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

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

## BRISTOL TENNESSEE ESSENTIAL SERVICES REPLY TO CENTURYLINK RESPONSE AND PETITION FOR DECLARATORY RULING

Bristol Tennessee Essential Services ("BTES") submits this reply to the April 12, 2013 *CenturyLink Response and Petition for Declaratory Ruling* ("*Response and Petition*").[1]

BTES submits that – as agreed upon by all parties – the Tennessee Regulatory Authority ("Authority") should reconsider its *March 20, 2013 Order on Preliminary Issues* (the "*March 20, 2013 Order*"). All parties agree that BTES is no longer required to obtain an amended certificate of convenience and necessity.

In response to the Intervenors' request for a declaratory ruling, BTES further submits that Public Chapter No. 61 and the Market Regulation Act of 2009 have redefined the Authority's jurisdiction over companies that elect market-based regulation, and BTES requests that the Authority declare that the Tennessee General Assembly has removed the Authority's jurisdiction to require compliance with these provisions of BTES' original certificate of convenience and necessity under the Market Regulation Act of 2009, as amended.

[1] By letter dated April 11, 2013, Intervenor Tennessee Cable Telecommunications Association ("TCTA") adopted the arguments contained in Century Link's *Response and Petition.* TCTA and CenturyLink will be collectively referred to as the "Intervenors."

## ANALYSIS

In the *Response and Petition*, the Intervenors agreed that the Panel should reconsider its *March 20, 2013 Order* in light of the enactment of Public Chapter No. 61. The Intervenors admitted that BTES' petition is no longer necessary in light of this new development.[2] As a result, BTES respectfully requests that the Panel withdraw its *March 20, 2013 Order* based upon this change in law and close this docket as it relates to BTES' original petition.

While the Intervenors agreed that BTES is no longer required to obtain an amended certificate of convenience and necessity, the Intervenors requested that the Panel keep this docket open for the purpose of issuing a declaratory order concerning the jurisdiction of the Authority following the passage of Public Chapter No. 61.[3] Specifically, the Intervenors have asked that the Authority declare (i) that BTES continues to be bound by the conditions of its existing certificate; (ii) that the provisions of Public Chapter No. 61 have no impact on the Authority's original certificate jurisdiction; and (iii) that the Authority will continue to enforce the municipal anti-subsidy statutes.[4]

The Authority should deny the Intervenors' request. As a preliminary matter, BTES objects to the Intervenors' recitation of various allegations that are not necessary to resolve the legal issue presented in the *Response and Petition.* In its *Response and Petition*, CenturyLink references other municipalities with telecommunications certificates issued by the Authority.[5] (Response at p. 6). References to other dockets are irrelevant to the issue presently before the Authority. CenturyLink's references to other matters not relevant to this particular proceeding

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[2] *Response and Petition,* pp. 1-2.

[3] *Response and Petition,* p. 2.

[4] *Response and Petition, p. 20*

[5] *Response and Petition,* p. 6.

and should be stricken from the record. Additionally, CenturyLink has attached a February 2013 Rizzuto Report as Exhibit A, which report is irrelevant and is submitted without any foundation for its admissibility. Furthermore, CenturyLink has attached an unsponsored and unverified list of questions concerning BTES' 2010 cost allocation audit as Exhibit B, which is clearly inadmissible in its current form. CenturyLink's attempts to include such extraneous information ignores the legal issue that BTES believes should be resolved with this proceeding. BTES moves to strike the references to other dockets and other matters in Section III that are not relevant to this proceeding, and also moves to strike Exhibits A and B to the *Response and Petition.* BTES further denies that the Intervenors' allegations in Section III of the *Response and Petition* fairly or accurately present various factual matters relating to BTES' cost allocation efforts.

Turning to the legal issues arising from the *Response and Petition*, the Intervenors' request seeks a declaration of law that, on its face, is barred by the plain language of the Market Regulation Act of 2009, as amended. The Intervenors also request that the Authority assert subject matter jurisdiction over BTES' original certificate where no jurisdiction exists. The Intervenors' request fails to state a claim upon which relief can be granted.

BTES requests that the Authority reject the Intervenors' request for declaratory relief and instead declare that, through the Market Regulation Act of 2009, as amended, the Tennessee General Assembly has provided limited – and not plenary – jurisdiction to the Authority, and that this jurisdiction does not extend to the requirements of Tenn. Code Ann. § 7-52-402 or to the requirements of BTES' original certificate of convenience and necessity. As is discussed in greater detail below, under the plain language of Public Chapter No. 61 and the plain language of the original Market Regulation Act of 2009, neither matter falls under the Authority's

jurisdiction over any market-regulated company. BTES respectfully submits that the Intervenors have overstated the jurisdiction that the General Assembly has provided to the Authority in the case of all market-regulated companies. For the reasons discussed below, the Authority should deny the Intervenors' request and close this docket.

