

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
October 25, 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

SUPPLEMENTAL COMMENTS OF AENEAS COMMUNICATIONS

PROCEDURAL STATUS:

Aeneas Communications was allowed to speak as a member of the public in this proceeding on October 16, 2006, and the Authority has requested follow up comments on certain issues raised at the hearing. Specifically, Aeneas was asked to comment on potential constitutional issues concerning the lending of public credit that EPB might trigger by providing voice services statewide.

EPB'S INCOMPLETE APPLICATION AND THE LENDING OF CREDIT:

A major problem with the EPB Application is that it does not disclose what the management of EPB is planning do to with public money. If they plan to build facilities for a third party to operate, they may run into problems with the prohibition against lending public credit found in Art II, Section 29 of the Tennessee Constitution. If they plan to lend a non-tangible asset to a third party- such as might happen if Chattanooga

has to pay someone to support services delivered hundreds of miles away- these same constitutional issues may come up. This provision applies regardless who the recipient is, private, quasi-public, or even governmental. Baker vs Hickman County, 164 Tn 294, 47 SW2nd 1090 (1932)-state/county; Fort Sanders Hospital vs H&S Board, 453 SW2nd77 (Tn1970)-City and Bond Board. If they plan to operate closed networks across the state to exclude retail competition, these state and also federal due process issues come into play. However, neither Aeneas or the TRA can determine if these issues are involved because the EPB has not complied with Rule 1220-4-8-.04(1) (b) or (d) or (f) or (i) requiring specificity on: the ability to support the services, any remote addresses of employees responsible for Tennessee operations, repair and maintenance information, and “a description of the category and types of services to be offered, the facilities and arrangements to be made available to end users and/or carriers, and the geographic area in which the services shall be offered.” No one can afford to brief every “what-if” that might come about from the various third party business models which EBP could chose from; but it is virtually certain that it cannot fulfill its aspirations using internal assets. It would facilitate a meaningful analysis of issues if EPB were required to comply with the rule and disclose its actual plans for implementation of whatever new services it is planning.

Although there is no sworn testimony as to Chattanooga’s plans, EPB management has recently been quoted in the Chattanooga Times Free Press as saying-

“We have no interest in getting into the retail phone business in Memphis or Jackson... We have a big, powerful switch, and we’d like to be able to sell services on the switch, especially if other municipalities get into the business, and we might want to connect and back up one another”. Attributed to Harold DePriest, EPB President.

“But we would like the flexibility in the future to be able to utilize our infrastructure and experience as a possible wholesale provider to other retail providers...” Attributed to Kathy Harriman, President of EPB Telecommunications.

Chattanooga Times Free Press, October 18, 2006, “EPB Rings Up Telecom Fight” (Full article, Attachment A).

Since owning a switch to provide simple wholesale switching to competitive local exchange carriers would not require a certificate of need, it remains a mystery as to what

EPB actually needs with state-wide authority to retail services, thus again highlighting the prudence of finding out what EPB actually intends to do. Until then it is impossible to evaluate its Application under the criteria in the Rules, and the Application should be denied for this reason alone.

EPB APPLICATION AND PUBLIC PURPOSE

One reviewable criteria for Chattanooga's plan is that any expenditure of public funds must be for a "public purpose". Article II, § 29, of the Tennessee Constitution provides that "The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, respectively...." From this language has grown the "public purpose doctrine", which dictates that public funds can be used only for public purposes. Courts have reasoned that, since taxes can be levied for only corporation or public purposes, expenditures can legally be made for only those same purposes. A public purpose is generally anything that promotes the public health, safety, welfare, morals, security, prosperity, or contentment of the residents of the municipality. Shelby Co. v. Exposition Company, 96 Tenn. 653, 36 S.W. 696(1896). See also generally, Ragsdale vs City of Memphis, 70 SW2nd 56 (Tn Ap 2001). Otherwise, "*...[m]unicipalities in Tennessee have no authority other than that granted by the General Assembly...Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied...The powers of a municipal corporation are strictly construed...*" Tennessee Jurisprudence, "Municipal Corporations", section 21 and 22, (case citations omitted).

