will send a letter to the complainant acknowledging receipt of the complaint and requesting a time and date the complainant can be reached by telephone to discuss the complaint. Complainants will not be parties to the Title VI investigation and will not enjoy a status different from other persons interviewed. A preliminary review will be conducted on all complaints to substantiate or refute the allegations.

If the preliminary review indicates that there may be a problem, a full complaint investigation will be initiated. TRA staff will send a letter to the complainant explaining that an investigation will be initiated and that their cooperation will be needed in the future. If appropriate, the TRA will coordinate with other agencies on matters of interdepartmental issues and reviews.

If the allegations are unsubstantiated, the TRA will send the complainant a letter containing a description of the investigated allegations, the scope of the investigation, the facts learned, and a closing statement summarizing the basis on which the determination was made. The complainant is also advised of his or her right to file a complaint with other applicable governmental entities if dissatisfied with the TRA's resolution of the complaint. According to the TRA, no Title VI complaints were reported during fiscal year 2006.

The table on the following page details the breakdown of TRA staff and directors by title, gender, and ethnicity.

**Tennessee Regulatory Authority Staff
By Title, Gender, and Ethnicity
As of December 13, 2006**

Title	Gender		Ethnicity				
	Male	Female	Asian	Black	Hispanic	Indian	White
Accounting Technician 1	1	0	0	0	0	0	1
Accountant 3	0	1	0	0	0	0	1
Administrative Services Assistant 2	0	7	0	2	0	0	5
Administrative Services Assistant 3	1	2	0	0	0	0	3
Administrative Services Assistant 4	0	2	0	1	0	0	1
Administrative Services Assistant 5	1	0	0	0	0	0	1
Attorney 3	1	2	1	0	0	0	2
Attorney 4	1	1	0	1	0	0	1
Clerk 2	0	2	0	0	0	0	2
Consumer Protection Assistant Director	1	0	0	1	0	0	0
Consumer Protection Specialist 2	2	1	0	0	0	0	3
Environmental Protection Specialist 3	4	0	0	0	0	0	4
Executive Administrative Assistant 2	2	4	0	1	0	0	5
Executive Administrative Assistant 3	0	4	0	1	0	0	3
General Counsel 3	1	0	0	0	0	0	1
Information Resource Specialist 2	0	1	0	0	0	0	1
Information Resource Specialist 3	0	1	0	1	0	0	0
Information Officer	0	1	0	1	0	0	0
Information Systems Director 1	1	0	0	0	0	0	1
Legal Assistant	0	4	0	1	0	0	3
Personnel Analyst 3	0	1	0	0	0	0	1
Telecommunications/Utilities Consultant	5	2	0	1	0	0	6
TRA Telecommunications Assistant Chief	1	0	0	0	0	0	1
TRA Consumer Services Chief	1	0	0	0	0	0	1
TRA Director	3	1	0	1	0	0	3
TRA Economic Analysis and Market Monitoring Chief	1	0	0	0	0	0	1
TRA Gas Pipeline Safety Chief	1	0	0	0	0	0	1
TRA Telecommunications Chief	0	1	0	0	0	0	1
Utility Rate Specialist 3	3	1	0	1	0	0	3
Utility Rate Specialist 4	0	1	0	0	0	0	1
Utility Rate Specialist 5	1	1	0	0	0	0	2
Totals	32	41	1	13	0	0	59
Percentages	44%	56%	1%	18%	0%	0%	81%

Appendix 2
Tennessee Regulatory Authority's Comments in Response to
Observation and Comment (see page 9)

The process for accepting or denying consumer advocate petitions needs improvement.

We concur in part with the observation and comment in this section of the Performance Audit Report (“Report”), specifically with the statement that the TRA “should judiciously utilize its discretion in reviewing all consumer advocate petitions, particularly those submitted by the CAPD.” The TRA supports this principle, and incorporates it in the TRA’s practices and procedures.

We do not concur, however, with three statements within the Observation and Comment, as explained herein.

The observation and comment discusses a number of practices and procedures of the TRA that are established and governed by statutes, rules or case law decisions. The Report draws attention to the actions of the TRA in two dockets involving Atmos Energy Corporation (“Atmos”) and a court of appeals opinion in a BellSouth tariff case (the “Welcoming Rewards” case). A thorough discussion of these matters requires an examination of the role of the TRA, the role of the Consumer Advocate and Protection Division (“CAPD”) and relationship between the two as articulated in statute and through court decisions defining the scope of the TRA’s discretion in determining whether to convene contested case proceedings.

