

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 4, 2013

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

FINAL ORDER

This matter came before Chairman Kenneth C. Hill, Director James M. Allison, and Director Sara Kyle of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on October 15, 2012, for consideration of the *Application of Telmate, LLC for Certificate of Authority to Provide Operator Services and/or Resell Telecommunications Services in Tennessee* (“Application”) filed on October 28, 2011.

BACKGROUND

On October 28, 2011, pursuant to TRA Rules 1220-4-2-.43 and 1220-4-2-.57, Telmate, LLC (“Telmate”) filed applications requesting certification to resell interexchange and intrastate long distance telecommunication services (“Reseller Application”), and authority to provide Customer Owned Coined (or Coinless) Operated Telephone (“COCOT”) service (“COCOT Application”) in

Docket Nos. 11-00181 and 11-00182, respectively.¹ Telmate is a limited liability company organized in June 2009 under the laws of the State of Delaware and licensed to transact business in Tennessee by the Secretary of State on April 30, 2010. As shown in its applications and subsequent filings, Telmate currently operates in upwards of twenty-two states providing non-facilities-based switched access interexchange services exclusively to inmate facilities under bid-contracts with State and Municipal Departments of Corrections on a prepaid and collect basis using interconnected voice over internet protocol (“VoIP”) circuits. In its Tennessee applications, Telmate seeks similar designation and authority to operate as it has been granted in other states. Telmate does not offer services to the general public and does not provide, nor seek authority in Tennessee to provide, local carrier exchange telephone services.

On April 19, 2012, Pay-Tel filed a *Petition to Intervene* in Docket No. 11-00181, which asserts that, as a competitor of Telmate in the inmate telephone business, its legal rights, duties, privileges, immunities or other legal interests may be determined in the certification proceedings of its competitor. Pay-Tel further contends that, under Tenn. Code Ann. § 4-5-310, it has a legal right to intervene and participate as a party in these proceedings so that it may evaluate whether Telmate has sufficiently demonstrated that it will adhere to the TRA’s rules, policies and orders.

Pay-Tel is authorized to provide operator services and/or resell (reseller) telecommunications services on an intrastate basis and as an operator of COCOT service in Tennessee under the Reseller and COCOT Certificates of Convenience and Necessity (“CCNs”) granted it by the Authority on July 1, 1997. In accordance with these certifications, Pay-Tel provides inmate calling services at correctional facilities via bid-contracts.

On May 3, 2012, Telmate objected to Pay-Tel’s request for intervention and asked that the

¹ On June 7, 2012, finding that because the dockets have interrelated issues and hearing them together would promote efficiency, the voting panel of Directors voted unanimously to consolidate Docket Nos. 11-00181 and 11-00182. The panel also reaffirmed the charge and authority that it previously delegated to the Hearing Officer in Docket No. 11-00181.

Authority decline to convene a contested case proceeding in the docket. On June 26, 2012, the Hearing Officer held a Status Conference and heard the oral arguments of the parties on Pay-Tel's *Petition to Intervene*.² On August 9, 2012, the Hearing Officer issued an order granting Pay-Tel limited intervention in the docket. The Hearing Officer limited Pay-Tel's intervention to the discrete issue raised by Pay-Tel in its *Supplemental Petition to Intervene*: whether Telmate should be required to obtain a Competing Local Exchange Carrier ("CLEC") Certificate, instead of a Reseller Certificate.³

On August 17, 2012, Pay-Tel filed a *Petition for Appeal of Initial Order* requesting that the Authority review issues related to Telmate's application.⁴ Pay-Tel stated that the Hearing Officer's ruling denied it the opportunity to participate as a party to this proceeding to determine whether Telmate's application is consistent with state law and requested that the parties be allowed to brief the issue.⁵

At the regularly scheduled Authority Conference held on September 10, 2012, the panel considered Pay-Tel's *Petition for Appeal of Initial Order*. After hearing the arguments presented by the parties, the majority of the panel found that the Hearing Officer's decision was well-reasoned and Pay-Tel had not established any other basis for intervention in the docket other than the issue of whether Telmate should file a CLEC or a Reseller Application. However, the majority found that it needed additional information to make a determination regarding whether the CLEC statute supersedes the Reseller rules.⁶ Thereafter, the majority of the panel voted to accept the *Initial Order Granting Limited Intervention* of the Hearing Officer granting Pay-Tel limited intervention solely on the issue of

² On June 21, 2012, Pay-Tel filed another *Petition to Intervene* ("*Supplemental Petition to Intervene*") in Docket No. 11-00182. In its *Supplemental Petition to Intervene*, Pay-Tel adopted and incorporated by reference the substance of its *Petition to Intervene* filed in Docket No. 11-00181, and further asserted that it should be permitted to intervene in the now-consolidated dockets to "raise the issue of whether Telmate must obtain a CLEC certificate, pursuant to T.C.A. § 65-4-201(b) and TRA Rule 1220-4-8-.03, in order to provide the services it seeks to offer."

