

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 24, 2012

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| IN RE: |) | |
| |) | |
| APPLICATION OF TELMATE, LLC |) | DOCKET NO. 11-00181 |
| FOR A CERTIFICATE OF AUTHORITY |) | |
| TO PROVIDE OPERATOR SERVICES |) | |
| AND/OR RESELL |) | |
| TELECOMMUNICATIONS |) | |
| SERVICES IN TENNESSEE |) | |
| |) | |
| IN RE: |) | |
| |) | |
| PETITION OF TELMATE, LLC |) | DOCKET NO. 11-00182 |
| FOR AUTHORITY TO |) | |
| PROVIDE COCOT SERVICES |) | |
| IN TENNESSEE |) | |

**BRIEF ON ISSUE OF WHETHER TELMATE IS REQUIRED TO
OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY
PURSUANT TO T.C.A. § 65-4-201**

As permitted by the Hearing Officer in the amended procedural schedule filed August 16, 2012, Pay-Tel Communications, Inc. ("Pay-Tel") submits this brief on the issue of "whether Telmate should be required to obtain a CLEC, instead of a reseller certificate." Initial Order of August 9, 2012 at 19.

Summary

Under state law, no "entity" may provide "any" telecommunications service in Tennessee without first obtaining a certificate of convenience and necessity from the Tennessee Regulatory Authority pursuant to the requirements of T.C.A. § 65-4-201(b) and (c). The only exception recognized in the statute is that a telecommunications provider already operating "on June 6, 1995" is not required to obtain additional authority. Id.

There is no dispute that Telmate is an entity proposing to offer telecommunications service in Tennessee and that Telmate was not operating in the state prior to June 6, 1995. Therefore Telmate is required to obtain a certificate pursuant to the requirements of T.C.A. § 65-4-201(b) and (c).

There is no statutory basis for the issuance of a "resellers" certificate in lieu of a certificate obtained pursuant to T.C.A. § 65-4-201(b) and (c). The term "reseller" is not found in Title 65. The TRA's rules regarding the regulation of resellers, which were adopted prior to the enactment of T.C.A. § 65-4-201(b) and (c), define a reseller as "a common carrier of telephone services other than a facilities-based carrier." TRA Rule 1220-4-2-.57(1)(f). In other words, a reseller is simply a sub-category of a "competing telecommunications service provider." See T.C.A. § 65-4-101(1) and TRA Rule 1220-4-8-.01(1)(f) defining a "competing telecommunications service provider" as an "entity" offering "any two-way communications service [or] telephone service." A reseller must therefore apply for a certificate under T.C.A. § 65-4-201(b) and (c) and must comply with the requirements of that statute. An applicant may, of course, choose to limit its certificate only to the provision of resold services and request a waiver of any TRA rules applicable only to facilities-based carriers.

Argument

The TRA is a regulatory agency which may exercise "only the authority that is given to it expressly by statute or which arises by necessary implication from an express grant of authority." Consumer Advocate v. Tennessee Regulatory Authority, 2012 WL 1964593 (Tenn. Ct. App.) slip op at 17. The Authority, that is, must act in accordance with the powers granted to it by the Tennessee legislature.

In 1995, the Tennessee legislature enacted Public Chapter 408, known as the "Tennessee Telecommunications Act of 1995." The language of the Act requiring all carriers to obtain a certificate of convenience and necessity is straightforward and unambiguous. Under subsection (b), all providers of "telecommunications services" in Tennessee, except those already legally operating prior to June 6, 1995, must obtain a certificate (referred to by the Hearing Officer as a CLEC certificate) pursuant to the Act. The procedure for obtaining a CLEC certificate is described in subsection (c) and is equally plain. Notice must be provided to all incumbent local telephone companies "and other interested parties." A "hearing" must be held. The Authority "shall" grant the requested certificate if the applicant demonstrates that it will "adhere to all applicable authority policies, rules and orders" and if "the applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services."

