

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**October 16, 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**

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**FINAL ORDER**

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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 June 17, 2013, to consider 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 Bristol Tennessee Essential Services (“BTES”) to provide telecommunications services within Sullivan County, Tennessee.<sup>1</sup> 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 that had been reached between BTES and United

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<sup>1</sup> 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).

Telephone-Southeast, Inc.<sup>2</sup> 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”).<sup>3</sup>

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.*<sup>4</sup> 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 needs 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

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<sup>2</sup> 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).

<sup>3</sup> See *Order on August 20, 2012 Status Conference* (August 30, 2012).

<sup>4</sup> 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 I)*, pp. 1-3 (October 5, 2012).

November 26, 2012 and a reply brief on December 6, 2012. CenturyLink and TCTA filed response briefs on December 3, 2012.<sup>5</sup>

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:

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 Certificate of Public Convenience and Necessity (“CCN”) of a market-regulated company, including but not limited to, conditions to prevent anti-competitive behavior under Title 7, Section 52, Part 4.

#### **POSITIONS OF THE PARTIES**

Each party has set forth its arguments in full in the record of this docket, in their pre-hearing memoranda and in the presentation of its case at the Hearing. The following section is intended as a brief summary of the positions of CenturyLink, BTES, and TCTA in this matter.

#### ***CENTURYLINK***

On March 26, 2013, Public Chapter No. 61 (“PC 61”) became law that, among other things, amended certain provisions of the Market Regulation Act of 2009. CenturyLink filed its *CenturyLink Response and Petition for Declaratory Ruling* (“*CenturyLink’s Petition*”) on

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<sup>5</sup> See *Order Granting CenturyLink’s Motion to Compel*, pp. 9-10 (November 20, 2012).

April 12, 2013,<sup>6</sup> which was accepted by the Hearing Officer on March 28, 2013.<sup>7</sup> CenturyLink requested a declaratory ruling by the Authority “confirming the legislation [Public Chapter No. 61] has no impact on the TRA’s existing certificate orders, and stating that the TRA will continue to fulfill its long-established role in enforcing the municipal anti-subsidy statutes.”<sup>8</sup> CenturyLink asked the panel to issue a declaratory order confirming that:

(1) BTES continues to be bound by the conditions of its existing certificate aimed at ensuring compliance with the anti-subsidy statutes; (2) the recently enacted Public Chapter No. 61 has no impact on the TRA’s original certificate of jurisdiction; and (3) the TRA will continue to fulfill its long-established role in enforcing the anti-subsidy statutes.<sup>9</sup>

CenturyLink argued that PC 61 “does not remove the TRA’s jurisdiction to enforce the anti-subsidy statutes and does not retroactively repeal the provisions of existing TRA certificate orders.”<sup>10</sup> Instead, CenturyLink asserted that the provisions of PC 61 amending the TRA’s authority over market-regulated companies must be interpreted in light of the underlying principle that the TRA’s authority ““must be liberally construed, with any doubt resolved in the Authority’s favor, to the end that the Authority may effectively govern and control the public utilities placed under its jurisdiction.””<sup>11</sup>

CenturyLink stated that PC 61 only amends the market regulation statute, Tenn. Code Ann. § 65-5-109, which applies to companies that have already been certificated, but does not expressly or implicitly amend the anti-subsidy provisions of Tenn. Code Ann. §§ 7-52-401 *et seq.*, the CCN requirements in § 65-4-201, or “any of the provisions establishing the TRA as the

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<sup>6</sup> On April 12, 2013, TCTA filed a letter indicating that it would not submit a formal response to the *Petition of Bristol Tennessee Essential Services to Reconsider March 20, 2013 Order on Preliminary Issues and Motion to Dismiss Petition Based Upon Change of Law*, but it agreed with and adopted the arguments contained in the brief filed by CenturyLink.

<sup>7</sup> See *Order Granting Petition for Declaratory Ruling and Setting Hearing Before TRA Panel* (May 31, 2012).

<sup>8</sup> See *CenturyLink’s Petition*, p. 2 (April 12, 2013).

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 3 quoting *Consumer Advocate Division v. TRA*, 2012 WL 1964593 \*14 (Tenn. Ct. App. May 30, 2012).

entity specifically charged with policing anti-competitive conduct.”<sup>12</sup> Thus, CenturyLink argued, the relevant provision of PC 61 “has no impact on the Authority’s jurisdiction over issuance of original certificates to competing providers, but instead only relieves already certificated, market regulated providers (or their affiliates) from additional regulatory requirements after the effective date of their market regulation notice, including the requirement to obtain an amended certificate from the TRA before offering service in new areas.”<sup>13</sup>

In its *Petition*, CenturyLink asserted that “[t]he legislature is presumed to be aware of state law and administrative agency interpretation of that law and legislative silence on the subject should be interpreted as legislative approval of the status quo.”<sup>14</sup> Absent specific language indicating otherwise, statutes are presumed to operate prospectively.<sup>15</sup> If the legislature intended to retroactively repeal the conditions of BTES’ CCN, it could have expressly done so in the legislation as it did in the provision of PC 61 eliminating unfunded discount programs.<sup>16</sup> As an example, CenturyLink cited Section 4 of PC 61 which states in pertinent part: “any unfunded discount program mandate by rules or orders of the regulatory authority or public service commission that was in place as of the effective date of this act shall terminate sixty (60) days following the effective date of this act.”