³ See *Initial Order of Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.* ("*Initial Order Granting Limited Intervention*"), pp. 13- 20 (August 9, 2012).

⁴ See *Petition for Appeal of Initial Order*, p. 1 (August 17, 2012).

⁵ *Id.* at 2.

⁶ *Id.* at 64.

whether Telmate must obtain a CLEC certificate instead of a Reseller certificate and to have a hearing on October 15, 2012 on the issue of whether a CLEC or Reseller certificate is appropriate for providers seeking to provide inmate payphone services in Tennessee.⁷ The Authority requested that the parties file briefs and argue the issue at the October 15, 2012 Authority Conference.⁸

OCTOBER 15, 2012 AUTHORITY CONFERENCE

At the regularly scheduled Authority conference held on October 15, 2012, the panel heard Pay-Tel's *Petition for Reconsideration Based on New Evidence*. In addition, the panel conducted a hearing on the appropriate application Telmate should file to provide its services and deliberated Telmate's *Application*.

Pay-Tel's *Petition for Reconsideration Based on New Evidence*

On October 12, 2012,⁹ Pay-Tel filed a *Petition for Reconsideration Based on New Evidence* asking the Authority to reconsider its decision limiting Pay-Tel's participation in this docket because it had newly discovered evidence that "raises serious questions about Telmate's application to offer service in Tennessee."¹⁰ Pay-Tel states that Telmate has a regulatory partner, Legacy International, which has been the subject of sanctions in several states.¹¹ Pay-Tel alleges that Telmate has "misled the TRA concerning the identity of its 'regulated partner'" and that Telmate's sample bills do not comply with TRA Rules.¹²

⁷ *Id.* at 67. Director Allison did not vote with the majority. Director Allison stated that he did not want to delay deliberations on Telmate's Application because Telmate had filed the appropriate Application based on the long-standing practices of the TRA. Director Allison preferred that a general determination on the appropriate certificate required to provide inmate payphone services going forward be made in a different forum.

⁸ *Id.* at 66.

⁹ On October 12, 2012, Pay-Tel also filed a *Petition for Appeal of Initial Order of a Hearing Officer* requesting that the Authority reverse the holding of the Hearing Officer in the *Order Denying Motion to Remove Confidential Designation* issued on October 24, 2012. Pay-Tel requested that except for the payment amount, the Authority declare both the Legacy and Airespring contracts to be public documents. Before the panel considered Pay-Tel's Petition, Pay-Tel asked that no action be taken on the appeal and later withdrew its appeal in a *Notice of Withdrawal of Appeal of Hearing Officer's Ruling* filed on November 30, 2012.

¹⁰ See *Petition for Reconsideration Based on New Evidence*, p. 3 (October 12, 2012).

¹¹ *Id.* at 1.

¹² *Id.* at 1-2.

At the regularly scheduled Authority Conference held on October 15, 2012, the panel considered Pay-Tel's *Petition for Reconsideration Based on New Evidence* and heard arguments on whether Telmate should be required to file a CLEC or a Reseller Application.

Pay-Tel's Position

Pay-Tel stated that in the discovery conducted in this docket, Telmate indicated that the "...billing and branding of their calls inside Tennessee would be done by a company called Legacy. Earlier in response to a TRA staff discovery request, they had indicated that the billing and branding were going to be done by a company called Airespring..."¹³ According to Pay-Tel, Legacy has been "subject to investigation and sanctions in four or five states, most recently Georgia and California."¹⁴ Pay-Tel asserted that it has never been clear in Telmate's Application what company was going to provide the service of billing and branding calls. "According to the TRA's Rules, Telmate is the one who is supposed to brand the call because they're the service provider."¹⁵ Pay-Tel argued that the billing and branding is important so that a person knows who to contact if there is a problem with the bill. And, all of the sample bills provided by Telmate had "Legacy" on the bill, but none of the bills had "Telmate" on them.¹⁶ Pay-Tel argued further that "if you look at the bills, it looks as if Legacy—the company with this terrible reputation—is the service provider. You won't see the name Telmate on the bills."¹⁷ Pay-Tel asserted that these are serious issues and the Authority should consider if the billing arrangement between Telmate and Legacy is consistent with the Authority rules and asked that the Authority reconsider limiting its intervention to one issue and allow it to participate as a full party in the docket.¹⁸

¹³ Transcript of Proceedings, p. 52 (October 15, 2012).

