

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 20, 2013

IN RE:

**APPLICATION OF BRISTOL TENNESSEE ESSENTIAL
SERVICES FOR EXPANDED CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO PROVIDE
COMPETING TELECOMMUNICATIONS SERVICES
STATEWIDE**

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**DOCKET NO.
12-00060**

ORDER ON PRELIMINARY ISSUES

This matter came before Chairman James M. Allison, Vice-Chairman Herbert H. Hilliard and Director Kenneth C. Hill of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on January 7, 2013, to consider a threshold issue that developed while the Hearing Officer was preparing this matter for a hearing before the panel on the *Application of Bristol Tennessee Essential Services for Expanded Certificate of Public Convenience and Necessity to Provide Competing Telecommunications Services Statewide* ("Application") filed on December 18, 2012.

BACKGROUND

In an Order issued March 21, 2006 in TRA Docket No. 05-00251, the Authority granted, subject to certain conditions, the application of BTES to provide telecommunications services within Sullivan County, Tennessee.¹ During the hearing on the application, BTES was permitted to amend its application to incorporate the terms and conditions set forth in a settlement agreement

¹ See *In re: Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunications Services*, Docket No. 05-00251, *Order Approving Application for Certificate of Public Convenience and Necessity* (March 21, 2006).

that had been reached between BTES and United Telephone-Southeast, Inc.² On June 20, 2012, BTES filed in this docket its *Application* seeking expanded authority to provide telecommunications services on a statewide basis.

On August 20, 2012, the Hearing Officer granted the petitions to intervene filed by 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”) and the Tennessee Cable Telecommunications Association (“TCTA”) (CenturyLink and TCTA together, “Intervenors”).³

In its discovery responses to the Intervenors, BTES asserted that upon its election of market-based regulation, the TRA has no regulatory interest or jurisdiction concerning whether BTES has complied with the requirements of the law related to its provision of telecommunications services under Tenn. Code Ann. § 7-52-401, *et seq.*⁴ BTES argued that the TRA only retains regulatory authority over a certificated provider that has elected market regulation when exercising its authority pursuant to the certification requirements of Tenn. Code Ann. § 65-4-201 because that authority is expressly retained in Tenn. Code Ann. § 65-5-109(n)(12). Further, BTES contended that the TRA has no regulatory authority concerning the municipality’s obligations under Tenn. Code Ann. § 7-52-401, *et seq.*, because that statute is not expressly referenced in Tenn. Code Ann.

² See *In re: Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunications Services*, Docket No. 05-00251, *Joint Motion of Bristol Tennessee Essential Services and United Telephone-Southeast, Inc. to Approve Settlement Agreement* (February 27, 2006) and *Corrected Page Two of the Settlement Agreement* (May 16, 2006); see also, Docket No. 05-00251, *Transcript of Proceedings*, pp. 4-5 (March 6, 2006).

³ See *Order on August 20, 2012 Status Conference* (August 30, 2012).

⁴ See *Responses of Bristol Tennessee Essential Services to Discovery Requests of Tennessee Cable Telecommunications Association*, pp. 1-3 (October 5, 2012); *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast LLC (Part 1)*, pp. 1-3 (October 5, 2012).

§ 65-5-109(n). Therefore, according to BTES, the Authority's consideration of matters relevant to BTES' request for expanded certification is limited as follows:

[T]he appropriate standard under Tenn. Code Ann. § 65-4-201 in the context of this proceeding – and the one appropriate for determining the relevance of the intervenor's discovery request – is that BTES must demonstrate that (1) 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).⁵

BTES further stated, "[m]atters involving the BTES telephone business unit that do not relate to the statutory standard set forth in T.C.A. § 65-4-201 may be raised in other proceedings and other venues. Matters involving divisions and business units of BTES other than the telephone business unit are beyond the jurisdiction of the Authority and the scope of this proceeding."⁶ The Intervenors do not agree with BTES' interpretation of the law.

All parties agreed that the scope of the TRA's authority over a municipality-owned electric company that has declared market regulation is a threshold issue that needed to be resolved before proceeding with this docket. The Hearing Officer asked the parties to submit briefs for consideration by the panel on whether the TRA has jurisdiction under Title 7, Section 52, Part 4 over a municipal telecommunications provider that has elected market regulation. BTES submitted its brief on November 26, 2012 and a reply brief on December 6, 2012. CenturyLink and TCTA filed response briefs on December 3, 2012.⁷

⁵ *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast, LLC (Part 1)*, pp. 2-3 (October 5, 2012).