The Legislature has spoken to define the proper scope of local utility's public works projects in this state-

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."

As stated previously, this is the first request by a publicly-financed, governmental project for authority 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 local government to *substitute for* private enterprise- even if “necessary” to pay its bills- rather than promote the welfare, health and safety of the inhabitants of the municipality, runs contrary to TCA 7-34-103 and as restated in section 115. 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- retail or wholesale- is just a speculative business venture funded with the public’s money.

LEGISLATIVE INTENT OF THE ENABLING STATUTE:

The Authority also indicated interest in more information about whether EPB’s ability to provide voice services state-wide is prohibited by law or should be prohibited as a matter of policy. Aeneas submits that the prohibition should exist as a matter of policy, and in fact does exist as a matter of law.

One of the key issues raised in this proceeding is whether the Legislature intended the City of Chattanooga’s Power Board to become the state’s official telephone switching and/or retailing provider surrounds the proper interpretation of TCA 7-52-401. In the comments in this proceeding so far, the parties have focused on the fact that “municipalities” generically were not granted authority to enter telecommunications, but rather, “municipalities with electric power plants”, implying that the Legislature only intended local governments to provide facilities over existing electric networks. In order to learn more about the legislative intent behind this statute, Aeneas pulled the floor debates from the House and Senate from 1997, and the information found there not only supports geographic restriction of government,

*Although Memphis Networkx was granted a state-wide certificate, the record reveals that this was not a contested matter and that it was not ruled on by the Authority.

but reveals that there is actually no legislative authority for local governments to enter telecommunications *as retailers*- it was intended from the beginning that private enterprise retailers were to be the beneficiary of these publicly financed networks.

According to Representative Matt Kisber-

“...Under the deregulation that the Federal government has now allowed, if this act passes, it opens up opportunities for them to joint venture- which I think would be the most likely scenario- with other private sector companies to create advanced services that could then benefit consumers and as I said earlier, competition ends up breeding a market and the consumer benefits...”

“...What this would do is to allow opportunities not in providing entertainment and content, but in providing infrastructures and partnerships with other private sector companies...”

“... What this can do is allow opportunities where they have the technology in place and they have the networks and the support systems where they can joint venture where a utility might want to joint venture with a telecommunications provider. The example I’ve been given before is that you might have a long distance and a local telephone company come to a utility and want to create a joint venture, which they (being the municipal electric distributor) provide the infrastructure. One provides service and one provides long distance service and they are able to do it in a package that’s competitive in this era of deregulation with other companies wanting to do the same thing ...” [parenthetical clarification added].

Representative Matt Kisber, May 19, 1997, speaking on House Bill 1427, which when passed, became TCA 7-52-401. (Excerpts, Attachment B).

No intent is shown for municipalities to become mass market retailers or state sanctioned wholesalers across the state. “Deregulated” government activity has historically always been a bad idea. The inclusion of the phrase “municipalities with electric plants” clearly was intended to mean that municipalities are empowered to use their electric power plants to support a telecommunications infrastructure over which private providers could distribute service.

POLICY CONSIDERATIONS

The Authority also asked whether the EPB request should be prohibited as a matter of policy. Because it is predictable that as more cities with electric power plants build out broadband capable networks, they are going to approach this Authority about interconnecting to trade traffic, Aeneas would like to comment of this inevitability.

If the quotes of EPB's management above are accurate, it would appear that EPB intends to facilitate the creation of as many municipal retailing entities as it can by wholesaling switching services; this is not authorized by TCA 7-52-401, was not the intent of the Legislature as expressed by Representative Kisber, and is one terrifically bad idea if one intends to foster competition and consumer choice. When a government aggressively sells its own branded retail products statewide, then the whole of Tennessee, like Chattanooga, will see no more business start ups in wireline telephony- facilities based or otherwise. The best way to choke off all future private capital investment in a market is for investors to believe that the government desires to control that market itself.

