

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

March 21, 2006

IN RE:

APPLICATION OF BRISTOL TENNESSEE  
ESSENTIAL SERVICES FOR A CERTIFICATE  
OF PUBLIC CONVENIENCE AND NECESSITY TO  
PROVIDE TELECOMMUNICATIONS SERVICES

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DOCKET NO.  
05-00251

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ORDER APPROVING APPLICATION FOR CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY

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This matter came before Chairman Ron Jones, Director Pat Miller, and Director Sara Kyle of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket on March 6, 2006, for consideration of the *Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunications Services* (the "Application").

**LEGAL STANDARD FOR GRANTING CCN**

The *Application* of Bristol Tennessee Essential Services ("BTES") was made pursuant to and considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in Tenn. Code Ann. § 65-4-201 *et seq.*, Tenn. Code Ann. § 65-5-112, and applicable sections of Tenn. Code Ann. § 7-52-401 *et seq.*

Tenn. Code Ann. § 65-4-201 provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line,

system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate. . . .

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(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

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(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

In addition, pursuant to Tenn. Code Ann. § 65-5-112, competing telecommunications providers are required to file with the Authority: 1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses and 2) information on programs that might provide technical assistance to such businesses.

BTES's *Application* is also subject to the requirements of Tenn. Code Ann. §§ 7-52-401, 7-52-403 and 7-52-405. Tenn. Code Ann. § 7-52-401 provides, in pertinent part:

Every municipality operating an electric plant, whether pursuant to this chapter or any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within and/or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable

state and federal laws, rules and regulations. A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant. . . . Notwithstanding § 65-4-101(a)(2) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

With respect to the applicability of other regulatory laws and rules to municipalities, Tenn.

Code Ann. § 7-52-403 provides:

(a) To the extent that it provides any of the services authorized by § 7-52-401, a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee. To the extent that such authority and powers do not conflict with the provisions of title 65, chapter 4 or 5, and any rules, regulations, or orders issued thereunder, a municipality providing any of the services authorized by § 7-52-401 has all the authority and powers with respect to such services as are enumerated in this chapter.

Additionally, Tenn. Code Ann. § 7-52-405 establishes the criteria for a municipality's allocation of the costs of providing its telecommunications services.

### **PROCEDURAL HISTORY**

On September 12, 2005, BTES filed its *Application* for a Certificate of Public Convenience and Necessity to provide facilities-based telecommunications services within Sullivan County, Tennessee. The testimony of Dr. R. Michael Browder, Alan D. Ellison, Dwight Work, and Beth Ringley were also filed with BTES's *Application*.<sup>1</sup> At the regularly scheduled Authority Conference held on October 17, 2005, the voting panel assigned to this docket appointed General Counsel or his designee as Hearing Officer to hear preliminary matters, to rule on any petitions for intervention, and to set a procedural schedule to completion. BellSouth Telecommunications, Inc. ("BellSouth") filed

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<sup>1</sup> *Application of Bristol Tennessee Essential Services for Certificate of Public Convenience and Necessity to Provide Telecommunications Services*, Exhibit M, Pre-Filed Testimony (September 13, 2005).

the *Petition of BellSouth Telecommunications, Inc. For Leave To Intervene* (“*Petition to Intervene*”) on September 30, 2005. United Telephone-Southeast, Inc. (“UTSE”) and the Southeastern Competitive Carriers Association (“SECCA”) also filed petitions to intervene on October 5, 2005 and November 8, 2005, respectively. In an Order issued on November 2, 2005, the Hearing Officer granted BellSouth’s and UTSE’s petitions.

On November 4, 2005, a status conference was noticed for November 18, 2005. During the status conference, the Hearing Officer granted intervention to SECCA and established a discovery schedule. An Order memorializing these decisions was issued on December 5, 2005. The parties’ first discovery requests were due on November 30, 2005 with responses due on December 14, 2005. The second discovery requests were due on December 19, 2005, with responses due on January 6, 2006. The interveners’ pre-filed testimony was to be filed on February 8, 2006 with rebuttal testimony to be filed by BTES on February 22, 2006. The Hearing Officer on January 13, 2006, noticed a pre-hearing conference for February 27, 2006, and a hearing was noticed for March 6, 2006. The Hearing Officer, in an Order issued on February 8, 2006, amended the procedural schedule with the interveners’ pre-filed testimony due on February 10, 2006, and BTES’s pre-filed rebuttal testimony due on February 23, 2006. The Hearing Officer set the hearing to commence at 9:00 a.m. on March 6, 2006.

### **SETTLEMENT AGREEMENT**

Counsel for BTES on February 10, 2006 filed a settlement agreement on behalf of BTES and UTSE.<sup>2</sup> A joint motion to approve the settlement agreement was filed on February 27, 2006 by both BTES and UTSE.<sup>3</sup> The settlement agreement:

1. limits the service area of BTES to the area in which BTES provides electric service and requires BTES to return to the Authority to amend its certificate should BTES wish to expand its service area; 2. requires BTES to obtain the consent of Sullivan County and other applicable local governments before providing telephone service

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<sup>2</sup> *Settlement Agreement*, p. 1-7 (February 10, 2006).