The creation of the Consumer Advocate Division and the powers attendant to that division are found in Tenn. Code Ann. § 65-4-118. Subsection (b) of that section sets forth the extent of the powers as to the Consumer Advocate’s role in appearing before the TRA. Section 65-4-118(b) states:

(b)(1) The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division *may*, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority. (Emphasis provided)

This statutory language gives the CAPD the discretionary authority to participate or petition to intervene in an existing action or to initiate a proceeding before the TRA. This language does not give the CAPD the authority to require the TRA to initiate a proceeding or convene a contested case. To the contrary, Tennessee statutes and case law are very explicit regarding the discretion that the TRA has in determining whether a contested case should be convened.

Tenn. Code Ann. Sections § 65-4-104 and § 65-4-106 and case law interpreting these sections provide the TRA with broad powers to exercise its jurisdiction over matters involving public utilities. Tenn. Code Ann. § 65-4-104 provides:

The [TRA] has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.¹

Also, the General Assembly mandated in Tenn. Code Ann. § 65-4-106 that “any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction by this chapter.”²

The Tennessee Supreme Court has acknowledged these statutes and, in *Consumer Advocate Division v. Greer*, made the following observations:

In applying these general rules in the context of this case, we first observe that the General Assembly has charged the TRA with the “general supervisory and regulatory power, jurisdiction and control over all public utilities.” Tenn. Code Ann. § 65-4-104 (1997 Supp.). In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given “a liberal construction” and has mandated that “any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...” Tenn. Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has “signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction.” *Tennessee Cable Television Ass’n v. Tennessee Public Service Comm’n*, 844 S.W.2d 151, 159 (Tenn.App.1992). To enable the TRA to effectively accomplish its designated purpose--the governance and supervision of public utilities--the General Assembly has empowered the TRA to “adopt rules governing the procedures prescribed or authorized,” including “rules of practice before the authority, together with forms and instructions,” and “rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers.” Tenn. Code Ann. § 65-2-102(1) & (2) (1997 Supp.).³

The Supreme Court in *Greer* also determined from statutory authority that the TRA is not required to convene a contested case when presented with a complaint. To the contrary, the Court found that the General Assembly intended for the TRA to have discretion in determining whether to convene a contested case. The Court explained the nature of this discretion as follows:

In our view, the clear import of the statutory language, “the authority shall have the power,” is that the TRA has the power to convene a contested case

¹ Tenn. Code Ann. § 65-4-104 (Supp. 2002).

² Tenn. Code Ann. § 65-4-106 (Supp. 2002).

³ *Consumer Adv. Div. v. Greer*, 967 S.W.2d 759, 761-62 (1998).

hearing if it chooses to exercise the authority. In other words, the language used by the General Assembly implies discretion. Importantly, the statute does not say that the TRA “shall hold a hearing” upon the filing of a written complaint. Such language would clearly describe a mandatory duty. Once again, our role is to construe statutes consistently with legislative intent. If the Legislature had intended to mandate a contested hearing upon the filing of a written complaint, it easily could have utilized precise language to accomplish that mandate. Indeed, in other portions of the statutory scheme governing the TRA, the Legislature has employed such mandatory language requiring the TRA to convene a contested hearing. *See e.g.* Tenn. Code Ann. § 65-5-209(c) (1997 Supp.) (“the authority shall initiate a contested, evidentiary proceeding to establish initial rates on which the price regulation plan is based) (emphasis added); Tenn. Code Ann. § 65-5-209 (d) (1997 Supp.) (“the authority shall, upon petition of the competing telecommunications services provider, hold a contested case proceeding.”) (emphasis added). The absence of mandatory words in Tenn. Code Ann. § 65-5-203(a), indicates an intentional legislative choice. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991).⁴

The TRA’s rules establish a distinct procedure for reviewing complaints and convening contested cases on complaints filed against tariffs. Following the Court’s decision in *Greer*, the TRA promulgated detailed rules of practice and procedure which included the prerequisites for the convening of contested cases before the agency. These rules were reviewed and approved by the Office of the Attorney General, pursuant to Tenn. Code Ann. § 4-5-211, and became effective on September 13, 2000. Included in the Authority’s rules of practice is Rule 1220-1-2-.02(4), which states:

A tariff filing does not constitute a contested case; however, any interested person may object to the tariff filing by filing a complaint. Any such complaint shall state the nature of the interest, the grounds for any such objection and the relief sought. A copy of the complaint shall be served on the company filing the tariff. The company filing the tariff shall have the right to respond to such complaint. ***It shall be within the discretion of the Authority to convene a contested case.*** A complaint opposing the tariff shall be filed no later than seven (7) days prior to the Authority Conference immediately preceding the proposed effective date of the tariff. (Emphasis provided).