What House Sponsor Matt Kisber described is very close to what is now known as the "Utopia Project" model:

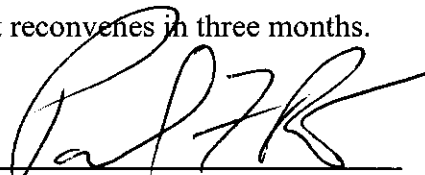
"The Utah Telecommunication Open infrastructure Agency (UTOPIA) is a consortium of Utah cities engaged in deploying and operating a fiber optic network to every business and household in its member communities. Recognizing the need to provide their residents with superior communications technology infrastructure—and the reality that current service providers in the marketplace were not delivering first-tier services—the communities banded together to create a world-class, 100 % fiber optic network for member communities. The ultra-broadband UTOPIA Community MetroNet will be open to multiple service providers to offer innovative and exciting services to citizens in the UTOPIA cities." <http://www.utopianet.org/what/about.html>

As previously stated, Tennessee's public networks could support a plethora of private commerce by multiple retailers- some day even AT&T and the remaining cable company could stop wasting millions of dollars maintaining duplicate networks and simply use the one public network. In reality Aeneas was forced use the courts to access

the JEA network and its request for access information for the publicly financed, owned, and operated network facilities in Chattanooga, Bristol, and Morristown by letters (Attachment C) dated August 10, 2006 remain unanswered. When cities have retail aspirations, they simply do nothing to encourage fair competition over their networks. If ever a situation called for Legislative intervention to organize and control the activities of the subdivisions it has created, this is it. Hopefully, the Governor's Broadband Task Force and the Legislature itself will acknowledge the lack of a comprehensive broadband deployment plan in Tennessee and examine the structure of the Utopia Project or something similar. This would help avoid conflicting requests like EPBs. If granted, could enable Chattanooga to provide voice service in Jackson, Tennessee, when another TRA order currently prohibits JEA from providing voice service in Jackson.

CONCLUSION

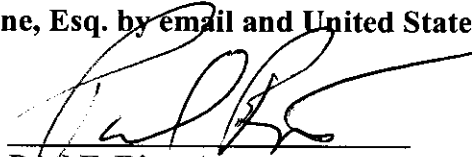
Aeneas would support the interconnection of as many municipal fiber projects as Tennessee can build out and would gladly pay a fair non-discriminatory price for network access to compete against Charter, Bellsouth, cable companies, Vonage, Skype, AOL, Time Warner, MSN, etc; there is certainly no shortage of retailers that could utilize a coordinated public fiber network and pay our taxes. A unit of government is not just another competitor in the market and thwarts the Legislature's intent to authorize public networks for use by private enterprise. "Deregulated" government activity has historically been a bad idea. EPB's retail aspirations are not authorized to traverse the entire state, and its Application should be denied. The Governor's Broadband Task Force (created by TCA 7-52-408) is currently in session and will no doubt consider and advise on government intervention in the telecommunications network and retail markets. If the Legislature desires a statewide governmental telecommunications retail company, it can pass an act clearly stating an intent to do so when it reconvenes in three months.



**Paul F. Rice, Attorney for Aeneas
Communications, LLC
PO BOX 1692
Jackson, TN 38302-1692**

Certificate of Service

I certify that a true copy of these Supplemental Comments of Aeneas Communications were served upon Melvin Malone, Esq. by email and United States Mail on this the 25th day of October, 2006.

A handwritten signature in black ink, appearing to read 'Paul F. Rice', written over a horizontal line.

**Paul F. Rice, Attorney
(731) 554-9235**

ATTACHMENT A

EPB rings up telecom fight Phone division asks OK to go statewide, but companies protest

By Dave Flessner Business Editor

Seven years after expanding into the telephone business in Chattanooga, the Electric Power Board wants to be able to offer phone services across Tennessee.

But telephone rivals of the electric power system said Tuesday they don't want a municipal utility operating outside its own area, taking customers and money away from private business.

The Tennessee Regulatory Authority has agreed to settle the dispute in November. But not before TRA directors hear again from EPB and other interested parties about the precedent-setting proposal.

