

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**August 23, 2007**

**IN RE:**

**APPLICATION OF ELECTRIC POWER  
BOARD OF CHATTANOOGA FOR EXPANDED  
CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY TO PROVIDE INTRASTATE  
TELECOMMUNICATIONS SERVICES**

**DOCKET NO.  
06-00193**

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**ORDER**

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This matter came before Chairman Sara Kyle, Director Eddie Roberson and Director Ron Jones of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 6, 2006 for consideration of the *Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* (the “Application”) filed by the Electric Power Board of Chattanooga.<sup>1</sup>

**BACKGROUND**

The Electric Power Board of Chattanooga (“EPB”) filed its *Application* with the Authority on July 28, 2006. On September 14, 2006, EPB submitted pre-filed testimony of Kathy M. Harriman. Also, on September 14, 2006, the Authority issued its Notice of Hearing setting the docket for hearing on September 25, 2006. On September 15, 2006, the Authority sent out its Final Conference Agenda which included the setting of this docket for hearing before the panel during the September 25, 2006 Authority Conference.

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<sup>1</sup> Previous to the November 6, 2006 deliberations on the *Application*, the Authority held hearings on October 16, 2006 and September 25, 2006. This order encompasses the Authority’s actions and findings on all three dates.

On September 25, 2006, shortly before the beginning of the Conference, attorney Paul Rice submitted a letter on behalf of Aeneas Communications, LLC (“Aeneas”) stating that he had not received notice of the Hearing and requested the opportunity to speak at the Conference on September 25, 2006. Mr. Rice participated in the Hearing via telephone.

The Hearing was convened, without objection, during the Conference on September 25, 2006. EPB witness Kathy Harriman, who appeared by telephone, summarized her pre-filed testimony and responded to questions from the panel. Mr. Rice asserted that he did not receive notice of the Hearing and requested that the Hearing be adjourned to allow him time to review certain statutes and possibly intervene in the docket. EPB’s counsel opposed an adjournment of the Hearing, stating that sufficient notice was given and that the TRA should not waive the requirements for intervention in this docket. A majority of the panel voted to adjourn the Hearing and allow Mr. Rice the opportunity to petition for intervention on behalf of Aeneas.<sup>2</sup>

On September 29, 2006, the Authority received petitions for intervention filed by Aeneas and the Tennessee Cable Telecommunications Association (“TCTA”). Aeneas alleged that it did not receive actual notice and argued that it sought to “protect any rights it may have respecting the Petition of EPB . . . .”<sup>3</sup> Beyond this assertion, the only other ground asserted by Aeneas for seeking intervention in this docket was that it “provides and/or offers services to customers in the areas into which EPB seeks to enter.”<sup>4</sup> Though it did not receive permission to file an intervention request, TCTA petitioned for intervention alleging that it did not receive notice of the proceeding and asserting an interest in protecting its rights through full participation in the proceeding. On October 4, 2006, EPB filed its *Objections of Electric Power Board of Chattanooga to Petition to Intervene of*

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<sup>2</sup> Director Jones dissented. He stated that the Authority provided sufficient notice of the hearing and that there was insufficient justification to permit intervention pursuant to Tenn. Code Ann. §4-5-310(b) or waiver of the seven day filing requirement contained in Tenn. Code Ann. §4-5-310(a) and Authority Rule 1220-1-2-.08(3).

<sup>3</sup> *Petition to Intervene by Aeneas Communications, LLC*, p. 1 (September 29, 2006).

