

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

August 28, 2012

**IN RE:
PETITION OF TELMATE, LLC FOR
CERTIFICATE OF AUTHORITY TO
RESELL TELECOMMUNICATIONS
SERVICES IN TENNESSEE**

Docket No. 11-00181

**IN RE:
PETITION OF TELMATE, LLC FOR
AUTHORITY TO PROVIDE COCOT IN
TENNESSEE**

Docket No. 11-00182

BRIEF OF TELMATE, LLC

At issue in this consolidated docket is Telmate's Application for Authority to Resell Telecommunications and Application to Provide COCOT¹ Services in Tennessee. The average time for the Authority to rule on such applications is 2-3 months.² Telmate's applications were filed October 28, 2011; as of the date of this brief, the applications have been pending for almost 10 full months. The sole relief Telmate is requesting by these applications is authority to compete in the inmate telecommunications market by participating in public bidding for state and local corrections department contracts, as Telmate currently does in upwards of 24 other

¹ Customer-Owned Coin (or Coinless) Operated Telephone service.

² See Docket No. 04-00014 (COCOT application granted 12 days after filing); Docket No. 04-00036 (COCOT application granted 27 days after filing); Docket No. 06-00070 (COCOT application granted 19 days after filing); Docket No. 08-00104 (COCOT application granted 24 days after filing); Docket No. 10-00052 (Reseller application granted 2 months after filing); Docket No. 06-00129 (Reseller application granted 3 months after filing); Docket No. 09-00049 (Reseller application granted 4 months after filing); Docket No. 01-00733 (Reseller application granted 3 months after filing); Docket No. 04-00406 (Reseller application granted 2 months after filing).

U.S. states and Canada. Telmate respectfully requests the Authority rule on the merits of its applications without further delay.

Telmate is submitting this brief pursuant to the August 24, 2012 Notice of Briefing Schedule on Pay-Tel's August 17, 2012 appeal of the Hearing Officer's August 9, 2012 Initial Order Granting Limited Intervention to Pay-Tel. Telmate also asks that this brief serve as the optional brief permitted by the Hearing Officer's August 16, 2012 Order Revising Procedural Schedule.

I. PROCEDURAL AND FACTUAL BACKGROUND.

A detailed and comprehensive recitation of the facts and procedural background in this docket is contained in the Hearing Officer's August 9, 2012 Initial Order. The background relevant to the issues currently before the Authority is summarized below.

A. Background Information on Telmate.

Telmate is an inmate service provider currently operating in approximately 190 correctional facilities across more than 24 U.S. states and Canada. Telmate contracts with state, local and federal corrections departments to provide inmate calling services via interconnected Voice over Internet Protocol ("VoIP") circuits. One of the largest customers of Telmate's services is the federal government; Telmate is the call services provider for all U.S. Department of Homeland Security and U.S. Immigration and Customs Enforcement primary facilities.

Telmate does not provide traditional telecommunications services; it provides services to inmate facilities through interconnected VoIP circuits. Telmate's web-based technology allows correctional facilities to offer inmates services such as individual secure voice mail and numerous pre-payment options, while providing the facility with sophisticated investigative, monitoring, and reporting tools, all without sending any call data over the facility's own network.

Telmate is strictly an inmate/detainee service provider; Telmate does not provide any services to the public at large.

B. Telmate's Tennessee Applications.

In order to begin participating in public bidding for correction facility inmate services contracts in Tennessee, Telmate representatives contacted Authority Staff in the fall of 2011 to inquire as to what applications, if any, would be required.³ By statute, VoIP is not regulated in Tennessee. *See* Tenn. Code Ann. § 7-59-307(d) ("No franchising authority, state agency, municipality, county or political subdivision of the state is authorized to regulate the provision of retail interconnected voice over Internet protocol service."). However, because Telmate partners with a regulated carrier that provides certain services directly to inmates, such as local call termination and collect call billing, Authority Staff advised Telmate to submit an application for certification as a reseller of telecommunications services. Authority Staff also advised Telmate to submit an application for COCOT certification. Telmate does not generally provide coin-operated pay phones for inmate use; inmate calls through Telmate are pre-paid by credit card, commissary account, or other sources. However, because Telmate's correction facility customers sometimes request Telmate provide a telephone for inmate use, Authority Staff directed Telmate to also file an application to provide COCOT services. Telmate submitted both applications on October 28, 2011.⁴

³ In many states, to provide the services Telmate offers, a notice filing is all that is required. In other states the services are entirely unregulated and no filing is necessary.

