Aeneas
Internet Telephone

Tennessee's Leading
Internet and Telephone Provider
www.aeneas.com

September 15, 2006

filed electronically in docket office on 09/15/06

Sharla Dillion
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

RE: Generic Docket: CLEC to CLEC
Docket 05-00327

Dear Ms. Dillion,

The Authority requested comments in this docket to be filed by today's date. I am sending our Comments today by email and four hardcopies of the Comments will be placed in the mail to you today as well. Thank you for taking care of this. Please let me know if I need to do anything else to get it on the docket today.

Sincerely,

Paul F. Rice, Attorney

300 N Cumberland • Jackson, Tennessee 38301 • 731-554-9200 • FAX 731-554-4440 • 1-800-470-7288

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:
Generic Docket to Develop Policy for the Submission and Review of CLEC-to-CLEC Interconnection Agreements **Docket 05-00327**

COMMENTS OF AENEAS COMMUNICATIONS, LLC

In response to the Authority's Notice of Filing Comments, dated August 24, 2006, Aeneas Communications would state as follows:

Aeneas Communications, LLC (Aeneas) is a Competing Local Exchange Carrier (CLEC) in Tennessee and delivers internet and voice services over multiple networks. One such network is the fiber to the home network operated by the Jackson Energy Authority (JEA), which is a CLEC limited by its Certificate of Convenience and Necessity to functioning as a "carrier's carrier"; this was the docket (04-00128) that initiated this proceeding. Over the approximately three year relationship between the parties, Aeneas has developed a unique insight into the day to day operational issues flowing from the public utility's commercial aspirations, however, the comments below are as relevant for private CLEC network operators as public CLEC network operators unless otherwise stated.

Jurisdiction

Upon information and belief, the traditional practice of the TRA with respect to CLEC to CLEC arrangements has been to recognize jurisdiction under TCA 65-4-101 et seq. However, the TRA has limited its exercise to resolving disputes when asked, and not to requiring filing of every agreement they may have between them. However, with encouragement of the Telecom Act amendments of 1996, a few private CLECs have undertaken network operations, and several local governmental entities have undertaken network operations as CLECs or otherwise. Thus, the TRA's decision to take a new look at the filing requirements of CLEC to CLEC agreements is timely and welcomed news.

It is the recommendation of this retail CLEC that the TRA take a proactive role in reviewing, approving, and monitoring network administration activities of any public or private network operator- utilizing the Certificate of Convenience and Necessity process as well as requiring filing and approval of network interconnection agreements. There follows an explanation of why this is recommended.

A "Light Touch"

Although the Jackson Energy Authority agreed in its Interconnect Agreement with Aeneas to file the document and any amendments with the TRA, it has apparently had a change of heart. It now appears to be the contention of the Jackson Energy Authority as well as at least one other public network that the TRA has no jurisdiction over them in whole or in part. This other network was built without seeking a Certificate of Convenience and Necessity or CLEC status from the TRA (at least, none appears on the TRA website). Three other public networks have failed to respond to Aeneas' requests to interconnect. JEA has declined to join with Aeneas in filing amendments to their interconnection agreement with the TRA and turned down a TRA request to submit a Disaster Plan. In addition, it is not respecting statutory and regulatory parity requirements by selling the retail services of one provider in preference to those of Aeneas in return for unequal compensation. It appears that the federal suggestion that states limit themselves to regulating "broadband" with a "light touch" is assumed by those seeking to escape regulation as an across-the-board federal preemption. Whether discussing public or private network operations, no such preemption exists.

The significance of voice communications to law enforcement, commerce, education, health care, homeland security, E911, Lifeline, Linkup, etc, seems beyond debate at this point in history. Laws and regulations passed when analog voice transmissions moved along copper wire over the past century reflect this. However, the notion that it wasn't the *reliable distribution* of these communications that was important- but rather the protocol and type of wire used- is disingenuous. A federal recommendation of a "light touch" concerning "broadband" does not render *reliable*

distribution of communications any less important than it ever was, and the Legislature has already asserted jurisdiction to regulate the *reliable distribution* of communications of all kinds under current statutory law. As far as broadband retailing and content is concerned, Tennessee is a "hands-off" state, and regarding the increasing number of public and private network operators, Tennessee is already exercising a "light touch"- too light, in fact.