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

*Aeneas Communications, LLC and to Petition to Intervene of the Tennessee Cable Telecommunications Association (“Objections”).*

The Hearing in this docket was reconvened during the October 16, 2006 Authority Conference at which time the panel determined unanimously to deny the petitions for intervention but to allow Aeneas and TCTA to speak as members of the public, not parties. In addition, counsel for Aeneas and TCTA were directed to make filings in support of specific positions they put forth during the Hearing. Specifically, Aeneas was instructed to provide legal authority in support of its assertion that the Tennessee Constitution prohibits a local government from raising or lending money and to state how EPB’s *Application* for statewide authority would come within such a constitutional prohibition. TCTA was instructed to provide a statement, with supporting documentation, as to whether a restriction on EPB’s ability to seek state-wide authority, as asserted by TCTA, exists as a matter of law or should be imposed as a matter of public policy. During the Hearing, EPB was instructed to provide written assurance to the Authority that the Mayor of Chattanooga was aware of EPB’s request for expanded authority. EPB fulfilled this request through its October 25, 2006 Late-Filed Exhibit which consisted of letters from Mayor Ron Littlefield and each EPB Board member.

On October 24, 2006, TCTA filed a letter advising the Authority that it was withdrawing its public comments and its appearance in this docket. On October 25, 2006, Aeneas filed its supplemental comments, and EPB filed its reply to those comments on November 1, 2006. The panel deliberated the merits of the *Application* at the November 6, 2006 Authority Conference.

### **FINDINGS AND CONCLUSIONS**

At the October 16, 2006 Authority Conference, the Authority addressed the issues raised in this docket regarding notice and the right to intervene in a contested case. It then considered the *Application* on its merits at the November 6, 2006 Authority Conference. Each of these issues is dealt with separately below.

## **1. Notice**

The requirement of legal notice can be divided into two concepts: actual notice and constructive notice. Tennessee courts have provided definitions of both of these concepts which are succinctly stated in Kirby v. Macon Co., 892 S.W. 2d 403, 409 (Tenn. 1994):

“Actual notice” has been defined by our Court as “knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts.” Texas Co. v. Aycock, 190 Tenn. 16, 227 S.W. 2d 41, 46 (Tenn. 1950) (quoting 39 American Jurisprudence, Section 4, page 234). “Constructive notice” is “information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.” Black’s Law Dictionary, 1062 (6<sup>th</sup> ed. 1990).

Legal notice can be presumed if the entity providing notice has procedures in place and properly follows those procedures.

The Authority has an established procedure for providing notice to persons and entities regarding Authority Conferences and hearings before the TRA. As a mechanism for providing notice of Authority Conferences to interested parties, the Authority utilizes a service list and sends copies of the conference agenda by way of facsimile transmission to persons or entities on that list. The agenda for each Conference is also posted on the TRA website. The Authority issues separate notices for hearings, and distributes the notice by facsimile to persons or entities on the service list that has been specifically developed for the docket that is the subject of the hearing. The hearing notices are also posted on the TRA’s website.

In applying the relevant law to the Authority’s procedures, the Authority finds that proof of receipt of a conference agenda or hearing notice by a person or entity creates a presumption of actual notice of the agenda and/or hearing and matters contained therein. The Authority further finds that the presence of the agenda and/or hearing notice on the TRA website can be considered constructive notice to those persons who have a duty to make an inquiry.

A review of the Authority's service list reveals that Jonathan Harlan at Aeneas is sent a copy of the conference agenda each time an agenda is issued by facsimile transmission. In the instant case, TRA records reveal that a copy of the agenda was transmitted by facsimile and received by Aeneas on the date of issuance of the agenda. Specifically, the confirmation service list reveals that a copy of the agenda for the September 25, 2006 Authority Conference was sent to and received by the fax telephone number of Mr. Harlan at Aeneas on September 15, 2006 at 2:09 p.m.<sup>5</sup> While there was no evidence presented whether or not Paul Rice, attorney for Aeneas, actually received notice of the conference agenda on September 15, 2006 or sometime thereafter, the Authority finds that the facsimile telephone number for Mr. Rice, which has been used in other dockets wherein Mr. Rice represents Aeneas, is the same facsimile number that the Authority uses, and did use in this instance, to send notices and agendas to Jonathan Harlan at Aeneas. Based on the above, the Authority finds that the requirements for sufficient legal notice to Aeneas have been met.

