

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 29, 2012

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

REPLY BRIEF OF PAY-TEL

In accordance with the Hearing Officer's procedural schedule, Pay-Tel Communications, Inc. ("Pay-Tel") submits this reply to the brief filed by Telmate, LLC ("Telmate") on August 28, 2012.

Argument on the Sufficiency of Telmate's Application

Telmate no longer disputes—at least not in its most recent brief—that new applicants for a certificate to provide telephone service in Tennessee must comply with the requirements of T.C.A. § 65-4-201(b) and (c) (a "CLEC application"). Instead, Telmate states it would “gladly” have filed a CLEC application if it had been asked to do so but that an unidentified person on the agency staff advised Telmate to file a "Reseller" application instead. Telmate Brief, at 10. Rather than correct this error, Telmate contends that it does not matter what label is used to describe its application because the standards for approving a Reseller application are

"substantively the exact same standards" as a CLEC application and that the company has already submitted "all of the information that would have been included in a CLEC application." Id., at 10-11.

Neither claim is correct. As discussed by Pay-Tel in its brief filed August 24, 2012, the standards for issuing a Reseller certificate are similar to, but not the same as, the standards for approving a CLEC application. There are small but critical differences.¹ More importantly, a CLEC application requires, among other things, (1) pre-filed testimony describing the proposed services and the carrier's qualifications, (2) a sample customer bill, (3) three years of projected financial data, and (4) mandatory notice of the application to all incumbent local exchange carriers² and "other interested parties." None of that has been provided by Telmate. Although filing this additional information and complying with the statutory notification requirement should not be difficult, Telmate has declined to do it. During the parties' last conference with the Hearing Officer on August 15, 2012, the Hearing Officer asked Telmate's general counsel if Telmate would be willing to amend its filing to comply with the CLEC application requirements. He replied that his company had made enough filings and wanted a ruling on its application at the next Authority conference³.

¹ The Reseller rules say 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." The CLEC statute requires the Authority to find that the applicant "possesses sufficient managerial, financial, and technical abilities" and that the applicant will "adhere to all applicable authority policies rules and orders."

² Telmate argues that its failure to provide notice should be excused because incumbent local exchange carriers "do not even provide the same services" as Telmate. Telmate Brief, at 11. That is misleading. In fact, every incumbent carrier is a potential provider of inmate service. All of them have offered these services in the past and could do so again without seeking regulatory approval. As discussed in Pay-Tel's earlier brief, incumbent local exchange carriers may also have an interest in determining whether Telmate, which will route all calls out of Tennessee and back using VOIP technology, intends to pay terminating access charges on those calls. In any event, the statute requiring an applicant to send notice to incumbent carriers is mandatory.

³ Since there is no transcript of this telephone conference with the Hearing Officer, the exact words of Telmate's general counsel were not recorded. The sentiment, however, was clear to all.

Under these circumstances, the TRA has no choice but to dismiss the application. The notice requirements of T.C.A. § 65-4-201(c) cannot be waived. Telmate has also failed to provide the information required by the TRA's rules and policies governing the filing of CLEC applications. Dismissal of the application will make it unnecessary for the Authority to rule on this appeal.

Argument on Pay-Tel's Petition to Intervene

If the Authority does not dismiss Telmate's application because it was improperly filed, the Authority must consider Pay-Tel's appeal of the Hearing Officer's "Initial Order" denying Pay-Tel's petition to intervene (except on the limited issue of whether Telmate should have applied for a CLEC certificate). If Telmate does, in fact, agree to amend its application and comply with the statutory notice requirements, interested parties must be given another opportunity to intervene. Those petitions should be granted. Pay-Tel and other competitors have a legally protectable interest in making sure that Telmate's proposed service complies with state law and the Authority's rules, orders, and policies. At a minimum, the Hearing Officer should grant a petition which raises an issue of fact, law, or agency policy sufficient to meet the standards for convening a contested case as described by the Tennessee Court of Appeals in Office of the Attorney General v. Tennessee Regulatory Authority, 2005 WL 3193684.

Telmate's brief filed August 28, 2012 confirms that the carrier's business plan raises at least one such issue, and perhaps more.

Telmate's brief acknowledges that the local telephone services which Telmate intends to offer "are actually provided and branded by Telmate's certificated partner." Telmate Brief, at 12. Without pre-filed testimony, one cannot be certain what that means, but it appears to say that although Telmate is requesting legal authority to provide inmate telephone service and intends to

sign contracts with local jails to provide such services, the telephone customer who pays for a local, collect call will be told—when the call is "branded"—that another carrier is actually providing the service.⁴

If this is, in fact, Telmate's plan, it is apparently inconsistent with Tennessee law which requires that the entity which "holds out" an offering of service to the public i.e., the entity that advertises itself as the provider of service, is the same entity which must obtain a certificate, file a tariff, and answer to the customer and the Authority. In other words, the entity that "brands" the call is the entity that is legally responsible for the service. See Nashville and Chatanooga Railroad Co. v. Messine, 33 Tenn. 220, 225 (Tenn. 1853) (holding that "to constitute one a common carrier, it is necessary that he should hold himself out to the community as such"); Howell v. Sloan Messenger Co., 5 Tenn. App. 312, 315 (Tenn. Ct. App. 1927) (holding "a common carrier is one who holds itself out as ready to engage in the transportation of goods for hire"); State ex rel., v. Cumberland Telephone and Telegraph Company, 114 Tenn. 194, 200 (Tenn. 1905) (holding that a telephone company is a common carrier).