**The plain and unambiguous language of Public Chapter No. 61 prohibits the Authority from requiring BTES to maintain its existing certificate**. Section 4 of Public Chapter No. 61 very clearly states that the Authority is not authorized to impose any requirements on BTES relating to the maintenance of its original certificate of convenience and necessity. This language is very broad and unambiguous and prohibits "any requirements" that relate to any market regulated carrier's certificate. That language provides:

> ( ) The regulatory authority shall not impose any requirements relating to issuance or maintenance of a certificate pursuant to Section 65-4-201 on any market-regulated entity or on any affiliate of a market-regulated entity.

In other words, the Authority may not require BTES, as a market-regulated carrier, to maintain the requirements of its existing certificate. Instead, like all other market-regulated carriers, BTES will only be subject to the jurisdiction of the Authority as outlined in Tenn. Code Ann. § 65-5-109(m) & (n), as amended. The legislative history of Public Chapter No. 61 is equally clear. As BTES noted in its earlier request for reconsideration of the *March 20, 2013 Order*, the bill sponsor, House of Representatives' Majority Leader Gerald McCormick, directly addressed this issue in his statements[6] on the floor of the House of Representatives immediately prior to the passage of House Bill 972:

> Number one, as noted in the summary, this bill prohibits the TRA from requiring a market-regulated entity to obtain a Certificate of Public Convenience and Necessity and also prohibits the TRA from imposing any requirements related to the issuance or

[6] The video archive of this floor debate is available by opening the "video links" tab at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0972 and selecting the link to the House floor debate.

> maintenance of a Certificate on any market-regulated entity or any affiliate of a market-regulated entity. And number two, this bill applies equally to all market-regulated entities, competitive telephone companies, incumbent telephone companies, municipal telephone companies and cable television companies. They all have the same rights and obligations under the legislation.

Faced with this clear statutory language and equally clear legislative history, the Intervenors appear to attempt to confuse the plain language of the statute by incorrectly referring to "additional certificate ... maintenance requirements"[7] and "additional ... maintenance conditions"[8] on a market-regulated provider. These "maintenance requirements" and "maintenance conditions" do not exist today and are certainly not terms used in Public Chapter No. 61. The Intervenors incorrectly assert that the General Assembly sought to prevent the Authority from imposing these "maintenance requirements" or "maintenance conditions" on a market-regulated provider after the effective date of the provider's election of market-regulated status.[9] This interpretation is not supported by the plain language of the statute and is illogical for at least three reasons.

First, Section 4 of Public Chapter No. 61 also prohibits the Authority from imposing any requirements relating to the "issuance" of a certificate. Since the Authority cannot require a market-regulated company to obtain an additional certificate, it would be unnecessary for the General Assembly to also prohibit the Authority from requiring a market-regulated provider to maintain this additional certificate. In other words, BTES could not be required to maintain a certificate that the Authority has no jurisdiction to originally require in the first place. Read from the Intervenors' standpoint, the prohibition on requiring a market-regulated provider to maintain a certificate would be wholly unnecessary and would violate the fundamental rule of statutory

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[7] *Response and Petition,* p. 9.

[8] *Id.*

[9] *Id.*

construction that legislation is to be constructed to give meaning to all words in the legislation wherever possible. *See In re Sidney J.*, 313 S.W.3d 772, 775 (Tenn. 2010) ("We have a duty 'to construe a statute so that no part will be inoperative.'" (quoting *Tidwell v. Collins,* 522 S.W.2d 674, 676 (Tenn. 1975)). Clearly, the Intervenors' argument does not match the language of Public Chapter No. 61.

Second, from a practical standpoint, this interpretation would lead to irreconcilably different regulatory oversight as between a certificated company and one of its affiliates. The plain language of Section 4 of Public Chapter No. 61 permits an affiliate of a market-regulated company to operate without a certificate at all. By contrast, under the Intervenors' convoluted reading of this statute, the market-regulated company would still be subject to whatever conditions were contained in its original certificate. It makes no sense for a market-regulated company and its affiliate to have different regulatory treatment in this way. BTES' logical construction avoids the absurd result suggested by the Intervenors.

