

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 9, 2012

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

**INITIAL ORDER OF THE HEARING OFFICER
GRANTING LIMITED INTERVENTION TO PAY-TEL COMMUNICATIONS, INC.**

This matter is before the Hearing Officer, duly appointed by the voting panel of Directors of the Tennessee Regulatory Authority ("Authority" or "TRA"), to determine whether to convene contested case proceedings in the above consolidated dockets, and in the event that such proceedings are convened, to thereafter handle any preliminary matters in preparation for a hearing before the voting panel.¹

BACKGROUND & RELEVANT PROCEDURAL HISTORY

On October 28, 2011, pursuant to TRA Rules 1220-4-2-.57 and .43, Telmate, LLC ("Telmate") filed applications requesting certification to resell interexchange and intrastate long distance telecommunication services ("Reseller Application")², and authority to provide

¹ See *Order Appointing a Hearing Officer*, Docket No. 11-00181 (May 10, 2012); see also *Order Consolidating Dockets and Appointing a Hearing Officer*, Docket Nos. 11-00181 & 11-00182 (June 21, 2012).

² *In re Petition of Telmate, LLC for Authority to Provide Resell Telecommunications in the State of Tennessee*, Docket No. 11-00181, *Application for Certificate to Provide Operator Services and/or Resell Telecommunication Services in Tennessee* (October 28, 2012).

Customer Owned Coined (or Coinless) Operated Telephone (“COCOT”) service (“COCOT Application”)³ in Docket Nos. 11-00181 and 11-00182, respectively. 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, 2010.⁴ As shown in its applications and subsequent filings, Telmate currently operates in upwards of 22 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.⁵ In its applications, Telmate seeks in Tennessee 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.⁶

On April 19, 2012, Pay-Tel Communications, Inc. (“Pay-Tel”) filed a *Petition to Intervene* in Docket No. 11-00181, in which it 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.⁷ 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.⁸

³ *In re Petition of Telmate, LLC for Authority to Provide COCOT Services in Tennessee*, Docket No. 11-00182, Application for Authority to Provide Customer Owned Coined (or Coinless) Operated Telephone Service in Tennessee (October 28, 2012).

⁴ *Reseller Application*, Docket No. 11-00181, p. 6 (October 28, 2011); *COCOT Application*, Docket No. 11-00182 (October 28, 2011).

⁵ *Reseller Application*, Docket No. 11-00181, Attachment B (October 28, 2011); Telmate Data Responses, #2 (November 29, 2011).

⁶ *Reseller Application*, Docket No. 11-00181, Attachment B (October 28, 2011).

⁷ *Petition to Intervene*, Docket No. 11-00181 (April 19, 2012).

⁸ *Petition to Intervene*, Docket No. 11-00181 (April 19, 2012).

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 CCNs granted it by the Authority on July 1, 1997.⁹ In accordance with these certifications, Pay-Tel provides inmate calling services at correctional facilities via bid-contracts.¹⁰ On July 13, 2009, Pay-Tel notified the Authority of its intent to operate under market regulation pursuant to the Market Regulation Act of 2009, which amended Tenn. Code Ann. § 65-5-109.¹¹

On May 3, 2012, Telmate objected to Pay-Tel's request for intervention and asked that the Authority decline to convene a contested case proceeding in the docket.¹² In its *Response*, Telmate asserts that Pay-Tel has not provided factual support that its legal rights or interests may be impacted, much less determined, in the proceeding, and has therefore failed to satisfy the intervention requirements of Tenn. Code Ann. § 4-5-310. Telmate asserts that, consistent with the clearly articulated public policy of the state of Tennessee provided in Tenn. Code Ann. § 65-4-123, which expressly permits competition in all telecommunications markets and provides alternative forms of regulation of those markets in order to foster the development of technologically advanced telecommunications services in Tennessee, Pay-Tel is not protected

⁹ *In re Application for Authority to Provide Customer-Owned Coin or Coinless Operated Telephone Service in Tennessee Pursuant to Rule 1220-4-2-.43 to .54*, Docket No. 97-01232, *Order* (July 9, 1997) (memorializing Authority action taken during a regularly scheduled Authority Conference held on July 1, 1997); *In re Application for Authority to Provide Operator Services and/or Resell Telecommunications Services in Tennessee Pursuant to Rule 1220-4-2-.57*, Docket No. 97-01247, *Order* (July 9, 1997) (memorializing Authority action taken during a regularly scheduled Authority Conference held on July 1, 1997).

¹⁰ *In re Application for Authority to Provide Operator Services and/or Resell Telecommunications Services in Tennessee Pursuant to Rule 1220-4-2-.57*, Docket No. 97-01247, *Application for Certificate to Provide Operator Services and/or Resell Interexchange Services in Tennessee (Rule 1220-4-2-.57)*, p. 1 (June 9, 1997).

