BEFORE THE TENNESSEE REGULATORY AUTHORITY
October 13, 2006

IN RE: APPLICATION OF ELECTRIC POWER BOARD OF CHATTANOOGA TO EXPAND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES STATEWIDE

DOCKET 06-00193

RESPONSE OF AENEAS COMMUNICATIONS, LLC TO EPB'S OBJECTIONS TO INTERVENTION

Comes now counsel for Aeneas Communications, who states that it is imperative that the issues raised by this docket receive a full and thorough examination as they represent matters of first impression in both telecom and municipal law, and will affect the very nature of representative local government. Absent advance guidance from the Legislature, the establishment of such a sweeping policy for the state should not be adopted by procedural default.

PROCEDURAL STATUS OF THE CASE

Aeneas adopts the Electric Power Board's recitation of the "Travel of the Case" and the events which occurred before the TRA hearing panel as found in its "Objections", Section I and II.

DUE PROCESS-NOTICE

The Authority utilizes a website and posts recent filings in all dockets- a real public service and convenience to the bar. Postings are found under a section for 'weekly postings', 'recently active dockets' and the main docket page with links to all active dockets going back several years. In all but the latter postings, the 'hotlink' to the filing includes a short description prepared by someone at the TRA; many times the description gives a good idea of what is in the filing, other times the description does not. Regarding the website, there is no agency rule declaring the significance of these postings or declaring a duty to open every filing or be considered to have 'constructive notice' of the contents.

The Authority also utilizes a faxing service to send information about meetings to people who have acted to place their name on a list at the TRA. It is unknown to Aeneas whether other people are advised that the fax service is a convenience or an enforceable substitute for legal process or adequate "notice" for Due Process Clause purposes; Aeneas has not been so advised.

The fax and website are no doubt effective for giving notice of the agenda of the TRA meetings for purposes of satisfying the Sunshine Act, TCA 8-44-101 et seq, but completely unrelated to the notion of giving effective notice to an "interested party" under TCA 65-4-201 of the issues raised under a particular docket.

As related in the Affidavit of Jonathan Harlan, he is unaware that having the notices faxed to him is anything other than a convenience. The fax machine at Aeneas is the same one used by the provisioning department and dozens of people a day use it. He has no independent recollection of seeing this particular fax. Moreover, when the fax was apparently received by the Aeneas fax machine at 2:09pm on *Friday, September 15* about the hearing on September 25, there were only three calendar days for Aeneas to review the filings, investigate, meet with an attorney, prepare the necessary paperwork for

intervention and get it filed. Mr. Harlan had left the office early Friday afternoon, was not at work on Saturday or Sunday, and still didn't know anything about the matter on Monday the 18th, when his seven days expired.

The electronic communications are a good thing and the TRA staff does a great job up-loading a mountain of documents; however, the fact that neither Aeneas nor the Cable Association discovered this agenda item in time to intervene by the 18th indicates that notice to this "interested party" wasn't effective in this particular case. Counsel for EPB argued at the hearing that it would be unreasonable for the TRA to have to give notice like that given to ILECs under the statute to CLECs that might qualify as an "interested party" under TCA 65-4-201, however, it is also not reasonable to hold everyone on the internet or every person in offices getting these meeting agendas from the TRA to constructive notice of the matters within the dockets so briefly described.

EPB's Objections

The EPB's Objections identifies two statutes which it maintains contain non-waivable procedural deadlines preventing the Authority from listening to substantive input from Aeneas, a CLEC.

First, EPB argues that a strict construction of TCA 65-4-201(c)(2)- referring explicitly only to original applications for certification- dictates that a subsequent application to modify a certificate of need must be granted or denied "within sixty days of filing". This is incorrect.

The Legislature is silent as to the specific timetable for applications to modify an existing certificate of need, leaving the door open for an agency interpretation and

decision as to its own internal operating procedure in that instance. Thus, Rule 1220-4-8-.04(3)(a) speaks specifically to the case of a petition to modify:... *"If the competing provider wishes to expand into areas served by other incumbent providers, the competing provider must file a petition to modify the certificate. The Authority shall act upon that petition within sixty (60) days of filing."*

The hearing panel did, in fact, "act upon" the underlying Application to modify an existing certificate on the 59th day after filing by opening the hearing. In any event, however, the sixty day deadline is directory, not mandatory, and therefore, in the absence of prejudice, the agency's failure to abide by the 60 day deadline is not error. See Garrett v. State, 717 S.W.2d 290,291 (Tenn. 1986). This same principle was upheld recently by a Hearing Officer in http://www.state.tn.us/tra/orders/2001/0100704eb.pdf . As EPB admitted having no immediate plans under the authority sought, it was noted by members of the panel that no prejudice would follow from seeing what Aeneas had to say.

