

legal issue” during the voting panel’s deliberations on January 7, 2013. As noted in footnote 15, the Authority’s decision has not yet “been approved for release and entry in the docket file.” Accordingly, BTES has had no ability or opportunity to consider the advisability of filing a motion to reconsider or other appeal of that Order.

BTES’ request is limited to the aspects of the February 13 Order that direct BTES to commence audits of its cost allocation manual for years 2011 and subsequent years. BTES is in the process of working with Mr. Hal Novak to re-create an indexed compilation of BTES documents as directed in the February 13 Order and will thereafter confer with counsel for the intervenors to develop a procedural schedule for the remaining aspects of this case.

As is discussed in more detail below, BTES respectfully requests the opportunity to consider whether the decision of the Directors’ panel at the January 7 Agenda Conference exceeds the statutory jurisdiction of the Authority in the case of a market regulated provider like BTES. Because the Hearing Officer’s February 13 Order was entered in advance of the Order from the January 7 Agenda Conference and prior to BTES’ opportunity to seek reconsideration of it or otherwise appeal it, BTES is placed in the difficult position of having a compliance directive entered in advance of the entry of the underlying Order upon which the Hearing Officer’s decision appears to be predicated. BTES submits that granting partial reconsideration and a partial stay is the most efficient, fair and appropriate way to provide for the orderly consideration and resolution of this significant issue, and BTES respectfully requests that the Hearing Officer partially stay her February 13 Order pending BTES’ opportunity to consider and, if appropriate, seek reconsideration of or otherwise appeal the panel’s Order.

Following its review of the panel’s Order, BTES will more fully brief the issues relevant to any requested reconsideration of that Order. In the meantime, to the extent that footnote 15 of

the Hearing Officer's February 13 Order is predictive of the substance of that Order, BTES respectfully submits that the panel's decision would appear to exceed the jurisdiction provided to the Authority over market regulated carriers. If this Motion for reconsideration and a partial stay is denied, BTES in the alternative requests interlocutory appeal of the February 13 Order to the extent that it requires BTES to commence its 2011 cost allocation manual audit and the audit for subsequent years.

In support of this Motion, BTES submits that it appears that the panel's decision may be premised upon the Authority's general utility jurisdiction, rather than an application of the plain and unambiguous language of the Market Regulation Act of 2009. For the following reasons, BTES submits that the Market Regulation Act of 2009 applies equally to BTES as it does other certificated competitive carriers and, as a result, that the Authority's jurisdiction is limited as specified in the Act. In support of this motion, BTES offers the following summary of statutory principles and the analysis that will guide its review of the panel's Order:

- Municipal utilities like BTES are generally exempt from the regulatory jurisdiction of the Authority (Tenn. Code Ann. § 65-4-101(6)(A)(ii)).
- In 1997, the Tennessee General Assembly created an exception to the general municipal exemption under Tenn. Code Ann. § 65-4-101 and provided that a municipal electric system that provides telecommunications services is subject to the Authority's jurisdiction in the same manner and to the same extent as other certificated telecommunications carriers. (Tenn. Code Ann. 7-52-401). In other words, BTES – to the extent that it provides jurisdictional telecommunications services – is subject to the TRA's jurisdiction in the same way as other competitive carriers are subject to the TRA's jurisdiction.
- In Docket No. 05-0251, BTES applied for and was granted a certificate of convenience and necessity to provide certain telecommunications services.
- Pursuant to a settlement agreement with CenturyLink, BTES amended its application and requested that certain conditions be incorporated into its certificate of convenience and necessity.
- The Authority's jurisdiction to require certificated companies to maintain and comply with certificates of convenience and necessity is statutory, and the Tennessee General

Assembly retains the authority to modify that jurisdiction. The General Assembly has modified the Authority's jurisdiction several times and, in turn, modified the Authority's on-going jurisdiction over certificated companies. [See, e.g., Broadband Business Certainty Act of 2006, Tenn. Code Ann. § 65-5-201, *et seq.* (revising Authority jurisdiction over certain broadband services).]