¹¹ Tenn. Pub. Ch. 278, known as the Market Regulation Act of 2009, amended Tenn. Code Ann. § 65-5-109 by adding new subsections (l) to (r) that allow non-incumbent certificated providers, and incumbent certificated providers of local and/or intrastate long distance telecommunication services that have elected price regulation under subsections (a) to (k), to further elect to operate pursuant to market regulation. Those telecommunication carriers that elect market regulation become exempt from most aspects of the TRA's regulation of retail operations, including rate regulation/pricing. The Authority retains jurisdiction only over those elements of regulation specifically provided in subsection (n).

¹² *Response to Petition to Intervene and Request that the Authority Decline to Convene a Contested Case ("Response")* (May 3, 2012).

from competition. Pay-Tel's competitor status does not confer a protectable legal right or interest, nor does such status alone furnish an inherent basis to be granted intervention in these proceedings.¹³ Further, Telmate contends that Pay-Tel's request is improper and made solely for the purpose of delaying Telmate's entry into the telecommunications market in Tennessee.¹⁴ Telmate also asserts that Pay-Tel's petition is untimely, delays the Authority's consideration of its applications, and unjustly prejudices Telmate because it is prevented from responding to requests for proposals and bidding on contracts to provide inmate services in Tennessee.¹⁵

On May 4, 2012, Pay-Tel requested leave to file a reply to Telmate's *Response* in accordance with TRA Rule 1220-1-2-.06(3).¹⁶ In its *Reply*, Pay-Tel asserts that, because a hearing notice had not yet been issued, its *Petition to Intervene* is timely, and that Telmate's *Response*, which was filed two weeks after its *Petition to Intervene*, should be rejected as untimely.¹⁷ Pay-Tel asserts that Telmate's requests for extensions of time, designating its responses confidential, and asserting confidentiality in opposition to Pay-Tel's request that the data responses be made publicly available, are, at least in part, responsible for any delay in the Authority's consideration of Telmate's applications.¹⁸

Moreover, Pay-Tel asserts that under Tenn. Code Ann. § 65-4-201(c), Telmate's application requires a hearing, and Tenn. Code Ann. § 4-5-102(3) defines a "contested case" as a proceeding "determined by an agency after the opportunity for a hearing."¹⁹ Thus, Pay-Tel asserts that the proceeding in Docket No. 11-00181 is, by definition, already a contested

¹³ *Response*, Docket No. 11-00181, p. 3-4 (May 3, 2012).

¹⁴ *Response*, Docket No. 11-00181, p. 4 (May 3, 2012).

¹⁵ *Response*, Docket No. 11-00181, p. 4-5 (May 3, 2012).

¹⁶ *Reply to Telmate's Opposition to Pay-Tel's Petition to Intervene ("Reply")*, Docket No. 11-00181 (May 4, 2012).

¹⁷ *Reply*, Docket No. 11-00181, p. 1 (May 4, 2012).

¹⁸ *Reply*, Docket No. 11-00181, p. 3 (May 4, 2012).

¹⁹ *Reply*, Docket No. 11-00181, p. 2 (May 4, 2012).

case proceeding.²⁰ Further, Pay-Tel asserts that the “fact” that Pay-Tel and Telmate are competitors in the inmate telephone business, as noted in its *Petition to Intervene*, is a sufficient factual basis on which to establish its legal interest in “making sure that Telmate carries [its] statutory burden” of demonstrating that it will adhere to all applicable Authority policies, rules, and orders.²¹ Pay-Tel also asserts that Telmate’s data responses concerning its partnership with a certificated local exchange service provider to provide local calling service at the inmate facilities it will serve in Tennessee are unclear and should be explored at a hearing, and that, as a competitor, it has a legal right to participate in that hearing.²² In short, Pay-Tel contends that the status of “competitor” by its very nature confers, in and of itself, a legal right to participate in the certification proceedings of another provider of similar services that aspires to enter the telecommunications market in Tennessee.

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, and reaffirmed the charge and authority that it had delegated previously to the Hearing Officer in Docket No. 11-00181.²³ On June 19, 2012, the Hearing Officer scheduled a Status Conference for 10:30 a.m. on June 26, 2012, to hear the oral arguments of the parties on Pay-Tel’s *Petition to Intervene*.²⁴

On June 21, 2012, Pay-Tel filed another *Petition to Intervene* (“*Supplemental Petition to Intervene*”) in Docket No. 11-00182.²⁵ In its *Supplemental Petition to Intervene*, Pay-Tel adopted and incorporated by reference the substance of its *Petition to Intervene* filed in

²⁰ *Reply*, Docket No. 11-00181, p. 2 (May 4, 2012).