After investing nearly \$30 million to build the biggest city-owned phone system in the state, EPB officials insist they simply want to be able to utilize their telecommunications equipment and staff to improve reliability and connections with other municipalities and phone systems that may enter the business elsewhere in Tennessee.

"We have no interest in getting into the retail phone business in Memphis or Jackson," EPB President Harold DePriest said. "We have a big, powerful switch, and we'd like to be able to sell services on the switch, especially if other municipalities get into the business, and we might want to connect and back up one another."

Mr. DePriest said the petition before the TRA would simply provide EPB the same rights that BellSouth and most other competitive local exchange carriers have to operate across the state.

But Paul F. Rice, a Jackson, Tenn., attorney who represents Aeneus Communications LLC, said that as a city-owned utility, EPB is not the same as other phone carriers.

"One of the questions we have is whether the city of Chattanooga will be able to support customers hundreds of miles away," Mr. Rice said. "Even if they can, municipalities shouldn't be in business across the state just to make money. That's not legal, and it's not right."

Kathy Harriman, president of EPB Telecommunications, said such concerns are unfounded. EPB Telecom has no immediate plans to extend its phone service outside its electric service territory.

"But we would like the flexibility in the future to be able to utilize our infrastructure and experience as a possible wholesale provider to other retail providers," she said. "It would be a very small revenue source for us, but one where we might be able to better utilize our equipment and to help improve service in some areas around us."

TRA directors on Monday agreed to decide on EPB's petition on Nov. 6. Both Aeneus Communications and the Tennessee Cable Telecommunications Association tried unsuccessfully Monday to intervene against EPB's petition. TRA said the parties had objected too late, although they did hear from both groups as part of their public comment process. Chattanooga's Electric Power Board, which began as a distributor of TVA electricity in 1939, launched EPB Telecom in 1999 to provide business and data phone links using EPB's spare fiber-optic lines.

The phone and related Internet business at EPB is projected to generate more than \$13 million in revenues this year. The 47-employee division also is ringing up net income for the first time in the current fiscal year, Ms. Harriman said.

E-mail Dave Flessner at dflessner@timesfreepress.com

ATTACHMENT B

TENNESSEE HOUSE OF REPRESENTATIVES

FLOOR DEBATE

MAY 19, 1997

HOUSE BILL 1427 by Representatives Rhinehart, Kisber, et al.

Representative Rhinehart: HB1427 Telecommunications Bill. This bill allows municipal owned electric systems to own, operate telecommunications services under state and federal law

Representative Rhinehart moves for passage on third and final consideration.

Representative Jones moves for adoption of the committee amendment.

Representative Rhinehart explains briefly the amendment.

Amendment 1 makes the bill. Adopted by voice vote.

Amendment 2 by Representative Rinks.

Clerk reads the text: (exempts alarm service and cable service)

Representative Rinks explains briefly the amendment...

Representative Kisber in response: Thank you Mr. Speaker. I think every member of this body knows I have the utmost respect for my colleague who serves as the chairman of my caucus. He is a very wise and learned leader. Let me say the reason this bill is here today is because of opportunities the Federal government has made happen through deregulation. The Federal government has embarked on a policy to allow municipal electric companies to go into other fields of business. And what this legislation will do is allow them to go into the telecommunications business in a separate subsidiary not subsidized by public monies, not subsidized by the rate payers, but to embark in a separate subsidiary that can then go into the businesses competing for licenses, competing for customers, competing for opportunities, just as any other business, not with any advantage, not with any public monies, but to do it in a competitive and business like manner. What is important to remember and I've had this problem occur in my community is that in many instances there is no competition today and when there is bad service, when there is rude customer service there is nowhere for people to go except to their local officials who say I have my hands tied and I cannot do anything. What this could do is to allow opportunities not in providing entertainment and content, but in providing infrastructures and partnerships with other private sector companies that could then become the example of how

services can be provided and I think in most communities those who provide municipal electric service have some of the highest rating for customer service, for customer contact, for reliability and dependability. So therefore, I would think it would be unwise to close off this option. And it is only an option at this point. To say that this is an area that the Federal government has opened up but the State of Tennessee is going to not allow consumers the opportunity to benefit from, and therefore Mr. Speaker, I reluctantly and with the utmost respect for the author of the Amendment move Amendment No. 2 to the table.

