

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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 GRANTING PETITION FOR DECLARATORY RULING AND
SETTING HEARING BEFORE TRA PANEL**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“TRA” or the “Authority”) upon the *CenturyLink Response and Petition for Declaratory Ruling* filed in the docket file on April 12, 2013.

RELEVANT BACKGROUND

On March 20, 2013, the TRA entered an *Order on Preliminary Issues*, which found that when exercising its authority under Tenn. Code Ann. § 65-4-201 *et seq.*, the TRA may impose conditions on its approval of a petition for a Certificate of Public Convenience and Necessity (“CCN”), including conditions to promote competition and prevent anti-competitive behavior. The TRA further found that a utility’s election of market regulation under the Market Regulation Act of 2009,¹ including by municipal utilities required to adhere to conditions aimed at preventing anti-competitive behavior (subsidies) under Tenn. Code Ann. § 7-52-401 *et seq.*, does not alter the scope or exercise of the TRA’s authority to impose or enforce conditions on CCNs under Tenn. Code Ann. § 65-4-201 *et seq.*

¹ Tenn. Code Ann. § 65-5-109(l)-(t) (2010).

On March 26, 2013, Governor Haslam signed into law legislation that amended certain provisions of the Market Regulation Act of 2009 (*see* SB 1180/HB 972; 2013 Pub. Acts, c. 61, §§ 2 to 4, eff. March 26, 2013). On April 2, 2013, Bristol Tennessee Essential Services (“BTES”) of the City of Bristol, Tennessee, filed a *Petition to Reconsider March 20, 2013 Order on Preliminary Issues and Motion to Dismiss*, which requested that the TRA reconsider its ruling and withdraw its *Order on Preliminary Issues* based upon the recently-enacted 2013 legislation, and, thereafter, dismiss BTES’ CCN petition and close the docket.

On April 12, 2013, United Telephone-Southeast LLC d/b/a CenturyLink, CenturyLink 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”) filed a *Response and Petition for Declaratory Ruling (“Petition for Declaratory Ruling”)*. Also on April 12, 2013, the Tennessee Cable Telecommunications Association (“TCTA”) filed a letter noting its agreement with and adoption of the arguments set forth in CenturyLink’s brief. On April 19, 2013, BTES filed a *Reply to CenturyLink Response and Petition for Declaratory Ruling (“Reply”)*, in which it opposed the position of CenturyLink and TCTA and reasserted its alternative interpretation of the Market Regulation Act of 2009, as amended by 2013 Public Chapter No. 61.² In accordance with Tenn. Code Ann. § 4-5-317 (*see also*, TRA Rule 1220-01-02-.20), BTES’ request for reconsideration was deemed denied, by operation of law, on or about April 22, 2013.

Thereafter, in the exercise of discretion, the Hearing Officer permitted TCTA to file its *Response to Motion of Bristol Tennessee Essential Services to Dismiss Petition Based Upon a Change of Law and CenturyLink’s Petition for Declaratory Ruling (“Response”)* on May 28, 2013. In accordance with the *Notice of Filing* entered in the docket file on May 29, 2013, the

² 2013 Pub. Acts, c. 61, §§ 2 to 4, eff. March 26, 2013 (“Public Chapter No. 61”).

parties are permitted to file a reply to TCTA's *Response* by 2:00 p.m. on Wednesday, June 5, 2013.

PETITION FOR DECLARATORY RULING

CenturyLink

Pursuant to Tenn. Code Ann. § 65-2-104, CenturyLink petitions the TRA for a declaratory ruling on the jurisdiction and authority of the TRA to enforce CCN conditions imposed to ensure compliance with the anti-subsidy provisions applicable to municipal telecommunications providers under Tenn. Code Ann. §§ 7-52-401 *et seq.*, following passage of Public Chapter No. 61 (2013).³ Specifically, CenturyLink asks the TRA to declare that:

- (1) Bristol Tennessee Essential Services of the City of Bristol, Tennessee, continues to be bound by the conditions of its existing Certificate of Public Convenience and Necessity, which were established to ensure compliance with the anti-subsidy statutes set forth in Tenn. Code Ann. §§ 7-52-401 *et seq.*;
- (2) The provisions of Public Chapter No. 61 (2013) amending the Market Regulation Act of 2009 set forth within Tenn. Code Ann. § 65-5-109, have no impact on the Tennessee Regulatory Authority's original certificate jurisdiction under Tenn. Code Ann. § 65-4-201; and
- (3) The Tennessee Regulatory Authority will continue to fulfill its long-established role of enforcing the anti-subsidy provisions applicable to municipal telecommunications providers under Tenn. Code Ann. §§ 7-52-401 *et seq.*⁴

BTES

In its *Reply*, BTES asks that the Authority deny the *Petition for Declaratory Ruling* and instead declare that, through the Market Regulation Act of 2009, as amended by Public Chapter No. 61 (2013), the Tennessee General Assembly has provided limited jurisdiction to the Authority as to market-regulated utilities, and that such jurisdiction does not extend to the requirements of Tenn. Code Ann. § 7-52-402 or to the conditions imposed on BTES' original

³ 2013 Pub. Acts, c. 61, §§ 2 to 4, eff. March 26, 2013.

⁴ *Petition for Declaratory Ruling*, pp. 7-12, 20 (April 12, 2013).

