

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
APPLICATION OF BRISTOL TENNESSEE)	
ESSENTIAL SERVICES TO EXPAND ITS)	
CERTIFICATE OF CONVENIENCE AND)	DOCKET NO. 12-00060
NECESSITY TO PROVIDE COMPETING)	
TELECOMMUNICATIONS SERVICES)	
STATEWIDE)	

**BRIEF OF BRISTOL TENNESSEE ESSENTIAL SERVICES
REGARDING JURISDICTION OF THE TENNESSEE REGULATORY AUTHORITY
OVER A MARKET REGULATED CARRIER**

At the November 15 status conference in this Docket, the Hearing Officer heard arguments from the parties concerning a discovery dispute. Those arguments raised questions concerning the scope of the jurisdiction of the Tennessee Regulatory Authority (“Authority”) over a carrier that has elected market based regulation pursuant to Tenn. Code Ann. § 65-5-109. More particularly, the arguments raised questions about the extent to which, if at all, the Authority has jurisdiction under Title 7, Chapter 52, Part 4 of the Tennessee Code in the case of a municipal telecommunications provider that has elected market based regulation. Because the answer to this question could affect the scope of issues addressed in this Docket, the Hearing Officer asked the parties to brief this issue for the full Authority panel’s consideration at its January 2013 Agenda Conference.

Summary Argument. Bristol Tennessee Essential Services (“BTES”) respectfully submits this brief in support of its position that the language of Tenn. Code Ann. §§ 65-5-109(m) & (n) is clear and unambiguous: the Authority’s jurisdiction over market regulated carriers is limited to the jurisdiction provided in the plain language of those two provisions. Because the

requirements under Title 7, Chapter 52, Part 4 are not listed in Tenn. Code Ann. § 65-5-109(n), BTES submits that the Tennessee General Assembly did not give the Authority jurisdiction to address these requirements. To be sure, the requirements under Title 7, Chapter 52, Part 4 apply to BTES' operations, but, like the somewhat analogous requirements under Title 7, Chapter 52, Part 6 that apply to municipal cable and Internet operations, the application and enforcement of these requirements are simply beyond the Authority's jurisdiction.

BTES submits that the appropriate standard under Tenn. Code Ann. § 65-4-201 in the context of this proceeding is that BTES must demonstrate (1) that it possesses sufficient managerial, financial and technical abilities to provide telecommunications service outside of its electric system footprint, and (2) that it will adhere to the policies, rules and orders of the Authority that are "applicable" after its election to operate pursuant to market based regulation – meaning those found in the areas reserved for the Authority under Tenn. Code Ann. § 65-5-109(n). BTES respectfully suggests that the Authority should reject any attempt to expand the scope of this proceeding to consider issues under Title 7, Chapter 52, Part 4 of the Tennessee Code, as those issues are beyond the jurisdiction that the plain language of the Market Based Regulation Act of 2009 provides.

Background. In 1997, the Tennessee General Assembly authorized municipal electric systems like BTES to provide telecommunications service. The municipal telecommunications statutes are codified in Title 7, Chapter 52, Part 4 of the Tennessee Code. Among other things, these statutes subject municipal telecommunications operations to regulation by the Authority "in the same manner and to the same extent as other certificated providers of telecommunications services" Tenn. Code Ann. § 7-52-401.

On March 6, 2006, the voting panel of the Authority in Docket No. 05-0251 granted BTES a certificate of convenience and necessity to provide telecommunications services within its electric system footprint. The *Order Approving Application for Certificate of Public Convenience and Necessity*¹ outlined a three part standard applicable to BTES' application, considering the application "in light of the criteria for granting a certificate of public convenience and necessity ('CCN') as set forth in Tenn. Code Ann. § 65-4-201 *et seq.*, Tenn. Code Ann. § 65-5-112, and applicable sections of Tenn. Code Ann. § 7-52-401 *et seq.*"² Notably, after discussing the requirements of Tenn. Code Ann. §§ 65-4-201 and 65-5-112, the 2006 CCN Order correctly recognizes that the requirements under Title 7, Chapter 52, Part 4 of the Tennessee Code are separate and additional requirements, stating "BTES' *Application* is also subject to the requirements of Tenn. Code Ann. 7-52-401, 7-52-403 and 7-52-405."³

As part of that proceeding, BTES adopted and implemented a cost allocation manual to allocate shared and common costs between BTES' electric system operations and BTES' telecommunications business unit. Pursuant to the 2006 CCN Order, BTES prepared agreed upon procedures for a compliance audit of its cost allocation manual and submitted those agreed upon procedures to the Authority.⁴ BTES obtained and filed an initial compliance audit pursuant to these agreed upon procedures.⁵ BTES further obtained and filed four additional annual compliance audits of its cost allocation manual, covering BTES' fiscal years ending June 30 of 2007, 2008, 2009, and 2010.⁶

¹ Available at <http://www.tn.gov/tra/orders/2005/0500251ah.pdf> (the "2006 CCN Order").

² 2006 CCN Order at 1.

³ 2006 CCN Order at 2.

⁴ See <http://www.tn.gov/tra/orders/2005/0500251aj.pdf>.

⁵ See <http://www.tn.gov/tra/orders/2005/0500251am.pdf>.

⁶ Copies on file in Docket No. 05-00251, available at <http://www.tn.gov/tra/dockets/0500251.htm>.

