

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

In Re:)	
Application of Bristol Tennessee Essential Services)	Docket No. 12-00060
To Expand Its Certificate of Convenience and)	
Necessity to Provide Competiting)	filed electronically in the docket
Telecommunications Services Statewide)	office on 12/03/12

**RESPONSE OF CENTURYLINK TO BTES INITIAL BRIEF
REGARDING THRESHOLD LEGAL ISSUE**

Per the Hearing Officer's November 20, 2012 Order, United Telephone Southeast LLC d/b/a CenturyLink, CenturyTel of Adamsville, Inc. d/b/a CenturyLink Adamsville, CenturyTel of Claiborne, Inc. d/b/a CenturyLink Claiborne, and CenturyTel of Ooltewah-Collegedale, Inc. d/b/a CenturyLink Ooltewah-Collegedale (collectively "CenturyLink") file this Response to the Initial Brief of Bristol Tennessee Essential Services ("BTES") regarding a threshold legal issue that has developed in this proceeding.

Threshold Legal Question

BTES is a municipal electric providing telecommunications services in *portions* of Tennessee. BTES filed with the TRA an application for approval of a statewide certificate of public convenience ("CCN") to provide telecommunications services *throughout* the state of Tennessee.

The threshold legal question at issue in this proceeding concerns jurisdiction of the Tennessee Regulatory Authority ("TRA" or "Authority") to examine anticompetitive impacts, including cross subsidization issues, as set forth in Tennessee municipal electric law (namely Tenn. Code Ann. § 7-52-401, *et. seq.*) BTES claims that the TRA is without authority and jurisdiction to consider anticompetitive impacts in this CCN proceeding because BTES now

operates under market regulation pursuant to Tenn. Code Ann. § 65-5-109. CenturyLink maintains that when a municipal electric comes to the TRA under Tenn. Code Ann. § 65-4-201 with a CCN request relating to telecommunications services, the potential anticompetitive impacts of a municipal electric so expanding its CCN are properly within the TRA's jurisdiction to consider and address. BTES's election of market regulation does not prevent the TRA from exercising jurisdiction. Accordingly, the TRA has the jurisdiction and the authority to impose upon BTES conditions and requirements as necessary to address potential anticompetitive impacts of this municipal electric's request for a statewide CCN for telecommunications services, as set forth in Tenn. Code Ann. §7-52-401 *et seq.* and in Tenn. Code Ann. Tenn. § 65-4-201, and to take other action as may be necessary to foster the development of an efficient, technologically advanced, statewide system of telecommunications services, consistent with Tenn. Code Ann. § 65-4-123.

Argument

BTES argues that its 2011 election of market regulation under the Tennessee Market Regulation Act¹ modifies the CCN standard that the TRA should use for evaluating BTES's statewide CCN petition.² Specifically, BTES argues that, in addition to managerial, financial and technical abilities, BTES need only demonstrate that it will adhere to the policies, rules and orders of the TRA that "are 'applicable' after its [BTES's] election to operate pursuant to market based regulation – meaning those...reserved for the Authority under Tenn. Code Ann. § 65-6-109(n)."³ The anticompetitive and cross subsidization requirements of Title 7, Chapter 52, Part 4 of the municipal electric law in BTES's view are not applicable requirements because these

¹ BTES filed its notice on May 5, 2011. See, BTES Initial Brief at p. 5.

² Amended T.C.A. Section 65-5-109(n)(12), enacted May 21, 2009, in pertinent part provides that a certificated provider electing market regulation shall be subject to the jurisdiction of the authority only when: "The authority is exercising jurisdiction respecting the requirement of certificates pursuant to § 65-4-201."

³ BTES Initial Brief at p. 2.

provisions are not explicitly referenced at Tenn. Code Ann. § 65-5-109(n).⁴ BTES concludes that the Tennessee General Assembly in the Market Regulation Act did not give the TRA jurisdiction to address the anticompetitive and cross subsidization requirements as set forth in the municipal electric law.