### ***BTES***

On April 19, 2013, BTES filed *Bristol Tennessee Essential Services Reply to CenturyLink Response and Petition for Declaratory Ruling* (“*BTES Response*”) which stated that BTES “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...” As a result, BTES

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<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 10 citing *Purkey v. American Home Assur.*, 173 S.W.3d 703, 709 (Tenn. Ct. App. 2005).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11.

asked the Authority to “...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.”<sup>17</sup>

BTES argued that CenturyLink “seeks a declaration of law that, on its face, is barred by the plain language of the Market Regulation Act of 2009, as amended.”<sup>18</sup> And BTES contended that CenturyLink asks the TRA to “assert subject matter jurisdiction over BTES’ original certificate where no jurisdiction exists. The Intervenor’s request fails to state a claim upon which relief can be granted.”<sup>19</sup>

According to BTES, the “plain and unambiguous language of Public Chapter No. 61 prohibits the Authority from requiring BTES to maintain its existing certificate.”<sup>20</sup> Section 4 of PC 61 states in pertinent part:

( ) 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.

BTES asserted that the language of PC 61, Section 4 is broad and unambiguous - “the Authority may not require BTES, as a market-regulated carrier to maintain the requirements of its existing certificate.”<sup>21</sup> It “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.”<sup>22</sup> In addition, BTES maintained that the legislative history reveals a clear intent by the General Assembly that market-regulated carriers, such as BTES, “will only be subject to the jurisdiction of the Authority as outlined in Tenn. Code Ann. § 65-5-109(m) & (n), as

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<sup>17</sup> *BTES Response*, p. 1 (April 19, 2013).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 4. Emphasis in original.

amended.”<sup>23</sup> Further, BTES argued that “any effort to directly or indirectly assert jurisdiction over the conditions in BTES’ original certificate would exceed the jurisdiction the Tennessee General Assembly provided in the original Market Regulation Act of 2009.”<sup>24</sup>

### **BTES’ MOTION TO DISMISS**

#### ***BTES***

In its Motion to Dismiss, BTES asked the Authority to dismiss its *Application* for a statewide CCN based on the change of law resulting from the enactment of PC 61.<sup>25</sup> BTES asserted that the Authority no longer has jurisdiction to require BTES to obtain a certificate under Tenn. Code Ann. § 65-4-201 and “the Authority’s jurisdiction to enforce requirements of existing certificates, the matters before the Authority in this Docket are now moot.”<sup>26</sup>

#### ***CENTURYLINK***

CenturyLink stated that it agrees that BTES’ *Application* for an amended statewide certificate is no longer needed. However, according to CenturyLink, it obtained discovery that reveals “troubling questions about BTES’ past and current cost allocations and its auditing process.”<sup>27</sup> Therefore, CenturyLink asks the Authority to “keep it open for the purpose of investigating BTES’ compliance with prior TRA orders, the provisions of BTES’ existing certificate and BTES’ obligations under the anti-subsidy statutes.”<sup>28</sup>

#### ***TCTA***

TCTA filed 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*

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<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Petition of Bristol Tennessee Essential Services to Reconsider March 20, 2013 Order on Preliminary Issues and Motion to Dismiss Petition Based Upon Change of Law*, p. 4 (April 2, 2013).

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 2.

(“*TCTA’s Response*”) on May 28, 2013 “raising an objection to the other Parties’ contention that Public Chapter No. 61 eliminates the Authority’s jurisdiction to require BTES’ compliance with Tenn. Code Ann. § 65-4-201.”<sup>29</sup> TCTA stated that the other parties rely on Section 4 of PC 61 but Section 4 is “incapable of application due to vagueness under such an interpretation.”<sup>30</sup> TCTA argued that the TRA still has authority to issue CCNs under Tenn. Code Ann. § 65-4-201 and allowing BTES to “now obtain broader authority without a review of its financial, managerial and technical ability to service this dramatically expanded territory eliminates the consideration of the requirements of Section 201.”<sup>31</sup> TCTA maintained that “[n]othing in Public Chapter No. 61 addresses or otherwise diminishes these statutory requirements, nor does this legislation remove the Authority’s jurisdiction over ensuring compliance with these statutory requirements.”<sup>32</sup> TCTA also objected to consideration of the quotes of the legislative record filed by BTES because the Authority “should not look beyond the plain language of the statute to determine its meaning.”<sup>33</sup> TCTA asked that the Authority hear BTES’ *Application* on the merits as required by Tenn. Code Ann. § 65-4-201.