Caucus Chairman Rinks...

Representative Kisber...

Representative Rhinehart...

Representative Brenda Turner...

Chairman Rhinehart...

Representative Turner...

Chairman Rhinehart...

Representative Turner...

Representative Kisber: What this bill will do is follow the opening that's been allowed by the Federal Government in deregulation and telecommunications services. The bill defines telecommunications services which I'll be glad to read if you'd like. It says, unless the context otherwise requires, the term telecommunication service means offering or providing for hire any two way communication service, telephone service, telegraph service, paging service, or communication service similar to such services regardless of the facilities used to provide such services unless otherwise exempted from this definition by state or federal law. That's what the term means. But let me go further into the question that you asked. What this would allow under this legislation if it were to pass and under its dovetailing into the Federal deregulation act is that the municipal electric service could set up a subsidiary company only after the local government has approved such an act. It would set up a separate corporate entity that then could utilize for whatever purpose that local act charged give them the authority to go into whatever service that they wanted to, that they had received permission to. They would have to get permission from that local government and from the municipal electric service and they would have to be defined. They could not use rate dollars to subsidize the activity.

Representative Turner...

Representative Kisber: The best analogy I could draw is back when we got into cellular back in the 80's when we had legislation up here dealing with deregulating cellular communications and there was a concern that the local telephone users would subsidize cellular user and we required that a fire wall be built and that it was going to be deregulated to some extent but it was going to be a separate subsidiary and they cannot use the revenues and profits from one to subsidize the other. It is the same concept and we have done it in other industries wherein you would set up a

firewall with a separate corporate entity so as to protect the competition. And everyone knows that I'm as business oriented as they come but free competition on a fair basis would benefit the consumer and in my opinion that's what this is all about.

Representative Turner...

Representative Kisber: This is only municipals.

Representative Turner...

Representative Kisber: What this can do is allow opportunities where they have the technology in place and they have the networks and the support systems where they can joint venture where a utility might want to joint venture with a telecommunications provider. The example I've been given before is that you might have a long distance and a local telephone company come to a utility and want to create a joint venture, which they (*being the municipal electric distributor*) provide the infrastructure. One provides service and one provides long distance service and they are able to do it in a package that's competitive in this era of deregulation with other companies wanting to do the same thing. But again it cannot be publicly financed. It has to be financed without rate dollars.

Representative Turner...

Representative Kisber: Well, as you will read in the summary, paragraph 2 mentions a number of types of communications services, looks like a dozen of them and alarm and other monitoring services is an area that is included.

Representative Turner...

Representative Kisber: Let me stress this does not affect co-ops. These are municipal electric companies who would have to get permission. Let me use my hometown. The City of Jackson – the electric company would have to go to the city council. The city council would have to pass an ordinance to allow, would have to have public hearings and would have to go through all those procedures. And then they would be able to proceed within the corporate structure of setting up whatever kind of operation. In my community, we've had problems in the past and I hope they've been worked out where we had very poor cable TV service. I think there were probably 10% of the people who liked what they got and were thinking they were paying a reasonable fee. They went to the city and wanted something done about it but the city's hands were tied. Under the deregulation that the Federal government has now allowed if this act passes, it opens up opportunities for them to joint venture which I think would be the most likely scenario with other private sector companies to create advanced services that could then benefit consumers and as I said earlier, competition ends up breeding a market and the consumer benefits.

Representative Turner...