²¹ *Reply*, Docket No. 11-00181, p. 2 (May 4, 2012).

²² *Reply*, Docket No. 11-00181, p. 2-3 (May 4, 2012).

²³ *Order Consolidating Dockets and Appointing a Hearing Officer*, Docket Nos. 11-00181 & 11-00182 (June 21, 2012).

²⁴ *Notice of Status Conference* (June 19, 2012).

²⁵ *Supplemental Petition to Intervene*, Docket No. 11-00182 (June 21, 2012).

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.”²⁶ Contending that the TRA’s “[r]eseller rules which became effective June 13, 1995 were superseded by the [Authority’s] CLEC rules which became effective June 15, 1998,” Pay-Tel asserts that, “[n]ow, every carrier seeking to provide telecommunications services in Tennessee must obtain a CLEC certificate pursuant to T.C.A. § 65-4-201(b).”²⁷ Therefore, according to Pay-Tel, because Telmate did not specifically apply for a CLEC certificate, but instead requested a reseller certificate under the TRA’s reseller rules, which Pay-Tel asserts have been null and void since June 15, 1998, Telmate has not requested sufficient authority to operate in Tennessee. Although Pay-Tel concedes that Telmate’s application for COCOT authority under TRA Rule 1220-4-2-.43 may be necessary, it contends that, as Telmate’s reseller application is invalid. Thus, Telmate’s remaining application, if granted, would provide inadequate authorization by which Telmate may offer its proposed services.²⁸

JUNE 26, 2012 STATUS CONFERENCE

In accordance with public notice, a Status Conference was convened at approximately 10:30 a.m. on June 26, 2012, in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The following appearances were entered by counsel:

For Telmate:

Misty Smith Kelley, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC,
1800 Republic Centre, 633 Chestnut Street, Chattanooga, Tennessee 37450; and,

²⁶ *Supplemental Petition to Intervene*, p. 1 (June 21, 2012).

²⁷ *Supplemental Petition to Intervene*, p.1 (June 21, 2012).

²⁸ *Supplemental Petition to Intervene*, p.1 (June 21, 2012).

For Pay-Tel:

Henry Walker, Esq., Bradley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203.

During the Status Conference, the parties presented their positions concerning Pay-Tel's request to intervene and responded to questions raised by the Hearing Officer.

Pay-Tel

In addition to reiterating the arguments set forth in its filed pleadings, during the Status Conference Pay-Tel clarified the reasons it contends that a competitor, by definition, has a right to intervene in the certification proceedings of its actual or potential business competitor:

A competitor has a legal interest in making sure that the applicant does not gain an unfair competitive advantage by failing to dot every "I" and cross every "T" and follow the rules of this agency for getting and maintaining an application. That's why a competitor has an interest and, I believe, a protectable interest in intervening, is to make sure that the applicant does everything that the competitor has had to do in order to compete. We don't want anyone to have an unfair advantage by doing something that's not consistent with the agency's statutes and regulations.²⁹

In support of its assertion that a competitor has an inherent legal interest in the proceedings of another competitor, Pay-Tel contended that, "If you, in fact, look at the early applications for certificates, for CLEC certificates, BellSouth used to intervene in every one just to make sure that the CLEC met the requirements of the statute."³⁰ Further, Pay-Tel asserted that Telmate's characterization of its business model as "unique" should prompt a competitor to "want to make sure that that unique business model is consistent with the agency's rules and

²⁹ Transcript of Proceedings, pp. 11-12 (June 26, 2012).

³⁰ Transcript of Proceedings, p. 12 (June 26, 2012).

regulations.³¹ In summary, Pay-Tel stated that competitors have “the right to compete on a level playing field.”³²

Pay-Tel asserted that a proceeding involving an application for a CCN is, by definition, a contested case:

The definition of contested cases in TCA 4-5-102 refers specifically to the granting of certificates. And the courts have held that reference is specifically to the granting of certificates before the TRA; that that, by definition, is a contested case. The reason it’s a contested case is because a certificate application requires a hearing by statute. That court case, by the way, is 1996 Tennessee Appeals LEXIS 776. It’s AT&T v. Greer.³³

According to Pay-Tel, as this proceeding is already a contested case by virtue of the applicant’s request for authority to provide service, the agency is required to convene a public hearing. In addition, Pay-Tel asserted that a hearing is required because the TRA’s reseller rules have been superseded by both the CLEC rules and the general statute on CCNs, which both require hearings. Pay-Tel further contended that even if the reseller rules were not superseded, the reseller rules provide that the Authority “may grant or deny certificates based on the [reseller] application subject to the right of any party to request a hearing.”³⁴ Pay-Tel asserted that, as it has now requested a hearing in this matter, the Authority is compelled to oblige, and “hearings mean the opportunity to ask questions and have discovery.”³⁵

Pay-Tel agreed that the criteria considered by the TRA in certifying resellers and CLECs is the same, and explained the reasons for the similarity:

[T]he reseller rules were written to kind of bridge that gap between monopoly environment and the competitive environment. Well, just as those rules were being finished, the CLEC statute passed, which basically said, you know, it’s now the policy of the legislature, as Ms. Kelley said, to have competition. And if you want to compete, here’s the statute under which you should proceed.