Also, the Court of Appeals, citing *Greer*, has reaffirmed the general principal that the Authority has discretion with regard to the decision of whether to convene a contested case in *Consumer Advocate Division v. Tennessee Regulatory Authority*.⁵ Most recently, the Court of Appeals, in the Welcoming Rewards case, affirmed these decisions which have been relied upon by the TRA in exercising its discretion.

1. The TRA does not concur with the following statement in the Report:

⁴ *Greer*, 967 S.W.2d at 763.

⁵ *Consumer Advocate Division v. Tennessee Regulatory Authority*, 2001 WL 575570 * 4 (Tenn.Ct.App., May 30, 2001).

The CAPD’s ability to carry out its duty is hindered, however, because the TRA does not always grant the CAPD’s petitions that the TRA initiate an investigation, convene a contested case, or allow the CAPD to intervene in a case before the TRA. (Pursuant to Section 65-4-117, the TRA has the authority to “investigate, upon its own initiative, or upon complaint in writing, any matter concerning any public utility . . .”) (Report, p. 9)

Through the convening of a contested case, certain rules of procedure become applicable to the proceeding. The term “contested case” is defined in two statutes which govern the practices and procedures of the TRA. Tenn. Code Ann. § 4-5-102(3), a section in the Tennessee Uniform Administrative Procedures Act, provides the following definition:

(3) “Contested case” means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the granting or denial of licenses, permits or franchises where the licensing board is not required to grant the licenses, permits or franchises upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency’s jurisdiction;

Title 65, which specifically addresses public utility regulation, contains a definition of contested case in Tenn. Code Ann. § 65-2-101(2) as follows:

(2) “Contested case” means all proceedings before the authority in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the authority; provided, that the fixing of rates shall be deemed a contested case rather than a rule-making proceeding;

By statutory definition, certain matters are automatically deemed contested cases. The TRA does not exercise discretion in such matters but may formally convene a contested case by pronouncement or order. In such a matter, the procedural dictates and due process guarantees of statutes and rules immediately affix to the case. The TRA is not aware of any instance involving a matter deemed a contested case by statute in which the CAPD has been denied intervention, provided, as with any party, the intervention request complied with the requirements of the Tennessee Uniform Administrative Procedures Act (Tenn. Code Ann. § 4-5-101 *et seq.*).

The Report states that of twenty-nine petitions of the CAPD analyzed in the audit, six (or 21%) were denied by the TRA. The Report uses as an example of a petition denial an ongoing matter before the TRA involving the CAPD and Atmos. This matter has encompassed two dockets: Nos. 04-00356 and 05-00258. The Report discusses the events which unfolded in both dockets leading up to a hearing by the TRA. Because of the conclusions in the Report drawn

from the analysis of these two dockets, it is incumbent on the part of the TRA to explain the underlying bases for the actions of the TRA in both dockets.

Docket No. 04-00356 was opened on October 15, 2004, upon the filing of the CAPD's *Petition to Require Atmos Energy Corporation to Appear and Show Cause that Its Rates are Just and Reasonable and that It is Not Overearning in Violation of the Tennessee Law* ("Initial Petition"). In the *Initial Petition*, the CAPD asked the TRA to initiate a show cause proceeding against Atmos to investigate the justness and reasonableness of Atmos's rates and issue a show cause order requiring Atmos to demonstrate to the TRA why its rates should not be reduced. As provided for in TRA rules, on November 16, 2004, Atmos filed a response stating that the *Initial Petition* was an attempt by the CAPD to avoid making a prima facie showing as required of parties challenging the reasonableness of rates approved by the TRA.⁶ Atmos argued that the CAPD, in challenging the reasonableness of the TRA's rate decisions, must put forth material and substantial evidence to overcome the presumption that the rates approved by the TRA are valid. Further, Atmos noted that the CAPD did not allege that Atmos was earning more than the rate of return authorized by the TRA in the Company's last rate case. The CAPD filed a *Reply of Consumer Advocate to Atmos Energy Corporation's Response to Petition* ("Reply") on January 14, 2005, asserting that Atmos's objections to the *Initial Petition* were legally insufficient and stating that the CAPD had not "had an opportunity to conduct discovery and make its full case." (CAPD Reply, January 14, 2005, p. 6)