Representative Kisber: Well, first I think it would allow opportunities for those companies to come together or the electric company if the city council allowed them, they went through all the hoops to joint venture to work with the electric company to create new opportunities. But more

importantly, I think you can turn that table around and there are ways that they can then go to the city if they want to try to create those opportunities or if they feel, as you feel, they can go to their city council and say we don't want any of those to happen. What we're doing is giving local governments the flexibility and the options that congress has now granted. It just sets the framework and infrastructure. We sit here everyday and we talk about trying to respect the rights of local governments, not tie their hands, not force mandates, give them the opportunity to be flexible to do whatever they want and here we've got something the Federal government's allowed states to do, we're putting in place an infrastructure for it to happen and we're trying to work with private business to make opportunities happen. I can't stand here and tell you that you're going to end up having a constituent happy or not happy. But I will tell you that my opinion when the day is done and all is said and done the constituents that you have the consumers of your district if they were to embark on some service like this are going to be benefited and they're going to like having more choices.

Representative Turner...

Representative Rhinehart...

Representative Newton: Previous Question. Prevails 75-20.

Mr. Speaker Naifeh: Representative Rhinehart renews his motion for passage on third and final consideration.

Passes 90-5-2

ATTACHMENT C



Internet  Telephone

Tennessee's Leading
Internet and Telephone Provider

www.aeneas.com

August 10, 2006

Mr. Harold DePriest
President
Electric Power Board
536 Market St.
Chattanooga, TN 37402

RE: Request for Interconnection Agreement

Dear Mr. DePriest,

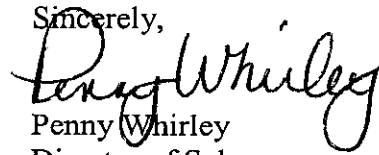
We at Aeneas Communications would like to congratulate your city on investing in the future of broadband with your public fiber to the home project. As you may know, Aeneas, a home-grown Tennessee company, was the first private large scale fiber to the home retail voice and data provider in Tennessee. Working with the Jackson Energy Authority, we were honored to be the sole voice and data provider on the network as *Broadband Properties Magazine*, and the FOCUS organization (Fiber Optic Communities of the United States) ranked Jackson's network as Number One in the entire country!

Aeneas Communications holds a Certificate of Convenience and Necessity from the Tennessee Regulatory Authority to provide voice services throughout Tennessee, and of course we can also provide state-wide internet services. We are very excited about the prospect of consumers in your city shopping, comparing, and (we trust) purchasing Aeneas services. This is the kind of choice your fiber infrastructure has made possible, and we look forward to leasing access on your publicly owned network.

I would like to invite you to visit our website (www.aeneas.com) to learn more about our company and traditional services we provide in addition to next generation broadband services. I am requesting a copy of your current interconnection agreement template as we further explore serving your citizens with our services.

Thank you again. I look forward to working with you.

Sincerely,



Penny Whirley
Director of Sales



Internet  Telephone

Tennessee's Leading
Internet and Telephone Provider

www.aeneas.com

August 10, 2006

Dr. R. Michael Browder
General Manager
Bristol Tennessee Essential Services
2470 Volunteer Parkway
Bristol, TN 37620

RE: Request for Interconnection Agreement

Dear Dr. Browder,

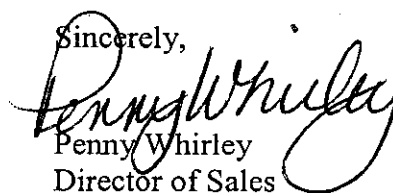
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Thank you again. I look forward to working with you.

Sincerely,



Penny Whirley
Director of Sales

August 10, 2006

Mr. Bill Swann
General Manager
MUS FiberNet
441 W. Main Street
Morristown, TN 37815

RE: Request for Interconnection Agreement

Dear Mr. Swann,

We at Aeneas Communications would like to congratulate your city on investing in the future of broadband with your public fiber to the home project. As you may know, Aeneas, a home-grown Tennessee company, was the first private large scale fiber to the home retail voice and data provider in Tennessee. Working with the Jackson Energy Authority, we were honored to be the sole voice and data provider on the network as *Broadband Properties Magazine*, and the FOCUS organization (Fiber Optic Communities of the United States) ranked Jackson's network as Number One in the entire country!

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Sincerely,



Penny Whirley
Director of Sales