⁴ These two applications (reseller and COCOT) are the ones typically required by the Authority in the past for inmate services providers. As noted below, the requesting intervenor, Telmate's competitor in the inmate services market, Pay-Tel, holds only reseller and COCOT certifications.

Over the next two months, Telmate worked with the Authority Staff to respond to a number of information requests and provide supplemental responses to augment the application details. These responses detailed the services Telmate would be offering and provided the Authority with the necessary information to verify that Telmate met the requirements to provide the requested services in Tennessee, *i.e.*, that Telmate has the financial, technical and managerial capacity and resources to enter the competitive inmate telecommunications market in Tennessee and comply with Tennessee law. The information contained in the application and subsequent data responses included: (1) a \$20,000 bond; (2) a small and minority-owned telecommunications business participation plan; (3) information on the company's key executives and officers; (4) multiple years of the company's financial statements; and (5) information on operational issues and other requirements unique to Tennessee.

By December 11, 2011, Telmate had provided all information requested by Authority Staff, and the applications were ready for the Authority's consideration. However, for reasons unknown to Telmate despite numerous inquiries, the applications were not placed on the Authority's January 9, 2012 agenda conference for final decision.

On January 10, 2012, Henry Walker, attorney for Pay-Tel Communications, Telmate's chief competitor in the inmate services market, filed a Tennessee Open Records Act request seeking copies of Telmate's confidential data responses. After working with the Authority Staff in an attempt to protect the competitively sensitive information, to avoid further delay, Telmate agreed that all of its data responses could be posted in full on the Authority's website, and filed a notice to that effect on February 3, 2011.

However, again for reasons that remain unknown to Telmate, the applications were not placed on either the February 13, 2012 or February 27, 2012 Authority agenda conferences for

decision, and the reasons for this delay remain unexplained. In response to inquiries from Telmate, Authority staff assured Telmate the applications would "soon" be placed on the Authority's conference for decision. They were not. The March Authority conference came and went while Telmate awaited notification.

On April 12, 2012 Telemate finally received word from TRA Staff that its reseller application would be placed on the Authority's April 23, 2012 conference agenda. As discussed below, the application was again not placed on the April conference agenda.

C. Pay-Tel's Intervention.

On April 20, 2012, three days before Telmate's reseller application was scheduled to be considered by the Authority, Telmate's chief competitor, Pay-Tel, filed a petition to intervene in the reseller application docket and asked that the Authority convene a contested case. Pay-Tel made no claims whatsoever that would to justify intervention, convening a contested case, or further delaying Telmate's application. Pay-Tel's Petition stated only that it is a competitor of Telmate and thus was interested in examining "whether Telmate has demonstrated that it will adhere to the TRA's rules, policies and orders." Telmate filed a response pointing out that Pay-Tel's intervention 3 days before the scheduled agenda conference hearing was quite clearly nothing more than an attempt to derail or delay its chief competitor from entering the market and offering its customers an alternative service and/or better pricing, and thus provided no grounds for the Authority to further delay its decision on Telmate's now 6-months old applications.

Pay-Tel's petition was indeed successful in delaying the proceedings; the application was not placed on the April 23, 2012 agenda conference. On May 7, 2012, the Authority appointed a Hearing Officer in Docket. No. 11-00181 (Telmate's reseller application), and directed the Hearing Officer to determine whether to grant Pay-Tel's intervention and whether to convene a

contested case. An additional month later, on June 7, 2012, the Authority consolidated Docket No. 11-00181 and Docket No. 11-00182 (Telmate's COCOT application) and directed the Hearing Officer to make the same determinations in both dockets.

The Hearing Officer heard oral arguments on the intervention at a June 26, 2012 status conference and took the matter under advisement. On August 9, 2012, the Hearing Officer issued a decision on the intervention. Due to an Authority clerical error, the order was not e-mailed to the parties until August 13, 2012.