The TRA deliberated the *Initial Petition* during the March 15, 2005, Authority Conference and the panel voted to deny the *Initial Petition* by a two to one vote. The TRA specifically found that the *Initial Petition* itself did not seek to "initiate" a proceeding but instead asked the TRA to initiate a show cause proceeding. Further, the CAPD's *Reply* suggested that the *Initial Petition* sought to convene a contested case in which Atmos would have the burden of proof and in which the Consumer Advocate could discover evidence to substantiate its allegations through proof. In voting to deny the *Initial Petition*, the panel encouraged the CAPD to file a complaint with the Authority setting forth sufficient allegations and thereby properly placing the burden of proof on the CAPD.

Instead of filing a complaint in Docket No. 04-00356 as suggested by the TRA, the CAPD filed a new petition in a new docket. Docket No. 05-00258 was opened on September 15, 2005, upon the filing of the CAPD's *Petition to Open an Investigation to Determine Whether Atmos Energy Corporation Should Be Required by the TRA to Appear and Show Cause that Atmos Energy Corporation is Not Overearning in Violation of Tennessee Law and That It is Charging Rates That Are Just and Reasonable* ("Second Petition"). The CAPD acknowledged that the *Second Petition* provided more specificity than the *Initial Petition* and did not seek to have the TRA initiate a show cause immediately.

The present Petition differs from the prior one in that the Consumer Advocate is now more explicitly setting out the procedure it is asking the TRA to follow. In

⁶ Rule 1220-1-2-.03(1) provides:

A respondent shall serve on the petitioner and file with the Authority a responsive pleading within thirty (30) days after the service of the complaint or initial petition, except where otherwise provided by statute, by these rules or by order of the Authority.

particular, the Consumer Advocate is asking the TRA to first conduct an investigation based on the allegations and proof that the Consumer Advocate is offering in this Petition, and then to open a show cause proceeding on the TRA's own motion. In addition, the present Petition contains proof not contained in the prior Petition; this proof overwhelmingly demonstrates that Atmos is overearning and that its rates are not just and reasonable. (CAPD *Second Petition* in 05-00258, filed September 15, 2005, pp. 5-6, Referencing Exhibit A, Testimony of Dr. Steve Brown; and Exhibit B, Testimony of Dan McCormac)

Pursuant to Rule 1220-1-2-.03(1), Atmos responded to the *Second Petition* on October 18, 2005, again strenuously opposing the request of the CAPD. The TRA granted the CAPD's *Second Petition* on November 15, 2005, and opened an investigation by TRA Staff into Atmos' earnings.

The two Atmos proceedings demonstrate that the Consumer Advocate exercised its discretion in determining not to file a complaint against Atmos which would have required the Consumer Advocate to bear the burden of proving its allegations. Instead, the Consumer Advocate sought to have the TRA initiate an action against Atmos in which the Consumer Advocate could participate as a party but not bear the burden of proof. The Consumer Advocate admitted in its *Second Petition* filed in Docket No. 05-00258 that its *Initial Petition* lacked clarity in the relief it was seeking from the TRA and was not supported by specific factual proof which it provided with its *Second Petition*. The circumstances presented in the two Atmos proceedings demonstrate that the TRA must be able to exercise its discretion to properly carry out its mission and cannot "always grant the CAPD's petitions."

2. The TRA does not concur with the following statement in the Report:

This is not the only case in which the TRA denied the CAPD's petition. In November 2005, the state Court of Appeals ruled that the TRA failed to follow the requirements of then-existing law when it declined to convene a contested case regarding BellSouth's "Welcoming Rewards Program" tariff. (Report, p. 10)

The Report initially referred to the Welcoming Rewards case as a "recent case," because the Court of Appeals issued its decision in November 2005. The Welcoming Rewards case was concluded by the TRA in early 2003. The appeal was argued in 2004, but it was not until November 2005, two and one half years after the TRA's final order, that the TRA obtained a ruling which provided some guidelines for the TRA to follow in exercising the discretion the Tennessee Supreme Court had articulated in 1998.

In the Welcoming Rewards case, the Court of Appeals acknowledged both that the TRA had the authority to exercise its discretion in determining whether to convene a contested case and that there were no statutes or rules in place to instruct the TRA as to how to exercise its discretion. The Court explained in its Opinion issued on November 29, 2005,

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

....