¹⁴ *Id.*

¹⁵ *Id.* at 54.

¹⁶ *Id.*

¹⁷ *Id.* at 55.

¹⁸ *Id.* at 56.

Telmate's Position

Telmate stated that Pay-Tel's *Petition to Intervene* was based on the fact that Pay-Tel is a competitor and it wants to make sure Telmate can follow Tennessee law. Pay-Tel did not present any evidence that Telmate would not follow the law, and the Hearing Officer found that Pay-Tel did not have a right to protect itself against competition.¹⁹ Telmate alleged that Pay-Tel is taking anti-competitive action against Telmate, its chief competitor, nationwide. Telmate stated "[t]hey want information to help them outbid Telmate, and that's exactly what the purpose of the intervention is."²⁰

Telmate explained that it provides its services exclusively through VoIP, which it asserts is not regulated in Tennessee. However, in an abundance of caution, if Telmate plans to do business in a state, it will go to the state commission and ask if it needs any type of certification.²¹ Telmate explained further that it is a "next-generation inmate services provider" and Legacy handles Telmate's traditional collect calls, "which are a very small portion of what Telmate does and they are on the decline." Those traditional calls are billed and branded as "Legacy" and it is clear on the bill and there is also a 1-800 number to contact Legacy on the bill.²² And, Telmate asserted that it "meets all the requirements of the Federal Truth and (sic) Billing", and "it meets all the requirements of the Tennessee rule."²³ According to Telmate, any issues Legacy may have had were before Telmate started operations under the name "Telmate" in 2009. Telmate also pointed out that Legacy is a registered provider in Tennessee.²⁴ "But the fact that Telmate has a contract with Legacy is not a reason to deny Telmate's application to enter the competitive market in Tennessee. We meet the

¹⁹ *Id.* at 57.

²⁰ *Id.* at 59.

²¹ *Id.* at 60.

²² *Id.* at 64-65.

²³ *Id.* at 65.

²⁴ *Id.* at 66.

requirements.”²⁵ Telmate asserted that there are no grounds for the TRA to reconsider the limited intervention granted to Pay-Tel, and asked that a final determination be made on its application.²⁶

Deliberations on *Petition for Reconsideration Based on New Evidence*

The majority of the panel found that the scope of intervention previously granted by the Authority is sufficient to protect Pay-Tel’s interest in this docket.²⁷ Thereafter, the majority of the panel reaffirmed its previous decision and declined to grant Pay-Tel full intervention in the docket, as requested in Pay-Tel’s *Petition for Reconsideration Based on New Evidence*.²⁸

Hearing on Appropriate Certificate for Telmate

After deliberating the *Petition for Reconsideration Based on New Evidence*, the panel held a hearing on whether Telmate should apply for a CLEC or a Reseller certificate to provide its services in Tennessee. Pay-Tel filed a brief on this issue on August 24, 2012 and Telmate submitted its brief on August 28, 2012.

Pay-Tel’s Position

Pay-Tel argued that the statute is clear that in order to provide telephone service in Tennessee, a company must obtain a CLEC certificate and the Reseller rules do not apply because they were written before the statute was passed.²⁹ Pay-Tel asserted that Telmate has submitted most of the information required for a CLEC certificate but has failed to give notice to incumbent carriers, as

²⁵ *Id.*

²⁶ *Id.* at 67.

²⁷ While the allegations against Legacy International were not a basis to expand the scope of Pay-Tel’s intervention, the voting panel agreed that it was appropriate for the TRA to investigate the issues raised about Legacy. The panel voted unanimously that TRA Staff launch an informal investigation into Legacy and report back to the panel regarding its findings.

²⁸ *Id.* at 79-84. Director Kyle did not vote with the majority. Director Kyle had concerns about the allegations made against Legacy International and thought that the TRA would be the appropriate forum to address the issues and gather additional information surrounding Legacy.