II. THE HEARING OFFICER CORRECTLY DETERMINED THAT PAY-TEL HAS NO RIGHT TO INTERVENE IN THESE PROCEEDINGS.

In the August 9 Initial Order, the Hearing Officer agreed with Telmate that Pay-Tel has **no** right to intervene in this docket. Following a thorough and detailed analysis of the legal standards for intervention and the de-regulated environment for telecommunications in Tennessee, the Hearing Officer found "unpersuasive" Pay-Tel's "assertion that competitor status alone confers an inherent legal interest and right sufficient to gain entry into the proceedings of another competitor."⁵ The Hearing Officer recognized it is the public policy of the State to "foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers."⁶ Given this strong public policy, affirmed and enhanced in 2009 by the market regulation option, the Hearing Officer found that Pay-Tel's legal rights,

⁵ August 9, 2012 *Initial Order*, p. 15.

⁶ August 9, 2012 *Initial Order*, p. 15 (quoting Tenn. Code Ann. § 65-4-123).

duties, privileges or immunities would not be determined in this docket, and therefore Pay-Tel's could not intervene as a matter of right.⁷

The Hearing Officer's decision on this issue is correct. Pay-Tel has stated it wants to intervene in this docket solely because it is interested in examining whether Telmate has sufficiently demonstrated it will adhere to the TRA's rules, policies and orders. This bare allegation is insufficient grounds to convene a contested case and further delay Telmate's applications, especially in light of the express public policy in Tennessee directing that competition in telecommunications markets be fostered and encouraged. Within this competitive environment, the Authority's recognized duty is simply that of gatekeeper to ensure that competitors wishing to enter the market have sufficient technical, managerial and financial resources to provide the services and comply with Tennessee law. Telmate has certainly demonstrated it meets those requirements.

As Pay-Tel concedes, Pay-Tel and Telmate compete with each other in the business of bidding on contracts to provide inmate services. Each delay in the Authority's review of the Telmate's applications has prevented and continues to prevent Telmate from engaging in business in Tennessee or from responding to requests for proposals, providing alternative service options and pricing for those detainee facilities to consider, and winning that business in Tennessee. Each delay further eliminates for Pay-Tel one of its strongest competitors; Telmate has been winning accounts from Pay-Tel and others throughout the nation when competing head-to-head on the basis of its technology, pricing, customer service and experience.

⁷ August 9, 2012 *Initial Order*, p. 18.

Based on the lack of any justification whatsoever for the intervention, it seems clear Pay-Tel filed its intervention requests to delay Telmate's ability to commence competing in the market place against it in Tennessee, and as an attempt to gain access to confidential competitively sensitive information and protected information Pay-Tel would not otherwise be able to access. The Authority should not allow Pay-Tel to co-opt the Authority's procedures for its own anti-competitive purposes.

Competition and new technologies in the telecommunications market are to be fostered and encouraged in Tennessee. Telmate has submitted applications and data responses to the Authority demonstrating that Telmate has more than sufficient financial, managerial and technical resources to enter the competitive inmate services market in Tennessee. As those data responses demonstrate, Telmate has received authorization to provide these same services in no fewer than 15 other states; none of Telmate's applications has been denied. Tellingly, almost all of those applications in other states were granted within 60 days of filing. Telmate's applications in Tennessee have now been delayed 10 months, principally due to an intervention by Pay-Tel, one of Telmate's chief competitors, that the Hearing Officer has now found has no legal merit. Telmate respectfully requests that the Authority affirm the Hearing Officer's finding that Pay-Tel has no legal right to intervene in these proceedings. Telmate further requests that the Authority promptly and without further delay rule on the merits of Telmate's applications.

III. THE HEARING OFFICER'S DECISION GRANTING PAY-TEL LIMITED DISCRETIONARY INTERVENTION SHOULD BE REVERSED.

Despite finding that Pay-Tel has no legal right to intervene in this docket, the Hearing Officer nevertheless granted Pay-Tel **limited** intervention under the discretionary rule permitting hearing officers to grant intervention "upon determining that the intervention sought is in the

interests of justice and shall not impair the orderly and prompt conduct of these proceedings."⁸ This discretionary intervention was limited to the discrete issue of whether Telmate should have been told to file for a CLEC, instead of reseller certificate.⁹ Telmate respectfully submits this portion of the Hearing Officer's decision is in error. Pay-Tel's limited intervention is not in the interests of justice and will indeed impair the orderly and prompt conduct of these proceedings by further delaying decision on Telmate's application over an irrelevant technical issue that elevates form over substance.