In 2009, the Tennessee General Assembly enacted the “Market Regulation Act of 2009,” now codified within Tenn. Code Ann. § 65-5-109. In doing so, the Tennessee General Assembly substantially revised the regulatory structure that is applicable to telecommunications providers and more narrowly defined the jurisdiction of the Authority over carriers that elect this alternative market based regulation. The General Assembly made this alternative regulatory path available to all participants in the telecommunications arena – incumbent local exchange carriers,⁷ subsidiaries and affiliates of incumbent local exchange carriers, national cable television companies and their affiliates and subsidiaries, for-profit affiliates and subsidiaries of telephone cooperatives, municipal telecommunications providers, and other competitive local exchange carriers.

An election of market based regulation under the Market Regulation Act of 2009 generally exempts a certificated carrier from the jurisdiction of the Authority except in two circumstances: (i) proceedings and complaints between carriers, which are to be considered under federal substantive laws (and not state substantive laws) (Tenn. Code Ann. § 65-5-109(m)); and (ii) those areas reserved for the jurisdiction of the Authority under Tenn. Code Ann. § 65-5-109(n).

On May 5, 2011, BTES filed notice of its intent to operate pursuant to market based regulation,⁸ and pursuant to the provisions of Tenn. Code Ann. § 65-5-109(l), that election became effective immediately upon BTES’ filing. Based upon the provisions of the Market Regulation Act of 2009, BTES did not obtain a compliance audit for its fiscal year 2011, but

⁷ The Market Regulation Act of 2009 does establish additional requirements for certain large incumbent carriers and for certain smaller population exchanges. See Tenn. Code. Ann. § 65-5-109(o).

⁸ Available at <http://www.tn.gov/tra/orders/2011/1100068.pdf>.

BTES' Cost Allocation Manual remains in place and is not expected to change following completion of this Docket.⁹

Relationship between the Market Regulation Act of 2009 and the provisions of Title 7, Chapter 52, Part 4. BTES respectfully submits that, with the enactment of the Market Regulation Act of 2009, the Tennessee General Assembly established a regulatory structure that does not provide the Authority with jurisdiction under Title 7, Chapter 52, Part 4 over a municipal electric system like BTES that has elected market based regulation.

BTES respectfully submits that the language of Tenn. Code Ann. § 65-5-109(m) and (n) could not be clearer. Tenn. Code Ann. § 65-5-109(m) plainly states that market regulated carriers like BTES are “exempt from all authority jurisdiction . . . except as defined in [Tenn. Code Ann. § 65-5-109(n)].” Tenn. Code Ann. § 65-5-109(n), in turn, provides that market regulated carriers “shall be subject to the jurisdiction of the [Authority] only when” the Authority is exercising jurisdiction pursuant to the provisions of Tenn. Code Ann. § 65-5-109(n)(1) – (14). Nothing in provisions of Tenn. Code Ann. § 65-5-109(n)(1) – (14) confers jurisdiction upon the Authority over matters arising under Title 7, Chapter 52, Part 4. Because the requirements of Tenn. Code Ann. Title 7, Chapter 52, Part 4 are not within the jurisdiction expressly provided by the Tennessee General Assembly for the Authority, BTES respectfully submits that any effort to directly or indirectly assert jurisdiction over these issues would go beyond the jurisdiction that the Tennessee General Assembly has established.

To be sure, the requirements of Title 7, Chapter 52, Part 4 continue to apply to BTES' telecommunications operations. Jurisdiction over those matters simply does not reside with the

⁹ See Responses 3(c), 6(c) and 9 of the *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast LLC*, available at <http://www.tn.gov/tra/dockets/1200060.htm>.

Authority in the case of a certificated municipal system like BTES that subsequently elects to operate pursuant to market based regulation.

The standard applicable to this case. The Authority’s jurisdiction “respecting the requirement of certificates pursuant to § 65-4-201” is among the jurisdiction that the Authority retains after a certificated carrier elects market based regulation (Tenn. Code Ann. § 65-5-109(n)(12)). In other words, if a certificated carrier that elects market based regulation is later required to expand or modify its certificate of public convenience and necessity (the case presented in this Docket), the Authority is granted jurisdiction over those proceedings. In accordance with Tenn. Code Ann. § 65-5-109(n)(12), the applicable standard in such a proceeding is the standard contained in Tenn. Code Ann. § 65-4-201. Again, the separate requirements under Title 7, Chapter 52, Part 4 are not mentioned.

BTES submits that the appropriate standard under Tenn. Code Ann. § 65-4-201 in the context of this proceeding is that BTES must demonstrate (1) that it possesses sufficient managerial, financial and technical abilities to provide telecommunications service outside of its electric system footprint, and (2) that it will adhere to the policies, rules and orders of the Authority that are “applicable” after its election to operate pursuant to market based regulation – meaning those found in the areas reserved for the Authority under Tenn. Code Ann. § 65-5-109(n).

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For the foregoing reasons, BTES respectfully requests that the Authority find that the Market Based Regulation Act of 2009 does not confer jurisdiction on the Authority to address issues that may arise under Title 7, Chapter 52, Part 4 of the Tennessee Code. BTES further respectfully requests that the Authority affirm that the appropriate standard under Tenn. Code Ann. § 65-4-201 in the context of this proceeding is that BTES must demonstrate (1) that it

possesses sufficient managerial, financial and technical abilities to provide telecommunications service outside of its electric system footprint, and (2) that it will adhere to the policies, rules and orders of the Authority that are “applicable” after its election to operate pursuant to market based regulation.

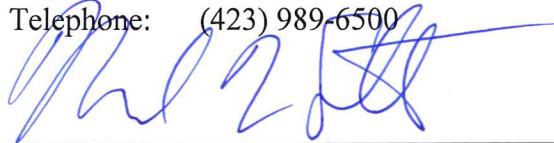
Respectfully submitted,

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CERTIFICATE OF SERVICE

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