³¹ Transcript of Proceedings, p. 12 (June 26, 2012).

³² Transcript of Proceedings, p. 29 (June 26, 2012).

³³ Transcript of Proceedings, p. 10 (June 26, 2012).

³⁴ Transcript of Proceedings, p. 19 (June 26, 2012).

³⁵ Transcript of Proceedings, p. 36 (June 26, 2012).

And it's no coincidence that the standards are the same because the reseller rules were written with those standards in mind. You look at the same technical, managerial, and financial capabilities whether it's a reseller or whether it's a CLEC.³⁶

Pay-Tel asserted that all applicants are required to proceed under Tenn. Code Ann. § 65-4-201(b) in order to get a telecommunications certificate. Under that statute, CLEC authority allows a provider to provide any type of telecommunications service, including local, long distance, COCOTs, etc. Although it conceded that the Authority could grant a more narrow authority, Pay-Tel asserted that if a CLEC certificate were obtained, there would be no need for additional authority or to specify which services were permitted, "because if you got a CLEC certificate, you know, you can do it all. . . . a reseller has to resell facilities-based services of another carrier. That's not in the CLEC certificate."³⁷

In response to the Hearing Officer's inquiry concerning the manner in which Pay-Tel envisioned the docket moving forward in the event Pay-Tel was granted intervention, Pay-Tel stated that it anticipated filing discovery concerning Telmate's business model and how it works, and "whether or not having Telmate as the person you pay for the service . . . constitutes holding out the service or not."³⁸ Further, Pay-Tel stated that it anticipated being ready for a hearing within a month, but further qualified its statement, "we have a process . . . and it may take a couple of weeks to do it, but that is the process we have."³⁹ As to discovery of information Telmate has already asserted constitutes confidential trade secrets, Pay-Tel stated that confidentiality protections can be erected that preclude the sharing of such information beyond a need-to-know basis, likening such a situation to the BellSouth hearings

³⁶ Transcript of Proceedings, pp. 21-22 (June 26, 2012).

³⁷ Transcript of Proceedings, p. 23 (June 26, 2012).

³⁸ Transcript of Proceedings, p. 32 (June 26, 2012).

³⁹ Transcript of Proceedings, p. 32 & 36 (June 26, 2012).

on the pricing of Unbundled Network Elements in which numerous competitors were involved and the agency issued orders strictly limiting who had access to the information.⁴⁰

Telmate

During the Status Conference, in addition to and in support of the arguments included in its *Response*, Telmate explained that it provides services through the use of a new technology, VoIP, which, it asserts, is unregulated in Tennessee.⁴¹ In addition, Telmate stated that before filing its applications, it sought the assistance of TRA Staff concerning the authorizations necessary for its operations and provision of services in Tennessee. After collaborating with TRA Staff, Telmate applied for reseller and COCOT authority. Due to the fact that Telmate partners with a regulated (certificated) carrier and/or operator services provider to provide certain services that it does not provide through VoIP, such as collect call billing, 911 services, and termination of the call route to the end-user, and because VoIP is not itself classified as a “telecommunications service,” a determination was made that Telmate was essentially reselling the telecommunications services of a regulated carrier. Accordingly, Telmate filed its application for reseller authority.⁴² In addition, because Telmate will at times provide telephone equipment at a correctional facility for inmate use, it applied for COCOT authority.⁴³

Telmate disagreed with Pay-Tel’s contention that the Authority’s reseller rules have been superseded as a result of the promulgation of the CLEC rules, and noted that Pay-Tel had cited no authority for its position. Further, Telmate asserted that the TRA routinely handles reseller and COCOT applications even following the 1998 overhaul of

⁴⁰ Transcript of Proceedings, p. 37 (June 26, 2012).

⁴¹ Although it asserts that VoIP technology is, by statute, unregulated in Tennessee, Telmate for purposes of these proceedings has waived any arguments it might have to assert that the Authority does not have jurisdiction of these types of operations and services. See Transcript of Proceedings, p. 15 (June 26, 2012).

⁴² Transcript of Proceedings, p. 13 (June 26, 2012).