CenturyLink disagrees. First, the General Assembly in enacting the Market Regulation Act in 2009 did not somehow repeal by omission the requirements of the municipal electric law when the TRA is exercising CCN authority under Tenn. Code Ann. § 65-4-201. Tenn. Code Ann. § 7-52-401 provides for continued TRA scrutiny of alleged anti-competitive practices by municipal electrics such as BTES, *notwithstanding any other provision of the code*. Specifically:

Notwithstanding § 65-4-101(6)(B) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, but not limited to, rules or orders governing anti-competitive practices

Tenn. Code Ann. § 7-52-401 (emphasis added).

Thus, the absence of a specific reference in § 65-4-201 (or in the Market Regulation Act) to Title 7's anti-competitive provision is immaterial, as the TRA's jurisdiction over such issues is explicitly preserved within Title 7 itself. In other words, notwithstanding any other provision of Tennessee law, *including the Market Regulation Act*, the TRA possesses the authority and jurisdiction to ensure that BTES as a municipal electric providing telecommunications services does not engage in anticompetitive practices.

Second, to accept BTES's position, the TRA would have to conclude that the General Assembly intended the Market Regulation Act to impliedly repeal or supersede this language set

⁴ BTES states that the municipal electric law is "not listed in Tenn. Code Ann. § 65-6-109(n)." *Id.*

forth at Tenn. Code Ann. § 7-52-401. The leaps in logic abound with such a contorted application of the statutory scheme. The omission of a specific reference to Tenn. Code Ann. § 7-52-401 in the Market Regulation Act does not repeal applicability of Tenn. Code Ann. § 7-52-401 as BTES assumes. If the General Assembly intended to repeal Tenn. Code Ann. § 7-52-401 or if it intended the Market Regulation Act to supersede Tenn. Code Ann. § 7-52-401, then the General Assembly would have done so explicitly, either by amending Tenn. Code Ann. § 7-52-401 or by explicitly providing so in the Market Regulation Act.

There is a presumption under Tennessee law that "whenever the legislature enacts a provision, it is aware of other statutes relating to the same subject matter." *Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009). The newer statutory provision is presumed to be in accord with the same policy embodied in the prior statutes unless the newer statute expressly repeals or amends the old one. *Id.* Statutes on the same subject must be construed in harmony if reasonably possible. *In re Akins*, 87 S.W.3d 488, 493 (Tenn. 2002); *see also Hayes v. Gibson County*, 288 S.W.3d 334, 337 (Tenn. 2009) ("Repeals by implication ... are disfavored in Tennessee, and ... will be recognized only when no fair and reasonable construction will permit the statutes to stand together."). The mere omission of a reference to Tenn. Code Ann. § 7-52-401 in the Market Regulation Act does not have import – and certainly does not imply that one is null and void given the other. In sum, the statutory provisions at Tenn. Code Ann. § 7-52-401 and the Market Regulation Act at Tenn. Code Ann. § 65-5-109(n), while separate statutory requirement, coexist and must be harmoniously interpreted and applied.

Third, the Market Regulation Act's broad reference at Tenn. Code Ann. § 65-5-109(n) to Tenn. Code Ann. § 65-4-201 enables the TRA to address the anticompetitive implications involved when a municipal electric seeks TRA approval of a statewide CCN for

telecommunications services.⁵ Under Tenn. Code Ann. § 65-4-201(c)(2), BTES must demonstrate that it possesses sufficient managerial, financial and technical abilities to provide the applied for services. BTES, is a municipal electric entity. BTES, however, does *not* have separate affiliates providing electric, telephone, and Internet services.⁶ Given these facts and the rather sparse application filed, BTES's request for a statewide CCN for telecommunications services is in need of greater – not less – regulatory scrutiny regarding potential anticompetitive practices *if and when* BTES exercises its alleged managerial, financial and technical abilities in the future.⁷

Similarly, under Tenn. Code Ann. § 65-4-201(c)(1) BTES must show that it “has demonstrated that it will adhere to all applicable authority policies, rules and orders” T.C.A. § 65-4-201(c)(1). BTES argues that the Market Regulation Act renders its past actions regarding anticompetitive policies, rules and orders irrelevant to BTES's future actions and performance and eliminates the TRA's ability and jurisdiction to implement remedies in a CCN proceeding to ensure against future anticompetitive practices. These outcomes demonstrate the circular reasoning of BTES's statutory interpretations and views. BTES's past actions (or non-actions) regarding TRA policies, rules and orders are highly indicative of BTES's future actions and performance. The Market Regulation Act's broad reference to Tenn. Code Ann. § 65-4-201 includes the authority and jurisdiction of the TRA to examine potential anticompetitive impacts of BTES's underlying CCN request.