As to TCTA, the service list for conference agendas also includes the law firm of Farris, Mathews, Branam, Babango & Hellen, with Christie Stout designated as the person at the Farris, Mathews law firm to receive TRA notices or agendas. The confirmation service list also reveals that a copy of the agenda for the September 25, 2006 Conference was sent to and received by the Farris, Mathews law firm on September 15, 2006 at 2:15 p.m.<sup>6</sup>

TCTA alleges in its petition that it is entitled to notice regarding a specific proceeding before the TRA involving EPB. In support of this allegation, TCTA relies on the order in the original EPB Certificate of Convenience and Necessity ("CCN") docket, Docket No. 97-07488, which refers to notice and a hearing involving a "contract or agreement between the Electric Power Board, on behalf of its Telecommunications Division, which provides for the joint ownership or joint ownership of control of assets, [together with] the sharing of profits and losses, or the sharing of [gross]

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<sup>5</sup> Sharla Dillon, TRA Docket Manager, Affidavit, p.2 (October 10, 2006)

<sup>6</sup> *Id.*

revenues.”<sup>7</sup> On its face, the relied upon language does not refer to a case involving the consideration of an application or petition for a CCN or an amendment to a CCN – which is the subject of the instant case. Furthermore, TCTA was represented by the Farris, Mathews law firm in Docket No. 97-07488. Assuming *in arguendo* that notice to TCTA of this instant proceeding had been required by the Order in Docket No. 97-07488, such notice would have been sent to the service list in that docket and therefore to Farris, Mathews law firm. The TRA service list for the September 25, 2006 Conference agenda demonstrates that the law firm representing TCTA received notice of the September 25 Authority Conference and of the hearing on the agenda for that Conference. Therefore, even if the language quoted by TCTA could be construed as to include an application for a CCN or an amended CCN, the Authority finds that TCTA received sufficient legal notice of the proceeding through the law firm which represented it in Docket No. 97-07488.

TCTA also attempts to take advantage of the panel’s extension granted to Aeneas and maintains that the panel’s September 25, 2006 action extended the opportunity to intervene in this docket to any interested party. The Authority finds such was not the case and affirms that its September 25, 2006 action allowing additional time to request intervention applied only to Aeneas.

In sum as to the notice issues, the Authority finds that the TRA properly followed its procedures in sending out hearing notices and Conference agendas and that both Aeneas and TCTA received actual notice of the hearing in this docket through receiving a copy of the September 25, 2006 Authority Conference agenda. Furthermore, the procedure followed by the TRA provided constructive notice of the existence of the *Application* of EPB, the notice of hearing issued on September 14, 2006 and the agenda, issued on September 15, 2006, which provided for consideration of EPB’s *Application* at the September 25, 2006 Authority Conference. Therefore, sufficient legal notice was provided in this case.

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<sup>7</sup> *Petition of the Tennessee Cable Telecommunications Association for Leave to Intervene*, p. 2 (September 29, 2006) (quoting the *Order Approving Application for Certificate of Public Convenience and Necessity, In re: Application of Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Docket No. 97-07488 (May 10, 1999)).

## **2. Petitions to Intervene**

Petitions to intervene are governed by Tenn. Code Ann. § 4-5-310 which sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) the petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) the administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

(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.

TRA Rule 1220-1-2-.08 also applies and provides as follows:

(1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.

(2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as a intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.

(3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.

The Authority finds that because the hearing was convened on September 25, 2006, neither Aeneas nor TCTA can seek intervention under Tenn. Code Ann. § 4-5-310(a) or TRA Rule 1220-1-2-.08 which requires intervention seven days prior to the start of the hearing. Further, the Authority finds that the petition of Aeneas fails to meet the criteria set forth in TRA Rule 1220-1-2-.08(2). Further, in reviewing the petition to intervene filed by Aeneas, the Authority finds it devoid of any explanation as to Aeneas's concerns. The petition does not contain sufficient allegations to invoke

Tenn. Code Ann. § 4-5-310(b) or withstand opposition to the petition.