⁴³ Transcript of Proceedings, pp. 15-16 (June 26, 2012).

telecommunications in Tennessee.⁴⁴ Telmate contended that, regardless of whether you call the proceeding a CLEC CCN, reseller, or COCOT application, the TRA considers the same standards. In determining whether to grant Telmate authority to operate in Tennessee, the TRA considers: 1) ability to provide the applied-for services and 2) that an applicant has indicated it will follow Tennessee law and the TRA's rules.⁴⁵ Despite the similarity of these standards for granting authority, Telmate asserted that distinctions exist between a reseller and a CLEC due to the operations and business intentions of the providers.⁴⁶ For the purposes of these proceedings, Telmate asserted that the only portion of its operations included within the definition of telecommunications, and subject to TRA regulatory oversight, is the reselling of services of an already-regulated carrier.⁴⁷

Telmate contended that if the factual basis asserted by Pay-Tel satisfies the statutory threshold, then, for all practical purposes, there is no standard for intervention at all:

If [Pay-Tel's] petition to intervene meets the standard for intervention, then there is no standard for intervention, because Paytel has not made a single allegation that Telmate is currently breaking any laws, that they have failed to comply with any laws. Pay-Tel simply says we want to intervene to make sure that [Telmate is] going to obey the law in the future. Well, if that's the standard, then any time you have a competing telecommunications provider coming in for authority to compete in the Tennessee marketplace, then you're going to have a full-blown litigated proceeding.⁴⁸

Further, should the Authority find that a competitor always has a right to intervene in the proceedings of another competitor, as Pay-Tel contends in this proceeding, then, as telecommunications service technologies continue to evolve, there will likely be an increase in intervention requests. Telmate noted that, in light of the statute's requirement that CLEC CCNs be completed within sixty (60) days, an increase in interventions in certification

⁴⁴ Transcript of Proceedings, p. 16 (June 26, 2012).

⁴⁵ Transcript of Proceedings, pp. 16-17 (June 26, 2012).

⁴⁶ Transcript of Proceedings, p. 24 (June 26, 2012).

⁴⁷ Transcript of Proceedings, p. 25 (June 26, 2012).

⁴⁸ Transcript of Proceedings, p. 18 (June 26, 2012).

proceedings could place a significant burden on the agency to comply with its statutory duties.⁴⁹

Telmate further asserted that the Authority should be aware of and guard against the danger that a competitor could use intervention in certification proceedings for anticompetitive purposes - to delay a competitor's entry into the market or to gain access to competitively sensitive information that it would not otherwise be able to obtain.⁵⁰ In addition, because it does not provide services directly to the public, but serves correctional facilities via contracts obtained through a public bidding process, Telmate asserted that the public interest concerns stemming from its applications are minimal.⁵¹

Telmate contended that the personal satisfaction of its competitors is not the standard by which the Authority is required to grant or deny a certificate of authority to service providers in Tennessee.⁵² The State has expressed a policy intended to encourage competition and has set forth certain minimal criteria that must be shown; "the TRA is merely a gatekeeper to make sure that the companies who are providing services are [sic] financially sound."⁵³ Telmate further contended that the discovery that Pay-Tel intends to request concerning Telmate's business model is "competitively-sensitive information that Telmate is concerned about disclosing to Pay-Tel, its main competitor," and that Pay-Tel's request to intervene is made for the purpose of attempting to obtain an opportunity to use the discovery process as a fishing expedition.⁵⁴ In such event, Telmate asserted that discovery disputes over

⁴⁹ Transcript of Proceedings, p. 26 (June 26, 2012).

⁵⁰ Transcript of Proceedings, pp. 26-27 & 33-34 (June 26, 2012).

⁵¹ Transcript of Proceedings, p. 18-19 (June 26, 2012).

⁵² Transcript of Proceedings, p. 34 (June 26, 2012).

⁵³ Transcript of Proceedings, p. 34 (June 26, 2012).

⁵⁴ Transcript of Proceedings, p. 35 (June 26, 2012).

how “the agency [does] its job while protecting the trade secrets of companies that are here before it,” are likely to arise and impede the efficient process of justice.⁵⁵

FINDINGS AND CONCLUSIONS

Petitions for intervention in contested case proceedings before the Authority are governed by the UAPA under Tenn. Code Ann. § 4-5-310, and the statutes and rules specifically applicable to the TRA, Tenn. Code Ann. 65-2-107 and TRA Rule 1220-01-02-.08. Pay-Tel has requested intervention in this proceeding as a matter of competitive right. As such, Tenn. Code Ann. § 4-5-310(a), which sets forth certain criteria required as to interventions as a matter of right, provides as follows:

- (a) The administrative judge or hearing officer ***shall*** grant one (1) or more petitions for intervention if:
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
 - (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
 - (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention. (***Emphasis added.***)⁵⁶

Nevertheless, Tenn. Code Ann. § 4-5-310(b) gives the agency discretion to grant petitions for intervention “at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.”⁵⁷ The Tennessee Attorney General has determined that the intervention provisions in Tenn. Code Ann. § 4-5-310 are substantially similar to provisions set forth in the Model Act § 4-

⁵⁵ Transcript of Proceedings, pp. 35-36 (June 26, 2012).