<sup>3</sup> *Joint Motion of Bristol Tennessee Essential Services And United Telephone-Southeast, Inc. To Approve Settlement Agreement*, p. 1-3 (February 27, 2006) (hereinafter *Joint Motion*).

outside the city of Bristol, Tennessee; 3. requires an independent auditor to examine the cost allocation manual filed by BTES; and 4. requires BTES to file annual reports with the TRA demonstrating compliance with the cost allocation manual and showing the financial results of each BTES business unit.<sup>4</sup>

The parties also agreed that BTES will “submit an audit of its cost allocation procedures within ninety days of the grant of the application.”<sup>5</sup> The parties also adopted language from prior Authority orders for the settlement agreement.<sup>6</sup> The provisions provide that: “BTES will submit to an annual audit to determine that BTES is operating in compliance with the cost allocation manual and the Authority’s rules and orders.”<sup>7</sup> The TRA will also be given full access to BTES’s records.<sup>8</sup> The other provisions include: (1) the government of BTES’s record keeping practices; (2) the prevention of BTES from favoring its telephone business unit over third party telephone companies; (3) the prohibition of BTES from entering into a joint venture to offer telephone services without consent of the Authority; (4) the need for the consent of local governments in certain situations; (5) the filing of annual financial reports, BTES correspondence with the State Director of Local Finance, and reports that BTES is required to file with the Tennessee Valley Authority.<sup>9</sup>

### **MARCH 6, 2006 HEARING**

A hearing was held before the Authority on March 6, 2006. Participating in the Hearing were Mr. Henry Walker representing BTES, Mr. Chuck Welch representing SECCA, and Mr. Jack Derrick representing UTSE. At the start of the hearing counsel for BTES moved to amend the *Application* to include the settlement agreement. Upon hearing no objection the panel granted the motion.

During the Hearing, the panel heard testimony from the witnesses relating to the issues in this matter. Dr. R. Michael Browder, General Manager of BTES, presented pre-filed direct testimony and was cross-examined by counsel for SECCA. Alan D. Ellison of Harbor Network Services, LLC,

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* 2-3. See also, *Memphis Networx*, Docket No. 99-00909 , p. 39-40 (August 4, 2000); *Jackson Energy Authority*, Docket No. 03-00438 p. 10 (March 5, 2004).

<sup>7</sup> *Joint Motion* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* 2-3.

a consultant for BTES's telephone operations, and Dwight Work of Work and Greer also presented pre-filed direct testimony. The pre-filed testimony of Beth Ringley, Director of Management Services for BTES, was waived into the record as if read.

## **FINDINGS AND CONCLUSIONS**

At the hearing the Authority granted BTES's *Application*, as amended with one condition. Specifically, the one condition is that audits will not be automatically conducted under the Authority's supervision; rather the Authority will exercise discretion concerning the extent of the Authority's participation. The following findings of fact and conclusions of law support the decision.

### **I. APPLICANT'S QUALIFICATIONS**

1. Bristol Tennessee Essential Services is a utility authority that provides electric service to approximately 32,000 homes, businesses and industries in and around Bristol, Tennessee. BTES was created in 1945 by the City of Bristol pursuant to the Municipal Electric Plant Law of 1935.

2. BTES principal place of business is located at 2470 Volunteer Parkway, Bristol, Tennessee, 37620. The telephone number is (423) 968-1526. The fax number is (423) 793-5545.

3. To demonstrate its financial capability to provide the proposed services, BTES will make available sufficient working capital through an inter-division loan from its Electric Business Unit. BTES's Board of Directors has approved an initial inter-company loan of two million dollars (\$2,000,000). BTES has also provided a copy of its 2004 Annual Report. BTES has obtained a surety bond in the amount of twenty thousand dollars (\$20,000.00) from Cincinnati Insurance Company. Therefore, based upon the financial data presented herein, the Authority concludes that BTES possesses the financial ability to provide the services it proposes to offer.

4. With respect to the managerial and technical ability of BTES, compelling evidence has been presented to demonstrate that BTES possesses an experienced management staff. The

record demonstrates that General Manager Dr. R. Michael Browder has substantial managerial and technical experience in public power. BTES has also retained Alan D. Ellison of Harbor Network Services, LLC as a consultant for BTES's telephone operations. The Authority concludes that BTES possesses the requisite expertise to provide the applied-for services based upon the foregoing demonstration of managerial fitness and technical ability.

5. BTES has represented that it will adhere to all applicable policies, rules and orders of the Authority.

## **II. PROPOSED SERVICES**

BTES intends to provide competing local telecommunication services, which include exchange access telecommunications services within Tennessee. BTES also requested a certificate of convenience and necessity in order to provide a broad array of local exchange services on a facilities-based and resale basis. BTES will make no effort to offer cable services outside of its electric service area before July 2008.

## **III. PUBLIC CONVENIENCE AND NECESSITY**

Upon a review of the *Application* and the record in this matter, the Authority finds that approval of BTES application would benefit the present and future public convenience by permitting competition in the telecommunications services market in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

## **IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN AND BUSINESS ASSISTANCE PROGRAM**


1. BTES has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-112 and the Authority's rules.

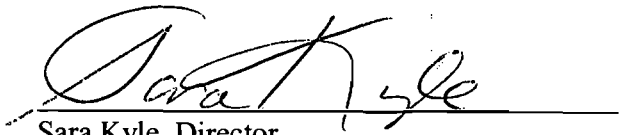
2. BTES has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-113.

**IT IS THEREFORE ORDERED THAT:**

1. The *Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunications Services* is approved with the condition that audits will not be automatically conducted under the Authority's supervision; rather the Authority will exercise discretion concerning the extent of the Authority's participation.
2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and
3. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a petition for review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

  
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Ron Jones, Chairman

  
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Pat Miller, Director

  
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Sara Kyle, Director