STANDARD FOR REVIEW

The second statute that EPB asserts to bar comments from CLECs such as Aeneas is a section from the Administrative Procedures Act which actually supports Aeneas' request. Normally, a petition to intervene must be filed at least seven days prior to a properly noticed hearing date under TCA 4-5-310(a), and that is written up in Rule 1220-1-2-.08(3). For every procedural rule, however, it seems there is always some situation that demands that form give way to substance, and that is recognized in statutes such as TCA 4-5-309 (excusing some defaults even when properly noticed) and TCA 4-5-310(b), which says:

"(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings."

Reliance on this statute would appear to make the possible Due Process "notice" issues in this case moot. If the above standard is met, the panel is within its rights as delegated from the Legislature to alter the usual timing for filing Petitions to Intervene in reliance upon Rules 1220-1-1-.05 (certainly the above criteria would also constitute "good cause") and -.11(2), and the real issue becomes whether or not Aeneas can meet that standard.

The intervention is sought in the interests of justice.

The Due Process argument above concerning the lack of effective notice should satisfy these criteria by itself. However, the issues raised also satisfy the criteria:

This Application raises several major matters of public interest in that the request of EPB brings a policy issue of first impression before the TRA, and requires a review of not only telecom law but the law of local government operations. In a nutshell, the issues include locating the line between permissible and impermissible governmental ventures into the business world; determining whether enacting telecommunications authority for entities with existing "electric power plants" was meant to tie municipal services to those plants, and just how this project promotes the health, safety or welfare of the inhabitants of Chattanooga. Since the Application makes almost no mention of what services EPB intends to provide or the areas it seeks to actually serve, the Application review will also require discovery to determine if Chattanooga can actually afford and support customers hundreds of miles away or otherwise satisfy the certificate modification requirements of TCA 65-4-201 and Rule 1220-4-8-.04(1), (b), (d), (f), and (i).

IS THIS AN APPROPRIATE VENTURE FOR A LOCAL GOVERNMENT?

Justice Drowata summarized in Cleveland Surgery vs Bradley Memorial, 30 SW3d 278 (Tn 2000) how America's westward expansion and the industrial revolution led states to finance the construction of railroads and canals, usually by issuing bonds or by guaranteeing private debt. After a multitude of failures, by 1855 nineteen states had enacted constitutional prohibitions limiting their ability to entangle themselves with private businesses. Tennessee's version of one such restriction is found in Article II, Section 29 of our Constitution. In describing the provision, Justice Drowata continued for the Court:

*"... A like provision is found in the Constitution of nearly every state in the Union, and the reason for its presence is not difficult to discover. It represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns...**[the provision] was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi-public purposes, but actually engaged in private business.**'"* (citation omitted, emphasis added). Cleveland Surgery, 30 SWnd, at 282-3.

In 1870, just after the Civil War, Article II, Section 31 was amended to forbid all private financing at the state level; Section 33, got the state out of the 'defaulting railroad' business. Significantly, the second and third sentences of Article II, Section 29 were added to push responsibility for local internal improvements back into local hands-where the people liable to pay for 'plans-gone-wrong' could pre-approve plans by referendum and elect, supervise, and hold accountable, those responsible for administering the project. Lewis Laska, *The Tennessee State Constitution, A Reference Guide,* Greenwood Press (___).

This is the first request by a publicly-financed, governmental project to sell retail services in competition with private providers far from the watchful eyes of the local electorate without providing the public with any advantage or benefit not already enjoyed

from the private sector. The notion that it is a proper goal of government to *substitute for* private enterprise- even if "necessary" to pay its bills- rather than *support* private enterprise, runs contrary to TCA 7-34-103 and as restated in section 115-

TCA 7-34-103(b) *"No municipality shall operate public works for gain or profit or primarily as a source of revenue to the municipality, but shall operate public works for the use and benefit of the consumers served by the public works and for the promotion of the welfare and for the improvement of the health and safety of the inhabitants of the municipality."*

From the point of view of a citizen of Chattanooga, without a network build out which accomplishes some public purpose benefiting Chattanooga, EPB's quest for paying customers is just a speculative business venture funded with the public's money. From the point of view of retail providers fearing the loss of business to this governmental entity, the Application is closely akin to the facts in the recent Fifth Amendment "taking" case of Kelo vs City of New London, 545 U.S. 469; 125 S. Ct. 2655; 162 L. Ed. 2d 439 (2005) wherein the city wanted money and simply took private homes from their owners and sold them to developers in hopes of reaping higher property tax revenues

This Intervention will explore just how setting up retail telephone operations in Jackson or anywhere else not served by EPBs distribution network 'promotes the welfare and the health and safety of the inhabitants of Chattanooga' and will thus serve the interests of justice.