⁵⁶ Tenn. Code Ann. § 4-5-310(a).

⁵⁷ Tenn. Code Ann. § 4-5-310(b).

209, and has found that the comments to the Model Act explain the distinction between intervention subsections (a) and (b):

The distinction between subsections (a) and (b) deserves emphasis. If a party satisfies the standards of subsection (a), the presiding officer *shall* grant the petition to intervene. In situations not qualifying under subsection (a), the presiding officer *may* grant the petition to intervene upon making the determination described in subsection (b).

Paragraph (a)(2) confers standing upon a petitioner to intervene, as of right, upon demonstrating that the petitioner's "legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding ..." However, paragraph (a)(3) imposes the further limitation, that the presiding officer shall grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings upon the legal rights, etc. of the petitioner for intervention, paragraph (a)(2), against the interests of justice and the need for orderly and prompt proceedings, paragraph (a)(3).⁵⁸

Tenn. Code Ann § 65-2-107, which is applicable to the Authority specifically, permits "all persons having a right under the provisions of the laws applicable to the authority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings . . ." and in the discretion of the agency, allows, upon motion, "any interested person to intervene and become a party to any contested case."⁵⁹ In addition, TRA Rule 1220-01-02-.08, which incorporates and is consistent with the standards set forth in Tenn. Code Ann §§ 4-5-310, likewise provides:

- (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
- (2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law.

⁵⁸ Tenn. Op. Atty Gen. No. 11-06 *3-4 (Jan. 11, 2011) (*citing* Model Act § 4-209, Comment (emphasis in original)).

⁵⁹ Tenn. Code Ann § 65-2-107.

Intervention may be denied or delayed for failure to provide such specific facts.

- (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.⁶⁰

The Tennessee Court of Appeals has held that the intervention procedures and criteria enacted by the Tennessee General Assembly, and those promulgated by the Department of State for the administrative agencies in Tennessee, are:

[D]esigned to strike a balance between public participation in an administrative proceeding and the rights of the parties. The rights of the parties counterbalances the drive to let all interested persons participate. Accordingly, intervention in administrative proceedings is not of right, and administrative agencies have substantial discretion to grant or deny intervention.⁶¹

After reviewing the standards of intervention set forth herein above, and considering the filed-pleadings and oral arguments presented by Telmate and Pay-Tel in these proceedings, the Hearing Officer finds unpersuasive Pay-Tel's request for intervention on the factual basis that it is a competitor of Telmate, and its assertion that competitor status alone confers an inherent legal interest and right sufficient to gain entry into the proceedings of another competitor. In 1995, the General Assembly made clear that the policy of this State is 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."⁶² The purpose of the 1995 act was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services.⁶³

⁶⁰ Tenn. Comp. R. & Regs. 1220-01-02-.08.

⁶¹ *Wood v. Metro. Nashville & Davidson County Gov't*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005) (internal citations omitted); *see also*, Tenn. Op. Atty Gen. No. 11-06 *3-4 (Jan. 11, 2011).

⁶² Tenn. Code Ann. § 65-4-123.

⁶³ *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 666 (Tenn.Ct.App.1997).

Effective May 21, 2009, the General Assembly affirmed this policy and enhanced it by enacting legislation that allows telecommunications providers to elect market regulation.⁶⁴ Market regulation further, and more substantially, eases regulatory constraints on telecommunication service providers by eliminating most aspects of regulation on retail operations, including pricing. Narrowing the TRA's regulatory involvement in the operations of telecommunication services providers that operate under such election, market regulation has opened wide the gates of competition in the telecommunications industry in Tennessee. Indeed, Pay-Tel elected to operate pursuant to market regulation on July 13, 2009, and operates currently pursuant to those market regulation provisions.

Pay-Tel failed to cite legal authority in support its position that its competitor status gives it a legal right to participate in these certification proceedings. While referring generally to BellSouth's requests to intervene in "early applications for certificates . . . just to make sure that the CLEC met the requirements of the statute," Pay-Tel provided no specific references or docket numbers supporting its claim. In researching the matter, the Hearing Officer found no instances in which BellSouth, or AT&T, had been granted intervention for the sole purpose of ensuring that a potential CLEC satisfied the requirements of the statute. In dockets where intervention has been granted, the Hearing Officer found that such interventions were based on the fact that the petitioner was both a customer of and potential competitor to the applicant CLEC;⁶⁵ involved applicants whose status required a heightened review or scrutiny by the agency, such as an applicant that was a subsidiary or affiliate of the

⁶⁴ Tenn. Code Ann. § 65-5-109 (approved May 21, 2009; effective upon becoming law).