This issue of having one carrier obtain a certificate and sign a contract to provide inmate service but branding the call with the name of another carrier raises an important question of law and policy which the agency has not previously addressed. It is the kind of issue which would warrant the opening of a "contested case" proceeding and, therefore, more than sufficient reason to grant Pay-Tel's petition to intervene. It is, moreover, only one of several issues Pay-Tel has identified and should be able to raise in the application hearing. As Pay-Tel asked in its earlier brief, if Pay-Tel is not allowed to intervene and ask these questions, who will?

⁴ The "branding" of a call occurs when a live or automated operator call tells the customer the name of the carrier handling the call: "Hello, this is Henry with Inmate Telephone Service. You have a collect call from Ken Hill, an inmate at the Nashville jail. Will you accept the charge?"

Response to Telmate's Claim of Unreasonable Delay

Finally, the Authority should be aware that, contrary to the implications in Telmate's brief, this docket has not been unduly delayed. Moreover, what delays occurred were largely the result of Telmate's own actions. As the docket reflects, the Staff issued four rounds of data requests about the application. Twice, Telmate asked for additional time to respond. Eight more weeks were wasted when Telmate claimed that its responses to several of the Staff's questions should not be made available to the public. When the Staff looked into Telmate's claims, the Staff found that none of the information was, in fact, confidential as that term is defined in state law and directed Telmate to remove the "confidential" designation from its answers⁵. Finally, as the Authority is aware, the TRA lacked a quorum after June 8 and did not meet again until August 20 of this year. That delay was not the fault of any party or the Staff.

This case has yet to be set for a hearing on the merits for the simple reason that the matter has never been ready for a hearing⁶. Because of the carrier's unusual business plan and questions about the carrier's operations in other states, the Staff sent the company a large number of data requests. Telmate's responses sparked other questions, many of which Telmate did not want to

⁵ Counsel for Pay-Tel requested on January 10, 2012, that Telmate's December 19, 2011 responses to the staff's data requests be made available to the public. Telmate states incorrectly that it resolved the confidentiality issue on February 3, 2012 and implies that the staff should have put the application on the Authority's docket in February or March. Telmate Brief, at 5. In fact, Telmate's February 3, 2012 letter stated that Telmate would agree to release only two of the seven answers it had provided in response to the Staff's December data requests. It took another five weeks before the remaining information was finally made public on March 12, 2012. In June, the Staff asked for additional information and Telmate made another claim of confidentiality that also turned out to be mistaken. See letter from Telmate dated June 25, 2012.

⁶ Telmate claims that Pay-Tel's petition to intervene was filed "three days before Telmate's reseller application was scheduled to be considered by the Authority" on April 23, 2012. Telmate Brief, at 5. That is not accurate. In fact, Telmate's application was not scheduled to be heard on April 23. The TRA met on April 23 for a regularly scheduled conference. The agenda, which had been circulated to all parties on April 13, did not include Telmate's application. The application has never been set for a hearing on the merits. Pay-Tel filed its petition to intervene on April 19, 2012. Pay-Tel's request was placed on the agenda for the May 7, 2012 conference. At that time, the Authority appointed a Hearing Officer to rule on whether to open a contested case and whether to grant the petition to intervene. Since then, the case has proceeded as one would expect in light of the contentious dispute over Pay-Tel's intervention and the inadequacy of Telmate's application.


answer publicly. When Telmate was finally required to disclose its business plan, Pay-Tel filed a petition to intervene. Telmate then objected to Pay-Tel's petition, causing more delay. Today, this matter is still not ready for hearing because Telmate declines to amend its filing to comply with state law.

Conclusion

For these reasons, the Authority should hold that unless Telmate amends its application to conform to the “CLEC application” requirements, the application will be dismissed. If Telmate agrees to amend its application and follow the statutory notice requirements, Pay-Tel and others should be allowed to file petitions to intervene. As discussed here, Pay-Tel and any other intervenors have the right to participate in a proceeding to determine whether Telmate’s business model is consistent with state law.

Respectfully submitted,

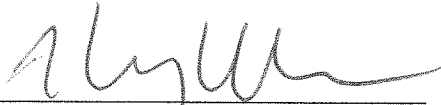
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st 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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