CCN.⁵ BTES contends that the plain language of Public Chapter No. 61 (2013) prohibits the Authority from imposing “any requirements” on the CCN of a market-regulated carrier, irrespective of whether such requirements or conditions pre-existed a carrier’s election of market regulation or relate to the issuance of a subsequent CCN to expand service beyond the areas designated in an original CCN.⁶ BTES asserts that its construction of the statutory language results in a consistent, logical application of the law; whereas, the approach urged by CenturyLink, and to the extent joined therein by TCTA, leads to absurd regulatory consequences.⁷

TCTA

In its *Response*, TCTA reaffirmed its earlier concurrence with CenturyLink’s position as to the Authority’s jurisdiction to enforce the municipal anti-subsidy provision of Tenn. Code Ann. § 7-52-401 *et seq.*, but opposed the positions of both CenturyLink and BTES concerning the application of Public Chapter No. 61, Section 4, amending Tenn. Code Ann. § 65-5-109(v).⁸ TCTA asserts that the language of Tenn. Code Ann. § 65-5-109(v) eliminates the TRA’s ability to impose requirements relating to the issuance and maintenance of a CCN held by a market-regulated entity, but in so stating, further presumes that the Authority may still consider and issue CCNs to market-regulated entities. In other words, the legislative language neither precludes, nor prohibits, the Authority from considering and issuing CCNs for market-regulated entities or “affiliates” of market-regulated entities in certain circumstances.⁹ TCTA contends that its reading of Public Chapter No. 61, as it amends Tenn. Code Ann. § 65-5-109, is appropriate because it is consistent with Tenn. Code Ann. § 65-4-201, gives effect to the

⁵ *Reply*, pp. 3-10 (April 19, 2013).

⁶ *Reply*, pp. 4-6 (April 19, 2013).

⁷ *Reply*, pp. 9-10 (April 19, 2013).

⁸ *Response*, pp. 1-2 (May 28, 2013).

⁹ *Response*, pp. 2-3 (May 28, 2013).

statutory and regulatory scheme as a whole, and does not lead to results that are contrary to public policy.¹⁰

Findings & Conclusions

The Authority is expressly authorized to hear requests for declaratory rulings pursuant to Tenn. Code Ann. § 65-2-104 (2004) and under the procedure set forth in the Uniform Administrative Procedures Act (“UAPA”) at Tenn. Code Ann. § 4-5-223 (2011). Tenn. Code Ann. § 65-2-104 (2004) provides that upon the petition of any interested person,

...the authority may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the authority.¹¹

Tenn. Code Ann. § 4-5-223 (2011) provides, in part:

(a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency. The agency shall:

(1) Convene a contested case hearing pursuant to this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or

(2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225.

(b) A declaratory order shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or a court in a proper proceeding.

(c) If an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.¹²

¹⁰ *Response*, pp. 3-4 (May 28, 2013).

¹¹ Tenn. Code Ann. § 65-2-104 (2004).

¹² Tenn. Code Ann. § 4-5-223 (2011).

Consistent with the above statutes, TRA Rule 1220-1-2-.05(1) also provides for the filing of requests for declaratory orders or rulings as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the Authority.¹³ Accordingly, the decision of whether to issue a declaratory order is within the Authority's discretion.¹⁴

Upon consideration of the foregoing, the Hearing Officer finds that the issue to be determined in this docket is one that concerns the applicability of a statute(s) within the primary jurisdiction of the Authority. In accordance with the directive of the voting panel to prepare this matter for hearing, which includes the delegated authority to consider preliminary matters, the Hearing Officer concludes that the issues presented for a declaratory ruling are appropriately before the Authority and should be granted a hearing.¹⁵ Therefore, the Hearing Officer grants CenturyLink's *Petition for Declaratory Ruling* and, subject to panel approval, sets the matter for a hearing before the Authority panel of Directors during its regularly scheduled Authority Conference beginning at 1:00 p.m. CDT on June 17, 2013.

IT IS THEREFORE ORDERED THAT:

1. The *Response and Petition for Declaratory Ruling*, filed by United Telephone-Southeast LLC d/b/a CenturyLink, CenturyLink 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 on April 12, 2013, is granted.

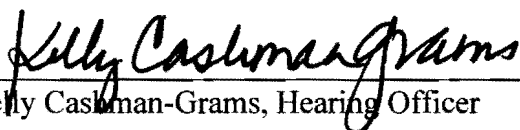
¹³ Tenn. Comp. R. & Regs. 1220-1-2-.05(1).

¹⁴ See *Consumer Advocate Div, ex rel. Tennessee Consumers v. Tennessee Regulatory Authority*, M1999-01170-COAR12CV, 2001 WL 575570 (Tenn. Ct. App. May 30, 2001), citing Tenn. Code Ann. § 4-5-223(a)(2).

¹⁵ *Order Convening Contested Case and Appointing a Hearing Officer* (September 7, 2012).

2. Subject to panel approval, the *Response and Petition for Declaratory Ruling* is set for Hearing before the Authority panel of Directors during its regularly scheduled Authority Conference beginning at **1:00 p.m. CDT on June 17, 2013.**

3. Any party aggrieved by the Hearing Officer's decision in this matter may file with the Authority a petition for reconsideration within fifteen (15) days of the date of this Order.



Kelly Cashman-Grams, Hearing Officer