²⁹ *Id.* at 88.

required by the statute.³⁰ According to Pay-Tel, either application process, CLEC or Reseller, requires a hearing.³¹

Telmate's Position

Telmate reiterated that it filed the applications it was directed to file by TRA Staff and the same type of applications as every other inmate services provider in the state has been filing for the last fifteen years.³² Telmate interprets the basis of Pay-Tel's argument to be a doctrine of implied repeal, which is disfavored under the law.³³ Instead, "you must presume that when the legislature passed that statute, they knew about the reseller and COCOT rules."³⁴ Telmate asserts that if the legislature intended to repeal the Reseller rules it would have done so, but it did not repeal them.³⁵ The bigger issue, Telmate argued, is that the Reseller and COCOT rules were promulgated pursuant to the Uniform Administrative Procedures Act ("UAPA"). According to Telmate, "the rules that are in place remain valid until they are either repealed by the legislature or they're repealed by this agency through the rulemaking process." The UAPA requires that the same process must be followed to repeal a rule as was followed to adopt a rule.³⁶ Telmate asserted that the statute requires a certificate from the TRA to provide telecommunications services, but the statute does not specify a particular type of certificate a company must have. Further, Telmate maintained that the TRA evaluates the technical, managerial and financial ability of the company to provide the requested services when granting a certificate of convenience under the Reseller rules, the COCOT rules and for granting a CLEC certificate.³⁷ Telmate asserted that Pay-Tel's argument that Telmate needs to start over and file a CLEC certificate

³⁰ *Id.* at 88-89.

³¹ *Id.* at 89.

³² *Id.* at 89.

³³ *Id.* at 90.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 92.

³⁷ *Id.* at 93-94.

is only so that Pay-Tel can file its petition to intervene again.³⁸ Telmate concluded its argument by stating that the TRA has everything it needs to rule on Telmate's applications and Telmate should be considered under the same standards as the TRA has considered other inmate service providers for the past fifteen years.³⁹

Deliberations on Telmate's Application

At the regularly scheduled Authority Conference held on October 15, 2012, the panel considered the parties' arguments on the issue of whether Telmate was required to file a CLEC or Reseller application. The majority of the panel found that it is undisputed that the Authority has plenary authority to interpret its statutes and rules. Further, the majority found that the TRA has used its broad discretion to further the Legislature's directive 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 service providers."⁴⁰ The majority of the panel found that the Authority has reduced regulatory barriers for entities seeking the limited scope of a Reseller's business. And, for over fourteen years, the Authority has consistently interpreted its rules and Tenn. Code Ann. § 65-4-201 to mean that businesses, such as Telmate, are only required to obtain a Reseller Certificate, not a CLEC Certificate, and the majority noted that to find otherwise would be inconsistent with long-standing precedent.

Based on these findings and the record in this proceeding, the majority of the panel voted that Reseller and COCOT Applications are the appropriate applications for Telmate to file in order to provide its services, and it is not required to file for a CLEC certificate.⁴¹

³⁸ *Id.* at 95-96.

³⁹ *Id.* at 95.

⁴⁰ Tenn. Code Ann. § 65-4-123 (2004).

⁴¹ Consistent with the concerns expressed during deliberations on the *Petition for Reconsideration Based on New Evidence*, Director Kyle did not vote with the majority.

Thereafter, the panel considered Telmate's Reseller and COCOT Applications and the majority of the panel voted to approve Telmate's Reseller and COCOT Applications.⁴²

In addition, based on the information provided about Legacy International in the *Petition for Reconsideration Based on New Evidence*, the panel voted unanimously that TRA Staff launch an informal investigation into Legacy and report back to the panel regarding its findings.

IT IS THEREFORE ORDERED THAT:

1. The relief requested in Pay-Tel Communications, Inc.'s *Petition for Reconsideration Based on New Evidence* is denied.

2. The appropriate applications for Telmate, LLC to file are Reseller and COCOT Applications, not a CLEC Application.

3. Telmate, LLC's application for a Reseller Certificate is granted.

4. Telmate LLC's application for a COCOT Certificate is granted.

5. Any party aggrieved by the decision of the Tennessee Regulatory Authority in this matter may file a Petition for Reconsideration within fifteen days of the date of this Order.

6. Any party aggrieved by the decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days of the date of this Order.

Chairman Kenneth C. Hill and Director James M. Allison concur. Director Sara Kyle dissents.

ATTEST:



Earl R. Taylor, Executive Director

⁴² Director Kyle did not vote with the majority.