

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 28, 2012

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

BRIEF IN SUPPORT OF PAY-TEL'S APPEAL

Pay-Tel Communications, Inc. ("Pay-Tel") appeals the "Initial Order" issued by the Hearing Officer on August 9, 2012, and submits this brief in support of its appeal. Pay-Tel also requests oral argument.

Summary

Telmate, LLC ("Telmate") has applied for a certificate of convenience and necessity to offer telephone service to inmates in jails and prisons. State law requires Telmate to file its application under T.C.A. § 65-4-201(b) and (c). That is the only statute under which a telephone company can obtain a certificate to operate in Tennessee. It requires, among other things, notice to local exchange carriers and other interested parties.

Telmate did not file under that statute. Instead, it filed for a "reseller" certificate, an outdated classification that has no statutory basis. Telmate did not notify anyone of its application.

This docket cannot go forward until Telmate amends its application to comply with state law and the Authority's rules and policies concerning certificate applications by a telephone carrier. Notice must also be sent, as required by state law.

This case should be remanded to the Hearing Officer so that Telmate can amend its application and provide proper notice. Following that, the Hearing Officer should consider any petitions to intervene filed by Pay-Tel and other interested parties.

In ruling on a petition by a competing carrier to intervene in an application filed under T.C.A. § 65-4-201(b) and (c), the Hearing Officer should consider, at a minimum, whether the petition raises factual, legal, or policy issues that would warrant the opening of a contested case under the standard set out by the Court of Appeals in Office of the Attorney General, Consumer Advocate and Protection Division v. Tennessee Regulatory Authority, 2005 WL 3193684, (Tenn. Ct. App. 2005). If, as here, the applicant has a "unique" business model which raises issues the agency has not previously considered, the petitioner should be allowed to intervene as a matter of right pursuant to T.C.A. § 4-5-310(a). If, as here, the statute under which the application is filed requires the applicant to notify certain parties, any such party should be allowed to intervene as a matter of agency discretion pursuant to T.C.A. § 4-5-310(b). Under either test, Pay-Tel's petition to intervene should be granted.¹

¹ This is not intended to suggest that these are the only criteria for evaluating a petition to intervene. For example, a petitioner may intervene simply because the petitioner has an interest in the outcome of an issue before the agency and wants to lend support to one side or the other. Such petitions have usually been granted because the agency recognizes that a decision in one case will set a precedent affecting other cases.

Background

The Authority has historically granted petitions to intervene filed by competing carriers. Most applicants, aware of the agency's practice, do not bother to object to such petitions. As a result, there are few decisions by the TRA on the criteria for granting or denying an intervention request. In her twenty-page opinion, the Hearing Officer cited only one instance in which the Authority denied a request by a competing telephone company to intervene in another carrier's application proceeding. In that case, Docket 06-00193, the competitor did not appear until the day of the hearing itself and filed a petition to intervene four days after the hearing. Since state law requires that such petitions be filed prior to the hearing, the Authority denied the petition as untimely and also noted that the petition was "devoid of any explanation" of the competitor's concerns. On the other hand, there are apparently no cases in which the Authority denied a timely filed request by a competitor to intervene in a telephone certification proceeding. This case would be the first.

Argument

The Hearing Officer denied, for the most part, Pay-Tel's request to intervene as a party in this application by Telmate to operate as a provider of telephone service at jails and prisons. Telmate states that it has a "unique" business model (Initial Order at 19) and intends to compete head-to-head against Pay-Tel and a handful of other carriers which offer inmate telephone service in Tennessee. By law, the Authority must convene or conduct a public hearing to determine whether Telmate has demonstrated, among other things, that the applicant will "adhere to all applicable Authority policies, rules, and orders."

Pay-Tel asks to participate as a party in that hearing. Among the issues Pay-Tel intends to raise are questions about whether Telmate's "unique" business model is consistent with the

TRA's "policies, rules, and orders" and whether granting Telmate's application will serve the public interest.

As discussed in Pay-Tel's "Petition for Appeal" filed August 17, 2012, there are several novel issues that Pay-Tel, and perhaps other carriers, should be able to raise concerning Telmate's "unique" business plan: Will Telmate or its "regulated partner" be responsible for handling local calls? How will collect calls be branded? How will they be billed? Will Telmate pay terminating interstate and intrastate access charges on all non-local calls? How will Telmate comply with Chapter 972 of the Public Acts of 2012? (Rather than repeat the discussion of these issues, Pay-Tel refers the Authority to the company's August 17 filing which, for convenience, is attached.)