### ***BTES***

BTES filed its *Reply of Bristol Tennessee Essential Services to Late-Filed Response of Tennessee Cable Telecommunications Association* (“*BTES Response to TCTA*”) on June 5, 2013. According to BTES, TCTA reversed its own position concerning the TRA’s jurisdiction under Tenn. Code Ann. § 65-4-201 to require BTES to obtain an amended CCN.<sup>34</sup> BTES stated that CenturyLink agreed that BTES no longer needed an expanded CCN after the effective date of PC

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<sup>29</sup> See *TCTA’s Response*, p. 1 (May 28, 2013).

<sup>30</sup> *Id.* at 1-2.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* citing *Cunningham v. Williamson Cnty. Hosp. Dist.*, 2013 WL 1912611.

<sup>34</sup> *BTES Response to TCTA*, p. 1 (June 6, 2013).



61 and TCTA adopted CenturyLink's arguments.<sup>35</sup> BTES argued that TCTA's new argument "seems to completely ignore the clear language of Section 3 of [Public] Chapter, 61, which affirmatively deleted the language of Tenn. Code Ann. § 65-5-109(n)(12)."<sup>36</sup> BTES asserted that "[t]he Tennessee General Assembly could not have been more clear when it removed the TRA's subject matter jurisdiction to require a market-regulated provider to obtain a certificate under Tenn. Code Ann. § 65-4-201."<sup>37</sup> BTES maintained that TCTA's position is erroneous and asked that the Authority reject TCTA's request that the panel hear BTES' *Application* on the merits and, instead, declare that because of PC 61 BTES' *Application* is no longer necessary.<sup>38</sup>

#### **CENTURYLINK**

CenturyLink filed a letter on June 4, 2013 indicating it would not file a response to TCTA's *Response*, which should not be construed as agreement or disagreement with TCTA's *Response*.

#### **FINDINGS AND CONCLUSIONS**

At the Authority Conference held on June 17, 2013, the panel considered CenturyLink's *Petition* and BTES' Motion to Dismiss. The Parties presented oral arguments reiterating the arguments made in the docket filings. After considering the record in this docket and arguments made by the parties, the panel made the following findings and conclusions:

1. Based on the law in effect at the time, the Authority was correct when it ruled on the preliminary issues in this docket and issued its order finding that when exercising its authority under Tenn. Code Ann. § 65-4-201 *et seq.*, the TRA may impose conditions on the granting of a CCN of a market-regulated company, including but not limited to, conditions to

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4.

prevent anti-competitive behavior under Title 7, Section 52, Part 4.<sup>39</sup>

2. On March 26, 2013, PC 61 was signed into law and became effective. PC 61 contains various provisions relating to the authority of the TRA. For market-regulated companies, Section 3 of Public Chapter 61 removes the provision reserving the TRA's authority over market-regulated companies in "exercising jurisdiction respecting the requirement of certificates pursuant to § 65-4-201."<sup>40</sup> And Section 4 of PC 61 reads as follows:

( ) 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.

3. Based on the clear and unambiguous language of PC 61 that the TRA may not impose requirements on the issuance or maintenance of the CCN of a market-regulated company pursuant to Tenn. Code Ann. § 65-4-201,<sup>41</sup> the panel voted unanimously to deny *CenturyLink's Response and Petition for Declaratory Ruling*.<sup>42</sup> Further, due to the change in law, BTES is no longer required to seek TRA approval to expand its territory, its *Application* is moot and there is no reason to keep the docket open. Accordingly, the panel voted unanimously to grant BTES' Motion to Dismiss and close the docket.

**IT IS THEREFORE ORDERED THAT:**

- 1) *CenturyLink's Response and Petition for Declaratory Ruling* is denied.
- 2) Bristol Tennessee Essential Services' Motion to Dismiss is granted.

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<sup>39</sup> *Order on Preliminary Issues* (March 20, 2013).

<sup>40</sup> See Tenn. Code Ann. § 65-5-109(n)(12).

<sup>41</sup> PC 61 did not impact the TRA's authority over the issuance and maintenance of CCNs pursuant to Tenn. Code Ann. § 65-4-201 for companies that are not market regulated.

<sup>42</sup> Director Hill stated he did not think the language of the statute was as unambiguous as stated in the Chairman's motion; however, he agreed overall with the findings and conclusions in the motion and voted with the majority. Director Hill commented that market regulation is successful only when there is a level playing field for all competing companies. The lack of oversight over municipalities offering telecommunications services where cross-subsidization is an issue may give the municipalities an unfair competitive advantage, which would lead to fewer choices and higher prices to the detriment of consumers. Director Hill went on to say that the possible unintended consequences of PC 61 seem to counter the intent of the legislature in trying to accomplish deregulation.

3) This docket is hereby closed.

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

ATTEST: .

  
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**Earl R. Taylor, Executive Director**