It is Better to Avoid Problems than Adjudicate The Harm They Cause

After the certification process, it is the Interconnection Agreement that sets out exactly how the network operator and broadband retailer(s) are going to work together to assure access in compliance with various state laws that apply to the relationship. The terms of the first access agreement entered establish a baseline from which parity and non-discrimination will be measured among multiple providers on the same network going forward. The experience in Jackson is illustrative: In Jackson, the JEA entered into an interconnection agreement with Aeneas generally charging Aeneas a certain amount for each unit of bandwidth ordered by Aeneas. However, a subsequent retailer to sign up on the JEA network and agreed to be charged a percentage of gross revenues for network access *and* for JEA to handle all its sales and marketing and other retail operations. This mixing of the network operations and compensation with the retail operations and compensation of one but not all CLECs on the network has obscured the ability of Aeneas and the TRA to monitor for pricing parity for access to the network. This mix also created a situation where the network operator became the sales agent for one retailer in preference to another. The JEA Certificate of Convenience and Necessity (Docket 03-00438) declares the utility's parity and non-discrimination duties, *but this problem surfaced in the subsequent Interconnect Agreement* and could have been spotted and cured had the second CLEC to CLEC interconnection agreement been filed for review by the TRA and competitors to whom a duty of parity and nondiscrimination is owed. In order to get a copy of the competitor's interconnect agreement for comparison from JEA, Aeneas filed a request under the Open Records Act.

Sample of Problems to Look For

Each provision of a network interconnection agreement could and should be examined for any provision which might violate any of the following:

TCA 65-4-115 *"No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which is unjust, unreasonable, unduly preferential or discriminatory..."*

TCA 65-4-122(c), which states in pertinent part: *"It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage."*

TCA 65-4-124(a), which states in pertinent part: ***"All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions, and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.***

A Special Note about Public Networks

There is a secondary logic to requiring publicly owned networks to disclose the terms for accessing their networks. When government controls access to a public asset- like a right of way, pole attachment, or access to a publicly financed and operated FTTH network- Due Process (substantive and procedural) already requires enforceable parity and non-discrimination. Subdivisions of the state are simply not to be used intentionally or accidentally allowed to divert public funds to build out networks for the discriminatory benefit of favored retail providers, and transparency is necessary to monitor compliance and avoid such mischief. The application of public funds for the operation of a publicly built, owned, and operated network is not a proprietary secret that local governments should be claiming as "trade secrets".

Consistent with this view of open government, the Legislature has made clear its policy prohibiting cross-subsidization of a public telecom project by an Electric Division, and public disclosure- as by filing with the TRA- are necessary to monitor for subsidization. An electric division must charge and allocate to its own telecom affiliate *"an amount for attachments to poles owned by the utility equal to the highest rate charged by the utility to any other person or entity for comparable pole attachments..."* TCA 7-52-405.

To date, for the governmental entities that have come to the TRA for Certificates of Convenience and Necessity to operate networks, the TRA is already requiring inclusion of "Codes of Conduct" to force disclosure of cross-subsidization. *Filing the terms and conditions for network access is likewise sound as a tool which allows competing retailers to monitor and enforce violations of parity or other statutory obligations imposed on public and private network operators.*

Conclusion Regarding Filing

In order to guard the public's right to the *reliable distribution* of communications- regardless of who the retailer is or what equipment or protocol is used- it is essential that the TRA exercise continuing jurisdiction starting with the CCN process and including approval of the legal framework of, and terms and conditions in, the interconnection agreements between public and private CLECs operating networks and CLECs seeking to provide retail services over those networks. This commenter does not recommend that agreements between CLECs concerning purely retail relationships- those not impacting network access or transport- should be filed.

Interconnect Agreement Subject Matter

The overall layout of the Aeneas/JEA Interconnection Agreement followed the Bellsouth pattern for agreements reviewed under the Telecom Act. A few of the subjects covered in our agreement have created special difficulties or situations:

Experience suggests that it would be prudent to require a clause in every interconnect agreement to the effect that the retailer will be solely responsible for marketing and sales, ordering, provisioning, tech support and collections under the Interconnect Agreement, and that any other arrangements for offering and/or compensating for such services (the legality of which for public entities is beyond the scope of this docket) will be provided under a separate and independent contract. As mentioned above, experience has proven the importance of separating network access issues and compensation from retail issues and compensation. If done at start up in particular, separating "network operations" accounting from "retail operations" accounting is not difficult, and it makes monitoring access/transport parity- without viewing proprietary retail information- possible and relatively simple.

"Opt in" or "Pick and Choose" clauses avoid requiring a network operator to be forever confined to the first Interconnect Agreement it signs with a retailer (in order to assure parity among subsequent multiple retailers). These provisions allow for modernization of the terms of access and transport by enabling all retailers to operate under the new terms if they desire, and should be required in every agreement.

Dispute Resolution

It is absolutely critical that the TRA retain jurisdiction over all CLEC to CLEC disputes in this state in order to provide a forum other than dragging network operators to court over every disagreement. The Judiciary is not as versed in the complexities of communications law as is the TRA, and crowded dockets render most courts worthless as a dispute resolution tool for on-going businesses. It would be tremendously helpful if something akin to a "small claims" forum operated on a so called "rocket-docket" format could be set up with the predicted result of speeding resolution and lessening the actual number of "contested cases" before the Authority.

This the 15th day of September, 2006.

Respectfully submitted,

Aeneas Communications, LLC

By: _____

Paul F. Rice, Attorney
PO Box 1692
Jackson, TN 38302-1692
(731)554-9235