⁵ In relevant part, Tenn. Code Ann. § 65-5-201 provides that the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

- (1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and
- (2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

⁶ See, e.g., BTES Response to CTL Discovery Question Nos. 14 and 11.

⁷ For example, the TRA in its order in this docket can impose conditions and requirements upon BTES to ensure that BTES does not engage in anticompetitive practices.

Fourth, citing the TRA's initial grant of a CCN to BTES in 2006, BTES contends that the requirements of the municipal electric law are separate and are in addition to CCN authority reserved in the Market Regulation Act's reference to Tenn. Code Ann. § 65-5-201.⁸ Presumably, this claim supports BTES's view that Title 7 in the municipal electric law and the CCN process for a company operating under market regulation are mutually exclusive. BTES's views are misplaced.

If prior decisions of the TRA demonstrate anything, then those decisions demonstrate that the TRA has historically considered anticompetitive impacts under Tenn. Code Ann. § 7-52-401 *et seq.* in conjunction with the TRA's authority to review a CCN request sought by a municipal electric entity. Indeed every telecommunications CCN the TRA has granted to a municipal electric in the past, including to BTES, has included conditions to protect against anti-competitive activity and ensure compliance with the anti-subsidy provisions of § 7-52-401 *et seq.* BTES's arguments, however, now would render those provisions in the existing orders meaningless for a municipal electric operating under market regulation. Under BTES's view, existing conditions in the TRA's past orders are wiped out, and the TRA would have no authority to impose conditions and requirements on BTES or other municipal electrics in the future to redress potential anticompetitive practices. Title 7 of the municipal electric law and the TRA's CCN process are separate statutes; however, BTES is wrong to conclude that these statutes cannot coexist and should not be harmoniously interpreted and applied by the TRA.

Finally, BTES's position that the separateness of the two statutory schemes means the TRA cannot or should not take into consideration a municipal electric's compliance with the anti-subsidy provisions of § 7-52-401 *et seq.* remains directly contrary to the TRA's statutory

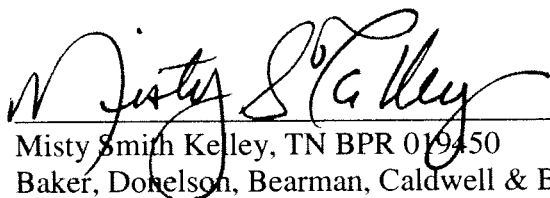
⁸ *Id.*, at p. 3.

duty to ensure a level competitive playing field. The TRA is obligated to monitor potential anticompetitive practices – so as “to foster the development of an efficient, technologically advanced, statewide system of telecommunications services” as set forth in Tenn. Code Ann. § 65-4-123. Under BTES’s view, this legislative policy goal would be obliterated and rendered meaningless relative to municipal electrics. The result is clearly absurd.

Conclusion

A municipal electric’s election to operate under market regulation does not alter the TRA’s jurisdiction and authority to ensure against anticompetitive practices as set forth in the Tennessee municipal electric law at Tenn. Code Ann. §7-52-401 *et seq.* Accordingly, the TRA has the jurisdiction and the authority to impose upon BTES conditions and requirements as necessary to address potential anticompetitive impacts of this municipal electric’s request for a statewide CCN for telecommunications services, as set forth in Tenn. Code Ann. §7-52-401 *et seq.* and in Tenn. Code Ann. Tenn. § 65-4-201, and to take other action as may be necessary to foster the development of an efficient, technologically advanced, statewide system of telecommunications services, consistent with Tenn. Code Ann. § 65-4-123.

Respectfully submitted this 3rd day of December, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct electronic copy of this response has been forwarded via electronic mail to the following on this the 3rd day of December, 2012.

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