- In 2009, the Tennessee General Assembly created a new regulatory structure for any certificated or incumbent carrier that elects market based regulation. While the Authority historically had broad general regulatory jurisdiction over utilities subject to its jurisdiction, the Market Regulation Act of 2009, codified in Tenn. Code Ann. § 65-5-109, substantially revised the Authority's jurisdiction over these carriers.
- Pursuant to the terms of the Market Regulation Act of 2009, all market regulated carriers, including BTES, are exempt from the jurisdiction of the Authority, except to the extent that jurisdiction is expressly provided in the Market Regulation Act of 2009. [Tenn. Code Ann. § 65-5-109(m) & (n).]
- The Market Regulation Act of 2009 grants jurisdiction to the Authority to address carrier to carrier anti-competitive complaints, and the Act directs the Authority to apply federal law to such complaints.² [Tenn. Code Ann. § 65-5-109(m).] That jurisdiction is not applicable to this case.
- The Market Regulation Act of 2009 also grants jurisdiction to the Authority to regulate certain telecommunications matters. [Tenn. Code Ann. § 65-5-109(n), but the requirements of under Title 7, Chapter 52, Part 4 of the Tennessee Code are not within the jurisdiction given to the Authority under Tenn. Code Ann. § 65-5-109(n).]³
- Similarly, the Market Regulation Act of 2009 does not authorize the Authority to rely upon Tenn. Code Ann. § 65-4-123 to create additional regulatory jurisdiction on a case by case basis. With the passage of the Market Regulation Act of 2009, the Tennessee General Assembly clearly established a policy of market based regulation over traditional utility regulation, and it would be contrary to the plain language of this Act to use Tenn. Code Ann. § 65-4-123 to indirectly reclaim jurisdiction over matters that go beyond the jurisdiction provided in the plain language of the Act.
- Tenn. Code Ann. § 65-5-109(n)(12) grants the Authority jurisdiction to require a market regulated carrier to obtain an expanded certificate under Tenn. Code Ann. § 65-4-201

² There is no pending complaint before the Authority, and the cost allocation requirements are matters of state and not federal law. Therefore, BTES submits that the Authority would hold no complaint jurisdiction over BTES' cost allocation matters even if this proceeding were a carrier to carrier complaint, which it is not.

³ As BTES has previously noted, the substantive requirements of Title 7, Chapter 52, Part 4 are still applicable to BTES' telecommunications operations. BTES simply asserts that the Market Regulation Act of 2009 does not grant jurisdiction to the Authority to address these requirements.

where necessary (the case here), but the statute does not grant jurisdiction over the requirements of a market regulated carrier's pre-existing certificate (emphasis added).⁴

Based upon these principles, BTES respectfully submits that the Tennessee General Assembly could not have been clearer when it authorized any non-incumbent certificated provider to elect market based regulation and provided that, immediately upon such election, a market regulated provider is statutorily "exempt from all authority jurisdiction" except as provided in Tenn. Code Ann. § 65-5-109(m) and (n) (emphasis added). To the extent that the Authority's Order from its January 7 deliberations asserts jurisdiction over matters that were not preserved in Tenn. Code Ann. § 65-5-109(m) and (n), BTES submits that such an assertion would be in error and contrary to the clear and unambiguous limits on the Authority's jurisdiction under Tenn. Code Ann. § 65-5-109(m) and (n).

BTES is mindful that this argument follows the general structure of its briefs that preceded the panel Directors' January 7 deliberations. BTES understands that it has asserted these arguments before. BTES has not yet, however, had the opportunity to review and analyze the actual written Order documenting the Authority's legal path for maintaining jurisdiction over obligations under BTES' original certificate of convenience and necessity notwithstanding its election of market based regulation and the clear statutory language of Tenn. Code Ann. § 65-5-109(m) and (n). Because of this, BTES is at a significant disadvantage to the extent that the Hearing Officer's February 13 Order requires BTES to comply with aspects of its original certificate of convenience and necessity before BTES has had the opportunity to review and, if

⁴ Indeed, if the Tennessee General Assembly had provided jurisdiction to the Authority to require that a market regulated carrier comply with requirements of its pre-existing certificate of convenience and necessity, this would have yielded a patchwork of inconsistent regulatory structures that varied according to the carrier and based upon conditions in that carrier's certificate of convenience and necessity. This approach would have also created a path by which the Authority could have retained broader jurisdiction over certificated carriers than expressly provided in the Market Regulation Act of 2009 by simply incorporating additional regulatory requirements in a carrier's original certificate. Both of these outcomes would defeat the clear purpose and plain language of the Market Regulation Act of 2009.

appropriate, request reconsideration of or a further appeal of the Order articulating the basis for the panel's decision.

For this reason, BTES respectfully requests that the Hearing Officer reconsider and stay the portions of her February 13 Order that direct BTES to commence audits of its cost allocation manual for years 2011 and subsequent years as necessary until such time as BTES has an opportunity to request reconsideration of or lodge a further appeal of the panel's January 7 decision. BTES further requests that, if it subsequently requests reconsideration of or a further appeal of that Order, the Hearing Officer further stay those portions of her February 13 Order until such time as the reconsideration or appellate process is complete BTES thereafter has the opportunity to request reconsideration of the February 13 Order if necessary and appropriate. In the alternative, BTES respectfully requests direct reconsideration of the portions of the February 13 Order that direct BTES to commence audits of its cost allocation manual for years 2011 and subsequent years as necessary based upon the clear and limited jurisdiction that the Tennessee General Assembly has provided the Authority over all market regulated carriers.

In the event that the Hearing Officer denies both Motions, BTES requests that the Hearing Officer grant BTES the opportunity to make an interlocutory appeal of the February 13 Order and establish a procedural schedule for such an appeal which includes an opportunity for oral argument.

Respectfully submitted,

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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 20th day of February, 2013.

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