

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

IN RE:)
)
APPLICATION OF BRISTOL TENNESSEE)
ESSENTIAL SERVICES TO EXPAND ITS)
CERTIFICATE OF CONVENIENCE AND)
NECESSITY TO PROVIDE COMPETING)
TELECOMMUNICATIONS SERVICES)
STATEWIDE)

DOCKET NO. 12-00060

**RESPONSE OF BRISTOL TENNESSEE ESSENTIAL SERVICES
TO REPLY BRIEFS OF CENTURYLINK AND
TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION**

Bristol Tennessee Essential Services (“BTES”) respectfully submits this brief in response to the reply briefs of CenturyLink and the Tennessee Cable Telecommunications Association (“TCTA”) filed on December 3, 2012 in this Docket.

INTRODUCTION

In its initial brief, BTES asserted that the Market Regulation Act of 2009 (the “Market Regulation Act” or “Act”) plainly exempts market regulated providers like BTES from “all authority jurisdiction” except as provided in Tenn. Code. Ann. § 65-5-109(m) & (n). Because Title 7, Chapter 52, Part 4 is not included in Tenn. Code. Ann. § 65-5-109(m) or (n), BTES respectfully asserted that the Tennessee General Assembly did not give the Tennessee Regulatory Authority (“Authority”) jurisdiction to enforce or apply these requirements in the case of a market regulated carrier like BTES.

In their respective reply briefs, CenturyLink and TCTA offer incorrect readings of Tenn. Code. Ann. § 7-52-401 to contend that, despite the plain language of Tenn. Code. Ann. § 65-5-

109, the Authority nevertheless holds jurisdiction under Title 7, Chapter 52, Part 4 over BTES. CenturyLink and TCTA offer additional arguments that are plainly incorrect as well.

BTES respectfully suggests that the Authority should reject these arguments and should affirm that the Market Regulation Act means what it says: all market regulated carriers— whether municipal telecommunications providers, incumbent providers, affiliates of incumbent providers or other certificated carriers – are subject to jurisdiction of the Authority as expressly provided in the Act and not otherwise.

ARGUMENT

The Authority should reject the arguments of CenturyLink and TCTA. The plain language of Tenn. Code. Ann. § 7-52-401 is clear, and municipal providers like BTES are to be subject to regulation by the Authority in the same manner and the same extent as are other certificated providers. The Tennessee General Assembly has specified the exclusive areas where the Authority holds jurisdiction under the Act, and jurisdiction over the requirements of Title 7, Chapter 52, Part 4 is not included.

In support of their positions, CenturyLink and TCTA each focus on the language “[n]otwithstanding § 65-4-101(6)(B) or any other provision of this Code to the contrary” in Tenn. Code. Ann. § 7-52-401. Both suggest that this language provides broad regulatory authority over BTES notwithstanding the language of the Act. That interpretation is clearly incorrect and disregards the controlling language later in the same sentence of Tenn. Code. Ann. § 7-52-401. The clear purpose of this first clause is to create an exception to the general exemption for municipal utilities from the Authority’s jurisdiction over public utilities. Tenn. Code. Ann. § 65-4-101(6)(B) [now codified at Tenn. Code. Ann. § 65-4-101(6)(A)(ii)], generally exempts “any county, municipal corporation or other subdivision of the State of Tennessee” from the Authority’s jurisdiction over public utilities. Similarly, Tenn. Code. Ann.

§ 7-34-117 recognizes this exemption. This first clause simply creates an exception to municipal utilities' general exemption from the jurisdiction of the Authority. It does not create a higher level of jurisdiction over a municipal provider like BTES.

In support of BTES' position, the Authority needs to look no further than language appearing later in that same sentence of Tenn. Code. Ann. § 7-52-401, where the statute clearly states that a municipal telecommunications provider "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." In other words, for the limited purposes of their telecommunications operations, municipal providers are to be regulated by the Authority in the same manner and to the same extent as are other certificated telecommunications providers. The plain language of Tenn. Code. Ann. § 7-52-401 flatly contradicts the intervenors' assertions that municipal market regulated carriers like BTES should be regulated under the Act in a different manner than other certificated providers are regulated under the Act.

Even if, for the sake of argument, the intervenors' interpretation were to be layered into the actual language of Tenn. Code. Ann. § 7-52-401 using CenturyLink's interpretive language, the meaning of Tenn. Code. Ann. § 7-52-401 does not change:

Notwithstanding § 65-4-101(6)(B) or any other provision of this code [*including the Market Regulation Act*,¹] 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**

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

With or without CenturyLink's language, the meaning of this statute is clear and does not change. There is no inconsistency between the provisions of Title 7, Chapter 52, Part 4, and the

¹ See *Response of CenturyLink to BTES Initial Brief Regarding Threshold Legal Issue* at p. 3.

