

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**August 17, 2012**

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

**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.<sup>1</sup>

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.<sup>2</sup> 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.

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

<sup>2</sup> 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intervene except on the legal issue of whether Telmate is required to obtain a "CLEC" certificate instead of using the outdated "Reseller" application.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.<sup>3</sup>

### **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

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<sup>3</sup> 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.<sup>4</sup>

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.

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<sup>4</sup> 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,

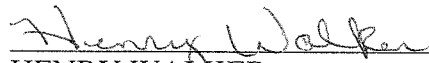
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**CERTIFICATE OF SERVICE**

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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