These issues raise unique factual, legal, and policy issues. These are "factual and policy issues that should not [be] resolved without a contested case proceeding." Office of the Attorney General, Consumer Advocate and Protection Division v. Tennessee Regulatory, supra, slip opinion at 8. In other words, the standards for granting a competitor's petition to intervene should probably be lower—but certainly not higher—than the standards for convening a contested case proceeding to hear a competitor's complaint against another carrier. If a competitor has a legal right to challenge Telmate's unusual business practices in a contested case proceeding, the competitor should have the right to raise those same issues at the hearing on Telmate's application.

Furthermore, Telmate failed to provide notice of its application to "all incumbent telephone companies" and to "other interested parties" such as competing providers of inmate telephone service. See T.C.A. § 65-4-201(c). Once notified of this proceeding, other carriers may ask to intervene. Since state law requires Telmate to provide such notice, those carriers

should be allowed to participate upon request. Otherwise, the notice requirement appears meaningless.

In sum, it is difficult to imagine what more Pay-Tel should be required to do in order to be allowed to intervene in this proceeding. As one of the few Tennessee carriers specializing in providing service to inmates, Pay-Tel has a legal interest in making sure that all competitors operate on a level playing field and that all abide by the Authority's rules, orders, and policies. Telmate itself admits that it has a "unique" business model and, as Pay-Tel has explained, that model raises novel issues of law and policy for the agency to consider. Pay-Tel should be able to participate in the determination of those matters. If Pay-Tel had not raised these issues, who would? If Pay-Tel is not entitled to intervene, who is?

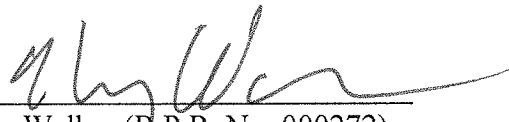
Conclusion

This application cannot go forward until Telmate amends its application to comply with T.C.A. § 65-4-201(b) and (c), the TRA's rules, and the agency's "CLEC application" requirements. Telmate must also send copies of its amended application to all incumbent exchange carriers and other interested parties. Following that notice, the agency must give interested parties the opportunity to intervene and, if intervention is granted, to participate in a hearing on the application.

Therefore, Pay-Tel recommends that the Authority remand this case to the Hearing Officer. After the application has been properly amended and public notice provided, the Hearing Officer should then consider any petitions to intervene in light of the standards discussed here and the agency's traditional policies regarding petitions to intervene.

Respectfully submitted,

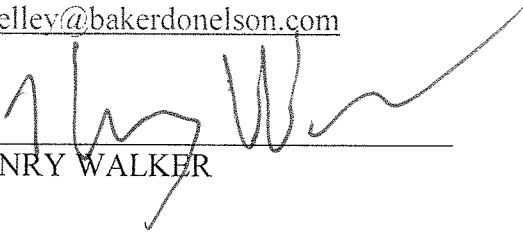
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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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BEFORE THE TENNESSEE REGULATORY AUTHORITY

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August 17, 2012

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IN TENNESSEE)

PETITION FOR APPEAL OF INITIAL ORDER

Pursuant to T.C.A. § 4-5-315, and TRA Rules 1220-1-2-.18(1) and (2), Pay-Tel Communications, Inc. ("Pay-Tel") submits this Petition for appeal of the "Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc." issued August 9, 2012 in the above-captioned proceeding.¹

Pay-Tel asks the Authority to review the issues described below. Furthermore, as required by T.C.A. § 4-5-315(e), the Authority "shall afford each party the opportunity to present briefs" on the issues raised in this appeal.² Pay-Tel suggests that the parties be directed to file simultaneous briefs on August 24, 2012 and to file reply briefs, if desired, on August 31, 2012.

¹ Although the Order is dated August 9, 2012, it was not distributed to the parties until August 13, 2012.

² In light of the fact that the Initial Order is over twenty pages long, briefs and oral argument would be helpful, and perhaps necessary, to cover all the issues.

The principal basis of this appeal is that the Hearing Officer acknowledged that the Applicant, Telmate, LLC, "has consistently characterized its business model as unique" (Initial Order, at 19) but the Hearing Officer has denied Pay-Tel (one of the few competitive carriers in Tennessee that offers inmate telephone services) the opportunity to participate as a party to this proceeding to determine whether Telmate's unique business model is consistent with state law. As shown below, Telmate's application raises an unusually large number of questions which the agency should consider before acting on this certificate. Nevertheless, the Hearing Officer denied Pay-Tel's petition to intervene except on the legal issue of whether Telmate is required to obtain a "CLEC" certificate instead of using the outdated "Reseller" application. If the TRA affirms the Hearing Officer's decision, this will apparently be the first time since the introduction of competition in 1995 that the Authority has denied a timely filed petition by a telephone company to intervene in the application of a competing carrier.³