⁶⁵ See *In re Application of United Telephone-Southeast, Inc. for a Certificate of Public Convenience and Necessity to Provide InterLATA, Interexchange Telephone Service*, TRA Docket No. 96-01235, *Petition of AT&T Communications of the South Central States, Inc. for Leave to Intervene* (August 30, 1996) and *Order Allowing Intervention of AT&T Communications of the South Central State, Inc.* (September 10, 1996).

incumbent local exchange carrier (“ILEC”)⁶⁶ or a municipal applicant implicating Tenn. Code Ann. § 7-52-401, in which implementation of competitive safeguards and other requirements were to be considered by the Authority;⁶⁷ and/or the applicant failed to or did not object to the intervention request.⁶⁸ None of these circumstances are at issue in these proceedings involving Telmate.

More recently, the Authority has specifically declined intervention for failure to meet the criteria required in TRA Rule 1220-1-2-.08(2), and further found that the competitor’s petition was devoid of an explanation of its concerns and contained allegations insufficient to invoke the Authority’s discretion.⁶⁹ Moreover, in the rate case proceeding of a wastewater service provider, wherein, the petitioner asserted an argument similar to that of Pay-Tel in these proceedings, the hearing officer found that a petition to intervene “simply stating that [intervention is warranted] because rates of a competitor are involved” does not satisfy the standards for intervention under Tenn. Code Ann. § 4-5-310(a).⁷⁰ In denying the request to

⁶⁶ See *In re Petition of BellSouth Long Distance, Inc. to Provide Competing Local Telecommunications Services*, TRA Docket No. 03-00602, *Petition to Intervene of AT&T Communications of the South Central States, LLC* (December 30, 2003), *BellSouth Long Distance, Inc.’s Objection to Petition to Intervene Filed by AT&T Communications of the South Central States, LLC* (January 13, 2004), *Response of AT&T to Objection of BellSouth Long Distance* (January 27, 2004), and *Order Convening Contested Case Proceeding, Granting Intervention, and Appointing a Hearing Officer* (March 4, 2004).

⁶⁷ See *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Competing Telecommunications Services Within the State of Tennessee*, TRA Docket No. 05-00251, *Petition of BellSouth Telecommunications, Inc. for Leave to Intervene* (September 30, 2005) and *Order Granting Petitions for Intervention* (November 2, 2005); see also *In re Application of Jackson Energy Authority for a Certificate of Convenience and Necessity*, TRA Docket No. 03-00438, *Order Granting Intervention of Charter Communications, Inc., etc.* (November 3, 2003) (Granting intervention to Charter Communications, and noting panel approval of limited intervention without objection to Aeneas Communications, LLC for monitoring purposes only, in CCN docket of municipal applicant).

⁶⁸ *Supra* at TRA Docket No. 96-01235; see also, *Id.* at TRA Docket Nos. 05-00251.

⁶⁹ See *In re Application of Electric Power Board of Chattanooga for Expanded Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services*, TRA Docket No. 06-00193, *Petition to Intervene by Aeneas Communications, LLC* (September 29, 2006) and *Order* (August 23, 2007) (denying intervention to Aeneas Communications, LLC).

⁷⁰ See *In re Petition of Tennessee Wastewater Systems, Inc. for Approval to Amend Its Rates and Charges*, TRA Docket No. 08-00202, *Initial Order on Petitions for Reconsideration of the Discretionary Grant of Limited Intervention, etc.* (January 22, 2009) and *Order Granting Motion to Withdraw and Denying Motion to Review Hearing Officer’s Initial Order* (April 29, 2009) (denying appeal of hearing officer’s initial order on the issue of unauthorized practice of law by nonlawyer).

intervene, the hearing officer concluded, "If [petitioner's] arguments were sufficient, 'that would allow virtually any other competitor to intervene in any other rate case,' which is simply not a legal right under Title 65."⁷¹

Despite certain minor factual differences, analogizing the request in Docket No. 08-00202 with the request made in these proceedings, the Hearing Officer finds that the requirements for intervention are the same regardless of the type of utility, industry, or contested case proceeding at issue before the TRA. Indeed, because wastewater utilities are not subject to open competition or market regulation like telecommunications carriers, allegations of impact upon a competitor would be even more persuasive to the Authority. Therefore, just as the bald assertion of competitive impact was found to be insufficient in Docket No. 08-00202, the Hearing Officer finds that Pay-Tel's contention that it holds an inherent right to intervene because it is a business competitor, without more, will not satisfy the requirements of intervention applied in these proceedings.