Finally, this interpretation could lead to another absurd result. The Intervenors have presented a completely illogical scenario where regulatory treatment of market-regulated companies will vary from case to case and certificate to certificate, depending upon what requirements are included in each company's certificate. Under the Intervenors' approach, the Authority could perpetuate certain regulatory requirements notwithstanding an election of market-based regulation by simply incorporating those requirements in a carrier's original certificate. To illustrate the absurdity of the Intervenors' position, under the Intervenors' approach, presumably the Authority could entirely preempt the application of the Market Regulation Act of 2009 by simply conditioning a new entrant's certificate on compliance with all state laws in effect at the time of certification. If the Intervenors are correct (which they are not),

as long as a requirement is included in a carrier's certificate, the exclusive jurisdictional areas that the Market Regulation Act of 2009 preserves for the Authority can be easily disregarded in favor of plenary jurisdiction. This is again an absurd result that is plainly incorrect.

The Market Regulation Act of 2009, as amended, provides the exclusive regulatory oversight for a market-regulated carrier, and the Authority should reject the Intervenors' invitation to use conditions to certificates as a tool to directly undermine the regulatory structure that the General Assembly has established. The provisions of the original Market Regulation Act of 2009 dictate the same result.

**The Market Regulation Act of 2009 defines the Authority's exclusive jurisdiction over a carrier that elects market-based regulation.** This limited jurisdiction is not confined to Public Chapter No. 61. It is also a clear feature of the original Market Regulation Act of 2009.

In originally enacting the Market Regulation Act of 2009, 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,[10] 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

[10] 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).

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).

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). While former Tenn. Code Ann. § 65-5-109(n)(12) had preserved jurisdiction of the Authority relative to the "requirement of certificates," that provision did not extend to the requirements (emphasis added) of existing certificates. Similarly, nothing in the provisions of Tenn. Code Ann. § 65-5-109(n) conferred jurisdiction upon the Authority over matters arising under Title 7, Chapter 52, Part 4.

Because the requirements of existing certificates and the requirements of Tenn. Code Ann. Title 7, Chapter 52, Part 4 were 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 the conditions in BTES' original certificate would exceed the jurisdiction that the Tennessee General Assembly provided in the original Market Regulation Act of 2009.

As BTES has previously acknowledged, 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 Authority in the case of a carrier like BTES that has elected to

operate pursuant to market based regulation under the original Market Regulation Act of 2009 or as that Act has been recently amended.

**The plain language of Public Chapter No. 61 and the Market Regulation Act of 2009 provides a clear, logical and nondiscriminatory regulatory structure for all market-regulated companies in Tennessee.** The Authority should reject the Intervenors' transparent attempt to confuse the overall regulatory structure for market-regulated companies after the passage of Public Chapter No. 61. Both the Market Regulation Act of 2009 and Public Chapter No. 61 provide a clear, straight-forward and logical regulatory structure that applies to all providers.

Under this process, a new entrant to the regulated market in Tennessee (i.e., one that is not affiliated with a market-regulated provider) is required to obtain a certificate. Upon receiving certification, the certificated carrier is subject to the Authority's general utility jurisdiction and must follow the conditions that are included in its certificate. At any time after certification, any certificated carrier can elect market-based regulation under the Market Regulation Act of 2009, as amended. Immediately upon this election, the market-regulated carrier is then only subject to the jurisdiction of the Authority as outlined in T.C.A. § 65-5-109 (m) & (n). Because these sections provide the exclusive jurisdiction of the Authority over market-regulated carriers, the Authority no longer has general utility jurisdiction over companies that elect this regulatory classification.

This is a clear, logical and non-discriminatory application of the plain language of the Market Regulation Act of 2009, as amended. The Intervenors' approach fails each of these tests and leads to absurd results. While BTES contends that enforcement of conditions in a certificate was already beyond the jurisdiction of the Authority in the case of a market-regulated company,

Public Chapter No. 61 clearly and unambiguously states that the Authority is not permitted to require a market-regulated carrier to obtain an additional certificate of convenience and necessity or maintain an existing one. The Authority should reject the Intervenors' attempts to confuse and rewrite the language and structure of the Market Regulation Act of 2009, as amended.

## CONCLUSION

BTES respectfully requests that the Authority dismiss its petition based upon the change of law resulting from Public Chapter No. 61. BTES further respectfully requests that the Authority deny the Intervenors' Petition for Declaratory Ruling and confirm that, pursuant to the plain language of the Market Regulation Act of 2009, as amended, the Tennessee General Assembly has removed the Authority's jurisdiction to impose any requirements on BTES relating to BTES' original certificate of convenience and necessity.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been forwarded to the following on this the 19th day of April, 2013 by the means noted below.

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