

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 10, 2008

IN RE:

APPLICATION OF JACKSON ENERGY AUTHORITY TO
EXPAND ITS CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATIONS SERVICES

)
)
)
)
)
)

DOCKET NO.
07-00201

ORDER EXPANDING AUTHORITY TO INCLUDE PROVISION OF STATEWIDE
RETAIL TELECOMMUNICATIONS SERVICES

This matter came before Director Eddie Roberson, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket at the Hearing held on August 11, 2008, to consider the *Application of Jackson Energy Authority to Expand Its Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services* (the “Application”) filed by Jackson Energy Authority (“JEA” or “Applicant”).

Background

JEA was previously granted authority to provide telecommunications services as a carrier’s carrier to Competitive Local Exchange Carriers (“CLECs”) within Madison County, Tennessee.¹ On August 31, 2007, JEA filed its *Application* requesting that the Authority expand its authority to include provision of retail services to end use customers throughout the State of Tennessee. On September 14, 2007, Aeneas Communications, LLC (“Aeneas”) filed its *Petition to Intervene of Aeneas Communications*. On October 9, 2007, Tennessee Cable Telecommunications Association

¹ See *In re: Application of Jackson Energy Authority for a Certificate of Convenience and Necessity to Provide Telecommunications Services as a Carrier’s Carrier*, Order Approving Application for Certificate of Public Convenience and Necessity, Docket No. 03-00438 (March 5, 2004).

(“TCTA”) filed its *Petition of the Tennessee Cable Telecommunications Association for Leave to Intervene*. On November 13, 2007, the Authority issued an Order convening a contested case and appointing a Hearing Officer. On December 7, 2007, the Hearing Officer issued an *Order Granting Petitions for Intervention and Establishing Procedural Schedule* in which Aeneas and TCTA were granted leave 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 an *Order Resolving Objections to Discovery Requests* 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 contended that it should be held to the same standard for obtaining a CCN as any other Competitive Local Exchange Carrier (“CLEC”). Aeneas took the position that as a municipal electric company expanding into the telecommunications market,² 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 also requested that the matter be remanded to

² 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.

him to conform his rulings to the Authority's decision if the Authority should determine that JEA should be held to a higher standard than a traditional CLEC.

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 a regularly scheduled Authority Conference on February 25, 2008.

At a regularly scheduled Authority Conference held on March 24, 2008, the panel deliberated the issue raised in the interlocutory appeal, considered the argument of counsel and the record as a whole, then 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 7.³ The panel also made the proviso that this decision does not preclude it from considering the need for anticompetitive safeguards when hearing this matter on its merits. On March 26, 2008, the Hearing Officer issued *an Order Resuming Proceeding and Modifying Procedural Schedule*.

Legal Standard for Granting Certificate of Public Convenience and Necessity

JEA's *Application* was made pursuant to, and was considered in light of, the criteria for granting a Certificate of Public Convenience and Necessity as set forth in Tenn. Code Ann. § 65-4-201 (2006), which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

³ See *Order Denying Interlocutory Appeal* (April 28, 2008).

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

* * *

Furthermore, pursuant to Tenn. Code Ann. § 65-5-112 (2004), a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

The August 11, 2008 Hearing

Pursuant to Tenn. Code Ann. § 65-4-204 (2004), public notice of the Hearing in this matter was issued by the Hearing Officer on July 18, 2008. At a Pre-Hearing conference held on August 5, 2008, Counsel for JEA announced that in a communication from counsel for TCTA, TCTA stated that it does not intend to actively participate in the case or cross-examine witnesses.⁴

At the Hearing held on August 11, 2008, Counsel for Aeneas announced that Aeneas had settled its difference with JEA and would no longer oppose the expansion of JEA's certificate but would reserve the right to revisit the issue raised at a future date, if necessary. Mr. Danny Wheeler, President and Chief Executive Officer of JEA participated in the Hearing and was subject to examination by the panel. Mr. Wheeler provided a summary of the history of JEA's experience as a wholesale provider and provided some background on the decision to enter the retail market. He introduced a substitute Exhibit B to JEA's *Application* which was admitted into the record and