In 1998, three years after the enactment of that statute, the Authority adopted "Regulations for Local Telecommunications Providers," (Chapter 1220-4-8) to implement the requirements of the Tennessee Telecommunications Act. Like the statute, the rules expressly require "every provider of telecommunications service" to obtain a certificate "under this rule" before providing "local telecommunications service." The rules require, among other things, that the applicant file "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 areas in which the services shall be offered." Rule 1220-4-8-.04(1)(i). Mirroring the statute, the rules also require the applicant to demonstrate "sufficient managerial, financial and technical abilities to provide the applied for services." *Id.*, at subsection (2). Over time, the TRA has expanded the requirements of a CLEC application based on experience and subsequent statutory requirements. Today, for example, the "CLEC Application" form on the TRA's web site states that a carrier

applying for a CLEC certificate pursuant to T.C.A. § 65-4-201(b) and (c) must submit, among other information, (1) "sworn, pre-filed testimony," (2) a "small and Minority-Owned Telecommunications Business Participation Plan," as required by T.C.A. § 65-5-112, (3) a sample bill, (4) three years of projected financial statements and capital expenditures, (5) a bond or letter of credit in the amount of \$20,000, as required by T.C.A. § 65-4-125, (6) a "toll dialing parity plan," (7) information regarding the conservation of telephone numbers, and (8) information regarding a half-dozen "Tennessee specific operational issues." Perhaps most importantly, the web site states that "pre-filed testimony is needed" describing the "services to be provided [and] the applicant's technical, managerial and financial abilities to provide the services."

None of the information enumerated above is required by the "reseller" rules which were drafted well before passage of the Tennessee Telecommunications Act of 1995¹ and are found at 1220-4-2-.57. In the reseller rules, there is no requirement for a hearing, no requirement of notice to incumbent carriers or other interested parties, no pre-filed testimony describing the service to be offered, nothing about a small and minority-owned business participation plan, or a bond requirement, and—notably—nothing expressly requiring the reseller to demonstrate "managerial, financial, and technical abilities to provide the applied for services," as required by T.C.A. § 65-4-201(c).²

Telmate proposes to offer telephone services to inmates at jails and prisons in Tennessee. It is undisputed that Telmate is an entity proposing to offer telecommunications services as those

¹ The reseller rules were filed on March 28, 1995, three months prior to passage of the Tennessee Telecommunications Act of 1995. Furthermore, it is counsel's understanding and belief that the reseller rules had been under consideration by the Tennessee Public Service Commission and that various drafts of rules regulating resellers had been circulated for several years prior to passage of the 1995 Act.

² The reseller rules say only that the Authority "may . . . consider" the reseller's "financial ability, character, and proposed rates as well as such other matters as the Authority finds relevant."

terms are used in T.C.A. § 65-4-201(b) and that Telmate is a "competing telecommunications service provider" as that term is defined in T.C.A. § 65-4-101(1). In contrast, there is no statutory definition of "reseller" in Title 65. In fact, it does not appear that the term "reseller" is even found in Title 65. The term is used only in the TRA's reseller rules which, as discussed, were enacted before passage of the Tennessee Telecommunications Act of 1995. Those rules have been effectively superseded by the 1995 Act and the rules implementing that Act. A reseller is simply a CLEC without network facilities of its own. Although there may be some rules and policies of the TRA that logically apply only to the facilities-based carriers, it is clear that all telephone carriers, including resellers, must obtain their operating authority pursuant to T.C.A. § 65-4-201(b) and (c) and comply with the requirements of that statute.

Conclusion

For these reasons, Telmate must apply for a certificate of convenience and necessity pursuant to T.C.A. § 65-4-201(b) and (c), and, where applicable, TRA Rules 1220-4-8-.01 et seq and the "CLEC Application" requirements described on the TRA's web site. Telmate cannot avoid those requirements by obtaining a reseller certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2012, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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