ENABLING ACT TIES EPB TO ITS LOCAL SOVERIGNTY, BOUNDED BY ITS POWER PLANT

The Application of the EPB does not propose to utilize its "electric power plant" to bring services to ignored or underserved areas with any connection to Chattanooga; in fact, there is pending before this Authority a request for approval of EPB's authority to provide traditional POTS services statewide over the Bellsouth (or its successor) network

(Docket 06-0042). This implies that there is no contemplation for building new distribution plant into underserved or ignored areas of the state.

The apparent intent of the Legislature in empowering entities with existing distribution networks- rather than "cities" or "counties"- was that the utilities' right of way placement of electrical poles and conduit would be utilized. (TCA 7-52-401 municipalities with electric plants/telephone; TCA 7-52-601 municipalities with electric plants/data and cable tv; TCA 65-25-201 et seq, electric cooperatives, TCA 65-29-101 et seq., telephone cooperatives.)

This Intervention will explore the legislative history behind the relationship between the power plant and the enabling legislation, and thus this Intervention will be in the interest of justice.

Illustrative of the complexities inherent in mixing up the principles of representative local government with statewide commercial ambitions, the request of Chattanooga includes doing an act in the Jackson market that the TRA has previously withheld from the Jackson Energy Authority. In January 2002, the "Jackson Energy Authority" (2001 Priv. Acts, Chap 55), filed a "Business Plan" with the State Comptroller's Office wherein JEA would enter a partnership with a fortunate group of private investors and utilize the public assets of JEA to build a fiber network for the partnership; financing was to be with JEA revenue bonds, guaranteed by the taxpayers of the City of Jackson. The plan was not universally supported.

After two citizen petition drives and a lawsuit, the settlement agreement ending the lawsuit *was incorporated into the Certificate of Need for the JEA project.* [TRA Docket 03-00438]. In that agreement, Jackson and JEA did alter their Business Plan and

JEA was certificated in the limited role of "carrier's carrier" for voice and internet services in its service area. JEA cannot provide voice services in Jackson. How ironic that a city hundreds of miles away has subsequently filed an Application to use another network to become a retailer in Jackson?*

This Intervention will explore the potential conflict between TRA certificates and the fact that recent political history in Jackson indicates that people prefer private enterprise over government carriers, and thus will serve the interests of justice.

The intervention sought shall not impair the orderly and prompt conduct of the proceedings.

EPB has not offered any evidence or suggestion that a thorough review of this modification request will harm any end user or the EPB itself. It's Application does not appear to address the criteria for establishing that it can afford to provide the services planned in the new areas- wherever they are, or whether it can support customers hundreds of miles away; EPB has mentioned is that several years ago, it was approved to provide services in a restricted area.

This intervention will query directly into these areas and expedite review of these facts if the Application is not dismissed at this point due to that deficiency. **TCA 65-4-201 and** Rule 1220-4-8-.04(1), (b), (d), (f), and (i).

*Like public roadways across the state, these public networks could support a plethora of private commerce by multiple retailers. Unfortunately, that doesn't seem to be what is happening. Aeneas was forced to sue its way on to the JEA network in Jackson. Aeneas has requested access information regarding the publicly financed, owned, and operated network facilities in Chattanooga, Bristol, and Morristown by letters dated August 10, 2006, but as yet has not received a response from any of them.

CONCLUSION

For all of the reasons outlined above, this remarkably important docket should receive a thorough review as the Authority decides not only the appropriate role of municipalities in telecom, but the nature the relationship between ratepayers and the commercial aspirations of their local governments, and the appropriate scope of municipal activities beyond the geographic areas associated with their rate or tax payers. Aeneas requests leave to intervene in this docket.

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Certificate of Service

I certify that a true copy of this document and attached affidavit were served upon counsel of record by fax and United States Mail on this the 13th day of October, 2006.

Paul F. Rice, Attorney