Market Regulation Act, and these statutes can be harmoniously interpreted and applied. The General Assembly has subjected BTES' telecommunications operations to regulation by the Authority in the same manner and to the same extent as other certificated providers. As a market regulated carrier, BTES is subject to the same limited jurisdiction of the Authority as applies to other certificated providers that have elected market-based regulation under the Act. The provisions of Title 7, Chapter 52, Part 4 have not been repealed, impliedly or otherwise, and continue to apply to BTES, but the Authority simply does not have jurisdiction over those requirements in the case of a municipal telecommunications provider like BTES that has elected market based regulation.

Faced with this clear defect in their primary argument, CenturyLink and TCTA offer three additional theories in an effort to bypass the clear language of the Market Regulation Act. First, CenturyLink contends that the Authority could assert jurisdiction over matters under Title 7, Chapter 52, Part 4 by utilizing the standard for granting a certificate of convenience and necessity under Tenn. Code. Ann. § 65-4-201(c) to indirectly reach these requirements. Second, CenturyLink asserts that the Authority's jurisdiction over anticompetitive conduct and its authority under Tenn. Code. Ann. § 65-4-123 provide supplemental jurisdiction to address matters under Title 7, Chapter 52, Part 4. Finally, TCTA contends that the Authority's 2006 Order granting BTES' its certificate of convenience and necessity (the "2006 CCN Order") creates a quasi-contractual obligation that the General Assembly was unable to alter through the enactment of the Market Regulation Act. Each of these arguments fails.

CenturyLink's attempt to use the Tenn. Code. Ann. § 65-4-201(c) standard to assert jurisdiction over matters arising under Title 7, Chapter 52, Part 4, falls short. As is discussed more fully in BTES' Initial Brief, the Authority has historically considered Title 7, Chapter 52,

Part 4 matters separate and apart from the certification standard under Tenn. Code. Ann. § 65-4-201(c). The Authority has not considered the requirements of Title 7, Chapter 52, Part 4 in the context of an applicant's managerial, financial or technical ability, but has rather considered these requirements as obligations that are separate and apart from the standard set forth in Tenn. Code. Ann. § 65-4-201(c). In light of this long-standing and consistent approach and the clear language of the Market Regulation Act, the Authority should reject CenturyLink's efforts to use the requirements of Tenn. Code. Ann. § 65-4-201(c) to indirectly assert jurisdiction over matters that go well beyond the parameters that the General Assembly established in Tenn. Code. Ann. § 65-5-109.

With respect to the contention that the Authority still holds general jurisdiction over anti-competitive conduct and also holds additional authority under Tenn. Code. Ann. § 65-4-123, this argument squarely contradicts the plain language of the Market Regulation Act as well. The Act only gives the Authority jurisdiction over complaints concerning anti-competitive conduct that arise under federal (and not state) substantive law [Tenn. Code. Ann. § 65-5-109(m)], and the Act does not give the Authority jurisdiction to use Tenn. Code. Ann. § 65-4-123 to more broadly regulate a market regulated carrier. Just as the Authority would not have jurisdiction to regulate CenturyLink and its market-regulated affiliates under state substantive law governing anti-competitive conduct or to use Tenn. Code. Ann. § 65-4-123 to assert general regulatory authority over CenturyLink or its market-regulated affiliates, neither would the Authority have this jurisdiction over BTES as a market-regulated provider.

Finally, the Authority should also reject TCTA's attempt to use the 2006 CCN Order to perpetuate broader jurisdiction over BTES than exists under current law today. Over the years, through the Act and other legislative enactments, the General Assembly has narrowed the

jurisdiction of the Authority in many ways. Those changes in law have, in turn, altered or amended many orders, regulations and other requirements of the Authority. Policy changes such as these are a regular and appropriate result of the legislative process, and nothing in the 2006 CCN Order suggests that the Authority intended (or would be authorized) to insulate that Order from subsequent legislative change.

Companies like TCTA have no vested rights in statutes or orders of administrative bodies applying those statutes. As the Tennessee Attorney General observed in Opinion 11-36² (April 21, 2011) at p.4:

Private citizens generally have no vested right in an existing ordinance, resolution, or statute. Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature ordains otherwise. *National R.R. Passenger Corp v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 105 S.Ct. 1141, 1451, 84 L.Ed.2d 423 (1985). Thus an ordinance or resolution is subject to invalidation when it violates a new state statute.

Similarly, the on-going jurisdiction of the Authority under one of its orders is subject to change when the legislature amends that jurisdiction, as it did with the enactment of the Act.

CONCLUSION

For the foregoing reasons, BTES respectfully requests that the Authority uphold the plain language of the Market Regulation Act and conclude that the Authority holds no jurisdiction under Title 7, Chapter 52, Part 4 in the case of a municipal provider like BTES that has elected market-based regulation. 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

² Available at <http://www.tn.gov/attorneygeneral/op/2011/op11-36.pdf>.

of the Authority that are “applicable” after its election to operate pursuant to market based regulation.

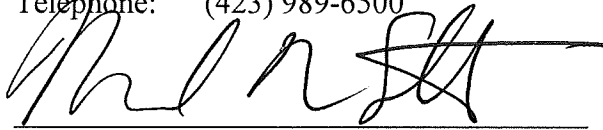
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct electronic copy has been forwarded via e-mail to the following on this the 6th day of December, 2012.

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