Not surprisingly, Pay-Tel is the source of this particular snag. The assertion that Telmate should have filed a CLEC application instead of reseller application was made by Pay-Tel for the first time shortly before and during the June 26, 2012 status conference. Pay-Tel claimed that the Authority's reseller rules were superseded by the 1998 CLEC rules, and, although the reseller rules are still on the books, they should be held void. Because the reseller rules are superseded and void, Pay-Tel concludes Authority Staff should have directed Telmate to file a CLEC application instead of a reseller application.¹⁰

The Hearing Officer noted that Pay-Tel cited no authority whatsoever for the proposition that the reseller rules were superseded in 1998.¹¹ As further noted in the Initial Order, such a conclusion is belied by the fact the Authority has routinely continued to grant countless reseller applications following the 1998 enactment of the CLEC rules.¹² **Indeed, as the Hearing Officer**

⁸ August 9, 2012 *Initial Order*, pp. 18-19 (quoting Tenn. Code Ann. § 4-5-310(b)).

⁹ August 9, 2012 *Initial Order*, p. 19.

¹⁰ August 9, 2012 *Initial Order*, p. 6.

¹¹ August 9, 2012 *Initial Order*, p. 10.

¹² *Id.*

recognized in the order, Pay-Tel itself provides inmate services through the exact same two approvals Telmate now seeks: reseller and COCOT.¹³ The August 9 Initial Order concludes that "[t]he Hearing Officer is not persuaded by, and does not agree with, Pay-Tel's contentions that the TRA's reseller rules are superseded."¹⁴

Despite rejecting Pay-Tel's unsupported theory that Telmate should have filed a CLEC application because the reseller rules have been superseded, the Hearing Officer nevertheless granted Pay-Tel limited discretionary intervention to explore this issue further. The sole reason given was that the CLEC issue was "an interesting question."¹⁵ Telmate respectfully submits that, especially in light of the circumstances of this case, this is insufficient justification to grant Pay-Tel discretionary intervention and further delay the Authority's ruling on Telmate's applications.

As recognized in the Initial Order, Telmate filed its applications under the reseller and COCOT rules because that is what the TRA Staff directed Telmate to do; had TRA Staff directed Telmate to submit an application for CLEC certification, it would have gladly complied.¹⁶ As the Hearing Officer also recognized, ultimately it makes no difference because the standards the Authority considers for granting CLEC certification are substantively the **exact same standards** applied to reseller and COCOT applications, *i.e.*, whether the applicant possesses sufficient managerial, financial, and technical abilities to provide the requested services and comply with

¹³ August 9, 2012 *Initial Order*, p. 3.

¹⁴ August 9, 2012 *Initial Order*, p. 19.

¹⁵ August 9, 2012 *Initial Order*, p. 19.

¹⁶ August 9, 2012 *Initial Order*, p. 11.

the Tennessee law.¹⁷ In addition, all of the information that would have been included in a CLEC application is already present in Telmate's applications and data responses already on file in this docket. Both reseller and CLEC applications may be ruled on following a hearing, which the Authority can convene at any of its regular agenda conference meetings. The entire CLEC issue belatedly raised by Pay-Tel is a technical distinction without a true substantive difference. The Authority already has all of the information it needs to rule on Telmate's applications, regardless of what nomenclature is used.

Sensing a window of opportunity, Pay-Tel seized upon the CLEC issue in its Petition for Appeal of the Initial Order to buttress its request for full intervention. In the appeal notice, Pay-Tel argues that if Telmate were required to start over and submit a CLEC application, Pay-Tel would automatically be permitted to renew its intervention request because the CLEC statute requires the applicant to notify the incumbent local exchange carrier and other "interested parties," and in Pay-Tel's view, notification implies the right to intervene. Even setting aside the completely unsupported nature of Pay-Tel's CLEC theory already rejected by the Hearing Officer, Pay-Tel's conclusion that notice requirements imply intervention is wrong. Applying those notice requirements to this case, in order to apply for permission to provide inmate VoIP services exclusively to correctional facilities, Pay-Tel would have to serve notice to incumbent local exchange companies that do not even provide the same services. No incumbent local exchange carrier's legal rights, duties, or interest would be determined through Telmate's application, and thus, no such carrier could meet the intervention standards, just as Pay-Tel has failed to meet the standard for intervention in this case. Pay-Tel's CLEC theory is simply a non-

