

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	April 28, 2008)	
APPLICATION OF JACKSON ENERGY AUTHORITY TO)	
EXPAND ITS CERTIFICATE OF PUBLIC CONVENIENCE)	DOCKET NO.
AND NECESSITY TO PROVIDE INTRASTATE)	07-00201
TELECOMMUNICATIONS SERVICES)	

ORDER DENYING INTERLOCUTORY APPEAL

This matter came before Chairman Eddie Roberson, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on March 24, 2008 for consideration of an interlocutory appeal filed by Aeneas Communications, LLC (“Aeneas”).

BACKGROUND

Jackson Energy Authority (“JEA”) filed its *Application of Jackson Energy Authority to Expand Its Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services* on August 31, 2007. The Authority issued an Order on November 13, 2007 convening a contested case and appointing a Hearing Officer. Thereafter, the Hearing Officer issued an *Order Granting Petitions for Intervention and Establishing a Procedural Schedule* on December 7, 2007 in which Aeneas and Tennessee Cable Telecommunications Association (“TCTA”) were granted permission to intervene.

On December 14, 2007, JEA filed objections to certain discovery requests of the intervenors. Aeneas filed its response to JEA’s objections on December 19, 2007. After hearing arguments of the parties at the December 20, 2007 Status Conference, the Hearing

Officer issued his *Order Resolving Objections to Discovery Disputes* (“Order”) on January 10, 2008. In the Order, the Hearing Officer noted that a significant issue impacting the resolution of this matter involves the standard to which JEA should be held in determining whether it meets the criteria required to obtain an expanded certificate of public convenience and necessity (“CCN”). JEA contends that it should be held to the same standard for obtaining a CCN as any other competitive local exchange carrier (“CLEC”). Aeneas contends that as a municipal electric company expanding into the telecommunications market,¹ JEA should be held to requirements usually imposed on incumbent local exchange carriers (“ILECs”). The Hearing Officer found that JEA should be held to the standards imposed on CLECs to obtain a CCN, and that Title 7 imposes additional requirements on municipal electric companies sufficient to assure a fair and competitive market. The Hearing Officer further found that JEA is not an ILEC, and Aeneas’ attempt to broaden the scope of the proceeding was overruled.

Because of the ramifications of the ruling, the Hearing Officer granted permission *sua sponte* for an interlocutory appeal of the discrete decision concerning the standard to which a municipal electric company should be held. The Hearing Officer stated that should the Authority make the determination that JEA should be held to a higher standard than a traditional CLEC, the Hearing Officer’s rulings on discovery disputes should be remanded back to the Hearing Officer in order to conform them to the Authority’s decision.

Aeneas filed its *Notice of Interlocutory Appeal* on January 25, 2008. The Hearing Officer filed a *Notice of Briefing Schedule* on February 5, 2008, and the panel heard oral arguments at the regularly scheduled Authority Conference on February 25, 2008.

¹ In addition to Title 65, JEA is subject to Tenn. Code Ann. Sections 7-52-401 *et seq.*, through which the legislature has statutorily imposed additional requirements (such as constraints on cross-subsidization) on municipal electric companies prior to their entrance into the telecommunications market.

POSITION OF THE PARTIES

Aeneas: Aeneas relies on the Court of Appeal's opinion in *BellSouth BSE, Inc. v. Tennessee Regulatory Authority* ("*BellSouth BSE*")² as support for its position that the TRA is not limited to the requirements of Tenn. Code Ann. § 65-4-201 (c) in reviewing a CLEC application but may also consider the effect on competition of granting the application and may impose safeguards against anti-competitive conduct as a condition of certification.

Aeneas also states that statutory law, such as Tenn. Code Ann. § 65-5-108(c), applies to Aeneas. In pertinent part, the statute permits the Authority to "... issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices." Aeneas contends that *BellSouth BSE* applies this statute not just to ILECs, but to all carriers.³

JEA: JEA maintains that there is no legal basis for applying incumbent obligations to a competitive carrier like JEA. Tenn. Code Ann. § 7-52-401 provides that the Authority is to follow the same certification process for municipal broadband providers as it follows for other competitive providers. Neither the statute, nor the JEA Private Act, suggests that JEA should be regulated like an ILEC. The Authority has consistently applied the plain language of the statute, while also recognizing that certain statutory requirements in Title 7, chapter 52, Part 4 apply to municipal providers. This analysis was used in granting JEA its current CCN (Docket No. 03-00438) as well as in other dockets involving municipal broadband providers.⁴ Thus, the Authority should follow its precedent and treat JEA's current application in the same manner.⁵

² *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, No. M2000-00868-COA-R12-CV (Tenn. Ct. App., February 18, 2003).

³ *Brief of Aeneas Communications, LLC on Discovery Disputes*, pp. 2-3 (February 20, 2008).

⁴ See *Order Approving Application for Certificate of Public Convenience and Necessity*, Docket No. 97-07488 (granting CCN to Electric Power Board of Chattanooga); *Order Approving Application for Certificate of Public Convenience and Necessity*, Docket No. 05-00251 (granting CCN to Bristol Tennessee Essential Services).

⁵ *Brief of Jackson Energy Authority in Support of Hearing Officer's Order Resolving Objections to Discovery Requests*, pp. 1-3 (February 20, 2008).


JEA maintains that Tenn. Code Ann. § 65-5-108 does not apply to CLECs and insists that *BellSouth BSE* upholds this proposition. While JEA recognizes the Authority's broad regulatory authority, it does not believe there is any basis to treat a non-dominant wholesale carrier as an ILEC.⁶

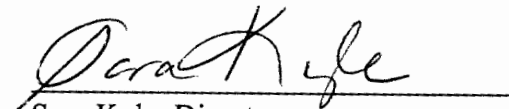
FINDINGS AND CONCLUSIONS

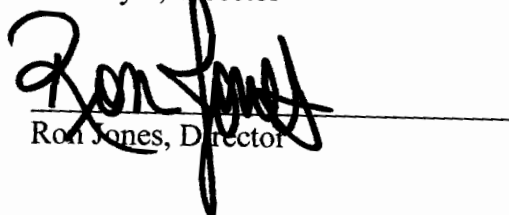
At a regularly scheduled Authority Conference held on March 24, 2008, the panel deliberated the issue raised in the interlocutory appeal. After considering the argument of counsel and the record as a whole, the panel voted unanimously to deny Aeneas' request to overturn the Hearing Officer's ruling that a municipal electric company such as JEA is not an ILEC, and therefore, should be held to the same standard as a typical CLEC when applying for a CCN, subject to any additional conditions imposed on municipal electrics by Title 7. Nevertheless, the panel clarified that this decision does not preclude it from considering the need for anticompetitive safeguards when hearing this matter on its merits.

IT IS THEREFORE ORDERED:

Aeneas Communications, LLC interlocutory appeal of the Hearing Officer's *Order Resolving Discovery Disputes* issued on January 10, 2008 is hereby denied.


Eddie Roberson, Chairman


Sara Kyle, Director


Ron Jones, Director

⁶ Transcript of February 25, 2008 Authority Conference, pp. 27; 32-33.