Issues Raised by Telmate's Application

1. The plain language of T.C.A. § 65-4-201 states that no one may provide telephone service in Tennessee "without first obtaining . . . a certificate of convenience and necessity," without providing "notice" to all incumbent telephone companies and "other interested parties"; and, without participating in "a hearing" before the Authority. Despite that language, the Hearing Officer stated that she "does not agree" that Telmate must file a CLEC application, give notice to other carriers, and participate in a hearing. Although she allowed Pay-Tel to participate as a party in this case solely for the purpose of addressing whether Telmate must file a CLEC application, her decision denying Pay-Tel the right to intervene on other issues ignores the notice

³ As will be discussed in Pay-Tel's brief, the only example cited by the Hearing Officer of a case in which the Authority denied a petition to intervene in a telephone application hearing occurred in Docket 06-00193 when the petition to intervene was not filed until the day of the hearing itself. The petition was denied as untimely and because granting the petition would have delayed the hearing.

requirements of the CLEC statute. There would be little reason to require the applicant to provide notice of its application to incumbent carriers and other interested parties if those carriers and parties did not have the right to intervene in the application proceeding. That notice requirement implies that a competing telephone company has a legal interest in the proceeding and should be allowed to intervene upon the timely filing of a petition. If, as state law mandates, Telmate must file a CLEC application under T.C.A. § 65-4-201, provide notice to other carriers, and participate in a hearing before the agency, then a competing carrier ought to be able to participate as a party in that hearing. That, at least, has been the approach followed by the TRA since 1995.⁴

2. Telmate's "unique" business model apparently involves using other carriers to provide "collect call billing." See the Dec. 16, 2011, response of Telmate to Staff Data Request, Question 1. In Tennessee, as in most states, the certified carrier is the one "holding out" service to the public. If Telmate is providing the service, Telmate must be clearly identified to the customer as the carrier responsible for the service. That means, for example, that an operator handling a collect call must identify Telmate as the provider. It also means that payments must be made to Telmate, not to another carrier. Telmate, however, apparently does not follow this practice and stated that in some states, Telmate acts as the billing carrier even though the service is provided by another entity. See the Response of Dec. 16, 2011, Question 5. This practice would be illegal in Tennessee and may also be illegal in the states where Telmate is operating.

⁴ The Hearing Officer stated that the "requirements for intervention are the same regardless of the type of utility." Initial Order at 18. That is not entirely accurate. The intervention statute recognizes that a petitioner may qualify as an intervenor under the provisions of T.C.A. § 4-5-310 or "under any provision of law." Some statutes, for example, require that an applicant give notice of the proceeding to specific entities, such as "public utilities operating in the municipality or territory affected." T.C.A. § 65-4-203(b). That notice requirement implies that a carrier receiving such notice has a right to intervene in the proceeding.

Since Telmate does not serve the general public but only serves inmates at correctional facilities, Telmate "asserted that the public interest concerns stemming from its applications are minimal." Initial Order at 12. That argument is certainly not consistent with the Authority's long standing concern over rates charged to inmates and their families. Unlike members of the general public, inmates and their families do not have a choice of carriers. They are forced to use the carrier selected by the correctional facility and pay rates substantially higher than the public would pay for the same service. Here, the Authority should examine Telmate's proposed rates and various unregulated charges before deciding whether to grant a certificate. At a correctional facility, the telephone provider has a monopoly. Consequently, the provider requires more, not less, scrutiny from the TRA.

3. Because of the lapse of time since Telmate's application was filed in November, 2011, the Applicant's financial information is no longer current. Telmate filed data from the calendar year 2010. Telmate must update its financial information in order for the Authority to find that Telmate satisfies the requirements of T.C.A. § 65-4-201(c)(2).

4. Similarly, Telmate's application does not address how it intends to comply with Chapter 972 of the Public Act of 2012. This new law, enacted during the last session of the legislature, adds a \$.10 fee to each inmate call. Since the law was passed after the application was filed, there is no information in the application about how Telmate intends to comply.

5. Finally, Telmate states that every call, including every local call, will be carried over VOIP to a switch in Texas and routed by another carrier back to Tennessee. As the Authority is aware, there has been substantial controversy over the payment of access charges by carriers handling traffic that is carried in part over VOIP. Furthermore, at least one long distance carrier based in Texas (Transcom) purports to terminate local and toll calls throughout the

country, including Tennessee, but pays no terminating access charges at all. Although Telmate likely has nothing to do with Transcom, the Authority should at least inquire as to how Telmate can afford to transport every local and intrastate call to Texas and back without passing on the costs of transport to its customers.

Conclusion

Telmate must provide notice to other carriers and go through a hearing at the TRA before obtaining a certificate. For reasons which will be further discussed in Pay-Tel's brief, Pay-Tel has a right to intervene in that hearing and raise the issues discussed above. Therefore, Pay-Tel files this Petition for Appeal and asks that the parties be permitted to brief and argue whether the Authority should reverse its long standing policy toward granting petitions to intervene.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the 17th 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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