¹⁷ August 9, 2012 *Initial Order*, p. 11; *Compare* Tenn. Code Ann. § 65-4-201(c) and Tenn. R. and Regs. 1220-4-2-.57.

issue, and does not provide sufficient grounds to reverse the Hearing Officer's decision to deny full intervention as of right.

In addition to not changing the ultimate outcome, proceedings to resolve the "interesting question" of whether TRA Staff should have originally directed Telmate to file a CLEC application instead of a reseller application would not be an efficient and productive use of the Authority's or the parties' resources. Such proceedings would inevitably mire the parties and the Authority in an academic definitional debate that likely would provide no clear legal answer, on an issue in which neither party has a vested interest. Many of the definitions of telecommunications services currently contained in statutes and regulations were drafted before VoIP existed and have not been amended since. Regardless of the semantics of the various definitions, all are subject to the same exception for services exempted by state or federal law. In this case, the VoIP services Telmate seeks to provide are, by statute, expressly exempt from regulation. *See* Tenn. Code Ann. § 7-59-307(d). The only telecommunications services Telmate could be viewed as providing are the operator, collect call and similar services that are actually provided and branded by Telmate's certificated carrier partner. The TRA Staff's direction that Telmate thus submit a reseller and COCOT application like all inmate services providers in the past was an eminently reasonable solution.

IV. CONCLUSION.

When Telmate wanted to expand its business into Tennessee and provide Tennessee detainee facilities an alternative choice for service and price, it contacted the Authority Staff to ask what applications, if any, were needed. Authority Staff directed Telmate to file a reseller and COCOT application, the exact same authorizations used by Pay-Tel, one of Telmate's chief competitors, to provide the same services in Tennessee. Telmate provided all of the information

requested by the Authority, demonstrating that Telmate has more than sufficient financial, technical, and managerial resources to provide inmate services in Tennessee and comply with Tennessee law. The Authority typically rules on reseller and COCOT applications within 2-3 months, yet Telmate's applications have languished on the Authority docket for 10 full months, and the Authority has yet to even take up Telmate's applications for decision. This delay is in large part the result of the wholly unsupported intervention by Pay-Tel, a chief competitor of Telmate the Hearing Officer has now determined has no legal right to intervene. Despite correctly concluding Pay-Tel has no legal interest in this docket, the Hearing Officer has granted Pay-Tel limited intervention to explore an interesting legal question: whether TRA Staff should have directed Telmate to file a CLEC, instead of a reseller application. There is no dispute a CLEC application contains the same substantive information and is judged by the same standards as Telmate's reseller application. As such, given the equities in this case, Telmate requests that the Authority decline to expend the parties' and the agency's resources on this technical question, and instead simply review the information submitted and decide whether Telmate has met the required standards. Telmate also respectfully requests that the Authority take up the merits of Telmate's applications promptly without further delay.

Respectfully submitted,

**BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ/PC**

By:



Misty Smith Kelley (BPR 00)
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-4800
Telephone: (423) 209-4148
Facsimile: (423) 752-9549
E-mail: mkelley@bakerdonelson.com

Attorney for Telmate, LLC

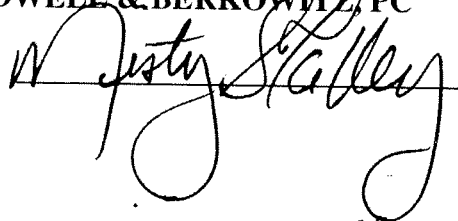
CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via email and U.S. Mail upon the following on the 28th day of August, 2012:

Henry Walker
Bradley, Arant, Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
hwalker@babco.com
Attorney for Pay-Tel Communications

**BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ, PC**

By:

A handwritten signature in black ink, appearing to read "Justy Stalley", is written over a horizontal line.