⁴ Transcript of Proceedings, August 5, 2008 Pre-Hearing Conference, p. 3.

affirmed that JEA will comply with all of Tennessee's public interest obligations and responsibilities as mandated in TRA Rule 1220-4-8-.04(3)(b) and (c). Upon JEA's conclusion of the presentation of its proof, the panel granted JEA's *Application* based upon the following findings of fact and conclusions of law:

I. JEA's Qualifications

1. JEA is a utility authority that provides electric, gas, water, wastewater, video and CLECs' carrier services to approximately 38,000 homes, businesses and industries in Jackson and the adjacent areas of Madison County, Tennessee. JEA was created on July 1, 2001 by Chapter 55 of the Private Acts of 2001 as a public corporation and political subdivision of the State of Tennessee and is the successor to the Jackson Utility Division of the City of Jackson, Tennessee created in 1959.

2. JEA's principal place of business is 119 East College Street, Jackson, Tennessee, 38301. The telephone number is (731) 422-7280.

3. The *Application* and supporting documentary information existing in this record and the record in Docket No. 03-00438 indicate that JEA has the requisite technical and managerial ability to provide competitive access services and transport telecommunications services within the State of Tennessee. Specifically, JEA's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience.

4. JEA has the necessary capital and financial ability to provide the services it proposes to offer.

5. JEA has represented that it will adhere to all applicable statutes, policies, rules and orders of the Authority.

II. Proposed Services

JEA has been offering facilities-based telecommunications services as a carrier's carrier to CLECs within Madison County, Tennessee and now intends to offer a full range of services,

including but not limited to dedicated and switched access services, private line services, local dial tone, 911 and enhanced services in its authorized service area. JEA will operate as a facilities-based local exchange provider, utilizing capacity on its fiber optics network and, as necessary supplementing its services by leasing the facilities of third party carriers and/or by reselling the services of the Incumbent Local Exchange Carrier (“ILEC”). The Applicant will continue to provide services as a carrier’s carrier to other CLECs within Madison County. JEA provided the Authority with a Notice of Filing to all eighteen ILECs in Tennessee.

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon a review of the *Application* and the record in this matter, the panel finds that approval of JEA’s *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

JEA has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-112 (2004) and the Authority’s Rules.

IT IS THEREFORE ORDERED THAT:

1. The *Application of Jackson Energy Authority to Expand Its Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services* filed by Jackson Energy Authority is approved pursuant to Tenn. Code Ann. § 65-4-201 (2006) and Tenn. Code Ann. § 7-52-401 et seq., subject to the conditions listed under Section V: Compliance with Additional Conditions in the Authority’s prior *Order Approving Application for Certificate of Convenience and Necessity*, p.10.⁵

⁵ See *In re: Application of Jackson Energy Authority for a Certificate of Convenience and Necessity to Provide Telecommunications Services as a Carrier’s Carrier*, Docket No. 03-00438 (March 5, 2004).

2. Any party aggrieved by the Authority's decision in this matter may file a petition for reconsideration within fifteen (15) days from the date of this Order.

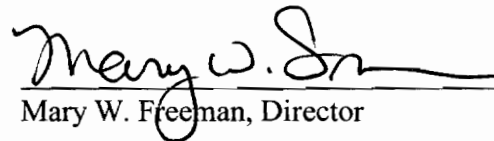
3. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a petition for review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

A handwritten signature in black ink, appearing to read "Eddie Roberson", written over a horizontal line.

Eddie Roberson, Director

A handwritten signature in black ink, appearing to read "Sara Kyle", written over a horizontal line.

Sara Kyle, Director

A handwritten signature in black ink, appearing to read "Mary W. Freeman", written over a horizontal line.

Mary W. Freeman, Director