No statute or regulation prescribes the factors for the Authority to consider when deciding whether to dismiss a complaint seeking a contested case regarding a proposed tariff. (Opinion, November 29, 2005, p. 11)

The Court referenced the rules implemented by the TRA in outlining the procedure used by the TRA to determine whether to convene a contested case in the instance of a tariff docket.

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

No statute or regulation prescribes how the Authority should decide whether to open a contested case proceeding with regard to a proposed tariff. The Authority may "investigate" the complaint to determine whether it has merit. Tenn. Code Ann. § 65-4-117(a)(1) (2004); Tenn. Comp. R. & Regs. 1220-4-8-.09(2)(b) (2003). Thereafter, the Authority may either enter an order dismissing the complaint or petition, Tenn. Comp. R. & Regs. 1220-1-2-.02(5), or it may open a contested case proceeding regarding the proposed tariff. If the Authority decides to open a contested case proceeding, it may also permit the person or persons who filed the complaint or petition challenging the tariff or other interested persons to intervene. Tenn. Code Ann. § 4-5-310 (2005); Tenn. Code Ann. § 65-2-107 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4). (Opinion, November 29, 2005, p. 9)

The reference by the court to "the requirements of then-existing law" is not a reference to a particular law or statute but actually to the absence of a specific law or statute. Further, this

language does not appear in the Court's November 2005 Opinion. The Court included this reference in its Opinion on Rehearing Petition issued on December 21, 2005. The phrase refers to the change in the law after the decision by the TRA in the Welcoming Rewards case. After the decision of the TRA and during the pending appeal, the General Assembly passed legislation which provided some guidelines in exercising discretion in whether or not to convene a contested case. The TRA's final order denying the petitions to convene a contested case proceeding was filed on April 14, 2003. The effective date of Tenn. Code Ann. § 65-5-101(c) was July 1, 2004. (See, Act of April 7, 2004, ch. 545, § 2, 2004 Tenn. Pub. Acts. 1335, 1336.)

In asking for a rehearing, the TRA sought guidance from the Court as to the effect of the passage of Tenn. Code Ann. § 65-5-101(c) which occurred during the interim between the TRA's decision and the Court's Opinion. The Court denied the rehearing request but provided some guidance. While the Court reaffirmed its earlier finding that the TRA should have convened a contested case, the Court acknowledged the passage of Tenn. Code Ann. § 65-5-101(c) modified the standards for determining whether the TRA should convene a contested case proceeding to review a proposed tariff.

This statute supplies specific standards and gives the Authority broad discretion with regard to convening a contested case proceeding. However, the statute was not in effect when the Authority considered the tariff at issue in this case. Our opinion measured the Authority's actions at issue in this case *against the law in effect at the time*. Proceedings occurring after July 1, 2004 will, of course, be measured against Tenn. Code Ann. § 65-5-101(c) to the extent it is applicable. (Emphasis provided). (Rehearing Opinion, December 21, 2005, p. 2)

On page 11, the Report quotes directly from the Rehearing Opinion in listing the three findings of the Court but does not mention the above qualifying statement of the Court. The impact of the recent statutory change is significant and, as noted by the Court, could have affected the outcome of the Welcoming Rewards case.

This result could conceivably have been different had this proceeding taken place after July 1, 2004 because Tenn. Code Ann. § 65-5-101(3)I(i) would have required the complaining party to demonstrate a "substantial likelihood of prevailing on the merits of its complaint. . . ." (Rehearing Opinion, December 21, 2005, p. 3, fn 2)

The Welcoming Rewards case demonstrates that a system is in place for reviewing the TRA's exercise of discretion in determining whether to convene a contested case. In fact, there is in place a unique judicial review process for decisions of the TRA. First, the General Assembly has mandated that the review process for the TRA should start in the Court of Appeals and not in the Chancery Court. Most state agency decisions are reviewed initially in the Chancery Court for Davidson County; the final decisions of the TRA in contested case proceedings are appealed directly to the Court of Appeals, Middle Section for Tennessee. Second, the General Assembly differentiated the scope of review for actions of the TRA when it provided that any final decision by the TRA in a contested case could be reviewed by the courts whereas only final orders of other state agency decisions are reviewed by the courts. The Court in the Welcoming Rewards

case specifically held that a decision by the TRA not to convene a contested case can likewise be reviewed in the Court of Appeals.

Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii) requires that appeals from “any final decision” by the Authority must be appealed to this court. The standard of review in Tenn. Code Ann. § 4-5-322(h) is another example. Like Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii), the statutory standard of review in Tenn. Code Ann. § 4-5-322(h) is not explicitly limited to the review of decisions in contested case proceedings. It simply refers to “the decision of the agency.” Accordingly, we have determined, that the proper standard of review for “petitions for review” filed in this court pursuant to Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii) is the one found in Tenn. Code Ann. § 4-5-322(h). Therefore, we will review the Authority’s decision to decline to stay or to open a contested case proceeding to review BellSouth’s “Welcoming Reward Program” tariff using Tenn. Code Ann. § 4-5-322(h). (Footnote omitted). (Opinion, November 29, 2005, pp. 10-11)

(5) The TRA does not concur with the following conclusion in the Report:

If the TRA focuses on procedural technicalities of petitions rather than substantive consumer protection issues, it could undermine public confidence that the TRA is meeting its mission to balance the interests of utility consumers and providers. (Report, p. 11)

The Report reaches the above conclusion based on a cursory analysis of the two Atmos proceedings before the TRA and a Court of Appeals decision which is now limited by statutory changes affecting the manner in which the TRA may suspend tariffs and convene contested cases. Further, the Report does not take into consideration the procedural requirements which the TRA must address in determining whether to convene a show cause proceeding. By not focusing on “procedural technicalities,” the TRA could likewise “undermine public confidence” by violating the due process protections of a utility service provider, in the cases in point, Atmos.

The TRA’s authority to commence show cause proceedings is derived from Tenn. Code Ann. § 65-2-106 which states as follows:

Show cause orders. – The authority is empowered and authorized in the exercise of the powers and jurisdiction conferred upon it by law to issue orders on its own motion citing persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears justified by preliminary investigation made by the authority under the powers conferred upon it by law. All such show cause orders shall fully and specifically state the grounds and bases thereof, and the respondents named in the orders shall be given an opportunity to fully reply thereto. Show cause proceedings shall otherwise follow the provisions of this chapter with reference to contested cases, except where otherwise specifically

provided. [Acts 1953, ch. 162, § 7 (Williams § 5501.30); T.C.A. (orig. ed.), § 65-206; Acts 1995, ch. 305, § 9].

From an evidentiary perspective, the burden of proof shifts upon the issuance of a show cause order, as set forth in Tenn. Code Ann. § 65-2-109(5). That subsection provides:

(5) the burden of proof shall be on the party or parties asserting the affirmative of an issue; ***provided, that when the authority has issued a show cause order pursuant to the provisions of this chapter, the burden of proof shall be on the parties thus directed to show cause.*** [Acts 1953, ch. 162, § 10 (Williams, § 5501.33); T.C.A. (orig. ed.), § 65-209; Acts 1995, ch. 305, § 9]. (Emphasis provided).

A show cause proceeding falls within the definition of a contested case because, by statute, the opportunity for a hearing is afforded to the party against whom the show cause order is entered. Issuing a show cause order against a party is vastly different from convening a contested case based on a petition or complaint. When a petition or complaint becomes a contested case, the burden of proof in the proceeding rests with the filing party. When a show cause order is issued, there is a presumption that the specific allegations in the show cause order are sufficient to shift the burden and require the responding party to bear the burden of disproving the specific allegations against it.

The *Initial Petition* of the CAPD requested that the TRA convene a show cause proceeding and issue a show cause order against Atmos. After denial of the *Initial Petition*, the CAPD filed a *Second Petition* which admittedly corrected certain deficiencies in the *Initial Petition* and which asked the TRA to commence an investigation to determine whether a show cause order should be issued. The TRA opened an investigation and then, with the investigation report, proceeded with a hearing on the issue of Atmos's rates. It was important and necessary for the TRA to follow proper procedures in these two proceedings to assure that the due process guarantees of all parties were properly protected.

Appendix 3
Office of the Attorney General and Reporter's Comments
In Response to Observation and Comment (see page 9)

We concur with the observation and comment, particularly with the conclusion regarding the difficulty of obtaining a hearing before the TRA. While we agree with the recommendation that the TRA should avoid putting too much emphasis on the technical composition of a petition, the CAPD petitions were (and are) both procedurally and legally sufficient in all respects. In accordance with the CAPD's statutory duty to represent Tennessee consumers of public utilities services, we will continue to petition the TRA for intervention and participation in public utility matters that affect consumers.