Thus, in balancing the requests to intervene against the harm or prejudice to EPB in the added delay to consideration of EPB's *Application* by granting the interventions, the Authority denies both petitions to intervene but permits the representatives of Aeneas and TCTA to speak to the *Application* as members of the public, not as parties.

### **3. Application on its Merits**

In reviewing the *Application* on its merits, the Authority finds that the comments from Aeneas do not provide a basis upon which the *Application* can be denied because they either rely on speculative allegations or construe statutes to include prohibitions not contained in the plain language of the statute itself.<sup>8</sup>

The Tennessee Court of Appeals in the BellSouth BSE, Inc. appeal concluded that rather than deny a CCN application for alleged anticompetitive conduct the Authority should develop standards or requirements to prevent anticompetitive possibilities.<sup>9</sup> The comments of Aeneas in part are similar to the arguments in the BellSouth BSE, Inc. appeal in that Aeneas warns of the possibility of anticompetitive conduct or illegal action on the part of EPB as the reason for denying EPB's application. In Docket No. 97-07488, the Authority has already imposed requirements on EPB to protect against illegal and anticompetitive conduct.<sup>10</sup>

The Authority further finds that it disagrees with any remaining comments of Aeneas construing statutory language to specifically prohibit statewide certification in this instance. The Authority finds no language in the statutes prohibiting statewide certification except the provisions of Tenn. Code Ann. § 7-52-403 that prohibit a municipal electric service from providing service within a service area of an existing telephone cooperative with fewer than 100,000 total lines. EPB's

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<sup>8</sup> The Authority did not consider the comments of TCTA since they were withdrawn in a letter filed with the Authority on October 24, 2006.

<sup>9</sup> *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, 2003 WL 354466, \*16-17 (February 18, 2003).

<sup>10</sup> *See In re: Application of Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Docket No. 97-07488, *Order Approving Application for Certificate of Public Convenience and Necessity* (May 10, 1999).



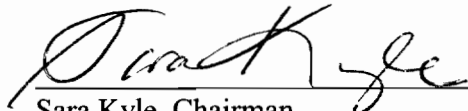
application properly takes this lone prohibition into consideration.

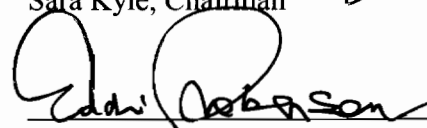
Therefore, based on the evidentiary and administrative record as a whole, the Authority unanimously voted to grant EPB a certificate of convenience and necessity as described in its *Application* filed on July 28, 2006 contingent upon EPB's agreement to comply with the following condition imposed in the settlement in Docket No. 97-07488:

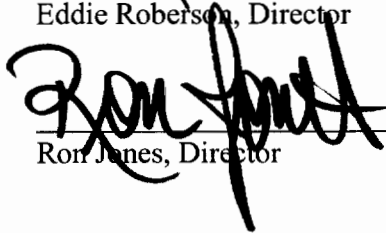
On behalf of its Telecommunications Division, EPB will not contract or enter into any agreement with another entity that provides for the joint ownership or joint control of assets, the sharing of profits and losses, or the sharing of revenues until the Tennessee Regulatory Authority approves such contract or agreement on petition and after notice and opportunity to be heard has been extended to interested parties. This provision shall not apply to any service or transaction which is not subject to regulation by the Tennessee Regulatory Authority.<sup>11</sup>

**IT IS THEREFORE ORDERED THAT:**

1. The petitions to intervene of Aeneas Communications, LLC and Tennessee Cable Telecommunications Association are denied.
2. The *Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* filed on July 28, 2006 and discussed herein is granted contingent upon the Company's agreement to comply with the settlement in Docket No. 97-07488.

  
Sara Kyle, Chairman

  
Eddie Roberson, Director

  
Ron Jones, Director

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<sup>11</sup> *Id.*