⁶ *Id.* at 3.

⁷ *See Order Granting CenturyLink's Motion to Compel*, pp. 9-10 (November 20, 2012).

POSITIONS OF THE PARTIES

BTES' Position

BTES asserts that because it is now a market-regulated company, the TRA no longer has jurisdiction over the provisions of Title 7, Section 52, Part 4, and consequently does not have the authority to place conditions on its Certificate of Public Convenience and Necessity ("CCN") authority. BTES argues that when the General Assembly enacted market regulation it did not intend for the TRA to maintain jurisdiction over Title 7, Section 52, Part 4.⁸ It asserts that the language of the market regulation statute is clear and unambiguous because Tenn. Code Ann. § 65-5-109(n) does not include Part 4 as part of the jurisdictional powers the TRA retains after market regulation. According to BTES, the appropriate standard for the Authority to review its *Application* is under Tenn. Code Ann. § 65-4-201, which is only to examine whether BTES has sufficient technical, managerial, and financial ability to provide the services it is requesting and that it will adhere to the policies, rules and orders of the TRA "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)."⁹

CenturyLink's Position

In its *Response of CenturyLink to BTES Initial Brief Regarding Threshold Legal Issue* ("*CenturyLink Reply Brief*"), CenturyLink argues that when a municipal electric comes to the TRA with a CCN request to provide telecommunications services under Tenn. Code Ann. § 65-4-201, the potential anti-competitive impacts of granting its CCN are properly within the TRA's jurisdiction to consider.¹⁰ CenturyLink maintains that the TRA has jurisdiction to impose conditions that are necessary to address the potential anti-competitive impacts of a municipal electric's statewide CCN

⁸ See *Brief of Bristol Tennessee Essential Services Regarding Jurisdiction of the Tennessee Regulatory Authority Over a Market Regulated Carrier*, pp. 2-3 (November 26, 2012).

⁹ *Id.* at 2.

¹⁰ See *CenturyLink Reply Brief*, p. 2 (December 3, 2012).

to provide telecommunications services as set forth in Tenn. Code Ann. § 7-52-401 *et seq.* and in Tenn. Code Ann. § 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. § 65-4-123.¹¹

According to CenturyLink, in enacting the Market Regulation Act, the General Assembly did not repeal through omission the requirements of the municipal electric law when the TRA is exercising its CCN authority under Tenn. Code Ann. § 65-4-201.¹² CenturyLink states that 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.”¹³ In the *CenturyLink Reply Brief*, CenturyLink asserts that the absence of a specific reference in § 65-4-201 or in the Market Regulation Act to Title 7’s provision is immaterial, as the TRA’s jurisdiction over such issues is “explicitly preserved within Title 7 itself.”¹⁴ CenturyLink contends that if the General Assembly intended to repeal the provisions of Title 7 then it would have explicitly done so by amending Tenn. Code Ann. § 7-52-401 or by explicitly providing for such a limitation in the Market Regulation Act.¹⁵

CenturyLink explains that “[t]here 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.’”¹⁶ According to CenturyLink, “[t]he 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.”¹⁷ CenturyLink maintains that the statutory provisions in Title 7, Section 53, Part 4 and

¹¹ *Id.* at 1-2.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.* quoting *Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009).

¹⁷ *Id.*

the Market Regulation Act, “while separate statutory requirement[s], coexist and must be harmoniously interpreted and applied.”¹⁸

TCTA’s Position

In its *Tennessee Cable Telecommunications Association’s Reply Brief Regarding Jurisdiction of the Tennessee Regulatory Authority* (“*TCTA Reply Brief*”), TCTA maintains that “the TRA must retain jurisdiction to consider all issues relating to potential anti-competition issues relating to a municipal electric company, regardless of whether it elects to operate under market regulation.”¹⁹ TCTA asserts that BTES does not seek to create a new entity, but rather seeks to expand the TRA’s 2006 Order granting its CCN, which was subject to the requirements of Title 7 relating to municipal electric companies.²⁰ TCTA maintains that the Market Regulation Act did not revise or modify the 2006 TRA Order “because the requirements of Title 7 still exist and have not been modified or repealed by any other section of the Tennessee Code.”²¹ TCTA argues that “the Market Regulation Act did not repeal the requirements applicable to municipal electric companies where the TRA is exercising CCN authority.”²²

In its *TCTA Reply Brief*, TCTA states further that as part of that ongoing authority, “Tenn. Code Ann. § 7-52-401 provides for TRA review of potential anti-competitive practices by entities such as BTES ‘[n]otwithstanding § 65-4-101(6)(B) or any other provision of this code....’ As such, the TRA’s jurisdiction over these issues is specifically preserved, regardless of whether or not the Market Regulation Act makes reference to those issues.”²³ TCTA argues that if the General Assembly intended to remove jurisdiction over these issues, it would have specifically done so. According to TCTA, “the Market Regulation Act remains silent on the matter (as opposed to its

¹⁸ *Id.*

¹⁹ See *TCTA Reply Brief*, p.1 (December 3, 2012).