In light of the clear policy of this State enacted by the General Assembly in 1995 and expanded in 2009, and recent precedent of the Authority, the Hearing Officer finds that Pay-Tel's petition to intervene fails to set forth facts demonstrating that its legal rights, duties, privileges, immunities or other legal interest may be determined in these proceedings. Therefore, the hearing officer denies Pay-Tel's request to intervene as a matter of right under Tenn. Code Ann. § 4-5-310(a).

Nevertheless, under Tenn. Code Ann. § 4-5-310(b), the Hearing Officer has discretion to grant petitions for intervention "at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of these

⁷¹ See *In re Petition of Tennessee Wastewater Systems, Inc. for Approval to Amend Its Rates and Charges*, TRA Docket No. 08-00202, *Initial Order on Petitions for Reconsideration of the Discretionary Grant of Limited Intervention, etc.*, p. 6 (January 22, 2009).

proceedings.” In determining to grant intervention, Tenn. Code Ann. § 4-5-310(c) allows a hearing officer to impose, at any time, conditions upon an intervenor’s participation in the proceedings. Conditions may include:

- (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
- (2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings . . . ⁷²

The Hearing Officer is not persuaded by, and does not agree with, Pay-Tel’s contentions that the TRA’s reseller rules are superseded. Yet, Telmate has consistently characterized its business model as unique, and Pay-Tel has raised an interesting question as to whether or not the uniqueness of Telmate’s operations warrants or otherwise requires that a CLEC, rather than a reseller, certificate be obtained. Therefore, in the exercise of her discretion, the Hearing Officer hereby convenes a contested case proceeding in these dockets and grants limited intervention to Pay-Tel as to this specific and discrete issue. Therefore, Pay-Tel’s intervention is limited as follows:

- 1) Participation in these proceedings is limited to the discrete issue of concern raised by Pay-Tel in its *Supplemental Petition to Intervene*: whether Telmate should be required to obtain a CLEC, instead of a reseller, certificate.

- 2) Because Pay-Tel is a competitor of Telmate, company representatives and personnel shall have no access to and cannot review any proprietary information filed by Telmate pursuant to a protective order, which will be entered separately in the docket file. If an objection to the confidential designation of such information is lodged, the Hearing Officer will review the information *in camera* and rule upon whether such information is protected

⁷² Tenn. Code Ann. § 4-5-310.

from disclosure. Pay-Tel's legal counsel, after executing the protective order, will be allowed to review such information, and may not share any proprietary information with Pay-Tel company representatives or personnel.

Further, in the interests of time, efficiency, and to avoid unnecessary delay, the Hearing Officer establishes the following procedural schedule:

August 15, 2012	Discovery Requests Due
August 17, 2012	Objections to Discovery, if any
August 20, 2012	Responses to Objections
August 24, 2012	Responses to Discovery
August 31, 2012	Pre-Filed Testimony by Pay-Tel
September 7, 2012	Pre-Filed Rebuttal Testimony by Telmate
September 10, 2012	1:30 p.m. Pre-Hearing Conference
TBD	Hearing on the Merits

***** All filings are to be made by 2:00 p.m. CST**

BE IT THEREFORE ORDERED THAT:

1. Pay-Tel Communications, Inc.'s petitions to intervene as a matter of right under Tenn. Code Ann. § 4-5-310(a), filed in 11-00181 and 11-00182, are denied, but Pay-Tel Communications, Inc. is granted limited intervention in accordance with Tenn. Code Ann. § 4-5-310(b) and (c) as specifically discussed in this Initial Order.

2. Pay-Tel Communications, Inc.'s intervention and participation in these proceedings is limited to the discrete issue of whether Telmate, LLC should be required to obtain a CLEC certificate instead of reseller authority.

3. Pay-Tel Communications, Inc. company representatives and personnel are prohibited access to and shall not review any proprietary information filed by Telmate, LLC

pursuant to a protective order in this docket. Pay-Tel Communications, Inc.'s legal counsel, after executing the protective order, will be allowed to review such information, and is prohibited from sharing such proprietary information directly or indirectly with any Pay-Tel Communications, Inc. company representative or personnel, or any other person or entity in accordance with the provisions of the protective order.

4. Telmate, LLC and Pay-Tel Communications, Inc. shall file an agreed proposed protective order, or if agreement cannot be reached, then each shall file a proposed protective order, **no later than August 20, 2012.**

5. The Procedural Schedule set forth herein above is adopted and is in full force and effect.

6. All filings shall be made in accordance with the Rules of the Tennessee Regulatory Authority.

7. Any party aggrieved by the decision of the Hearing Officer in this Initial Order may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Initial Order.



Kelly Cashman-Grams, Hearing Officer