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.*

²³ *Id.*

attention in 65-5-109(n) to specific regulatory items otherwise conveyed by Title 65). As such, the TRA has no more or less jurisdiction in relation to Title 7 than it had prior to the passage of the Market Regulation Act[.]”²⁴ TCTA asserts that the 2006 Order “constitutes the judicial resolution of an issue previously considered and determined.” In addition, TCTA argues that both the United States and Tennessee Constitutions prohibit a legislative body from adopting an ex post facto law; “which is a retrospective law which ‘from a legal standpoint, ...take[s] away or impair[s] vested rights acquired under existing laws or create[s] a new obligation, impose[s] a new duty, or attach a new disability in respect of transactions or considerations already passed.’”²⁵

Findings and Conclusions

At the regularly scheduled Authority Conference held on January 7, 2013, the panel considered the briefs filed by the parties on the threshold issue. The panel deliberated and was unanimous in its decision, finding as follows:

Tenn. Code Ann. § 65-4-201 sets out the TRA’s authority relevant to the issuance of CCNs.

Tenn. Code Ann. § 65-4-201 states in pertinent part:

... 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.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

BTES asserts that the scope of the TRA review must be limited to assessing its technical, managerial and financial ability to provide the services it seeks and whether it will follow the law and the rules and orders of the TRA.

²⁴ *Id.*

²⁵ *Id.* at 2-3.

The panel disagrees with BTES' analysis of the issue. Tenn. Code Ann. § 65-4-201 requires a telecommunications service provider to first obtain a CCN from the TRA before providing service in Tennessee, and this requirement and the extent of the TRA's power when exercising this authority was not changed by market regulation. When evaluating a company's technical, financial and managerial ability to provide the services it has applied for, the TRA has the authority to impose conditions on providers as part of the CCN process. And, when the Authority has imposed conditions on companies seeking a CCN, the TRA has done so in the context of its CCN authority. Accordingly, when examining a company's technical, managerial, and financial abilities and determining whether a potential provider will follow the law and TRA Rules, the TRA is well within its authority to impose conditions on a CCN. It is without question that the Market Regulation Act did not impact the scope or exercise of the TRA's authority under Tenn. Code Ann. § 65-4-201.

The General Assembly proclaims that it is the policy of the state to promote competition in Tenn. Code Ann. § 65-4-123, as follows:

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

In carrying out the mandate of the General Assembly, the TRA has an underlying obligation to promote competition. It is not the TRA's responsibility to merely encourage competition, but it must also take reasonable steps to curtail anti-competitive activity. BTES' election of market regulation does not change the TRA's authority under Tenn. Code Ann. § 65-4-201 to impose

conditions on its approval of a CCN in order to protect other providers from a reasonable possibility of anti-competitive behavior by a municipal electric company.

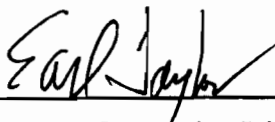
Based on the record, the panel, by a unanimous vote, concluded as follows:

- 1) The General Assembly has declared that it is the policy of the State of Tennessee to promote competition in the telecommunications services market.
- 2) The provisions of Title 7, Section 52, Part 4 were put in place to promote competition and to prevent anti-competitive behavior by municipal electric companies entering the telecommunications market.
- 3) When exercising its authority under Tenn. Code Ann. § 65-4-201, the TRA may impose conditions on the granting of a CCN of a market-regulated company, including but not limited to, conditions to prevent anti-competitive behavior under Title 7, Section 52, Part 4.
- 4) Any party aggrieved by the decision of the Tennessee Regulatory Authority in this matter may file a Petition for Reconsideration within fifteen (15) days of the date of this Order.
- 5) Any party aggrieved by the decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days of the date of this Order.

IT IS SO ORDERED.

Chairman James M. Allison, Vice-Chairman Herbert H. Hilliard and Director Kenneth C. Hill concur.

ATTEST:



Earl R. Taylor, Executive Director