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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

COMPLAINT OF	)	
AENEAS COMMUNICATIONS, LLC	)	**DOCKET NO. 14-00070**
AGAINST JACKSON ENERGY	)	
AUTHORITY	)	

RESPONSE OF AENEAS COMMUNICATIONS, LLC TO MOTION TO DISMISS AND MOTION IN OPPOSITION TO COMMENCEMENT OF A CONTESTED CASE

Aeneas Communications, LLC ("Aeneas") respectfully submits the following response to the "Motion to Dismiss" and the "Motion in Opposition to Commencement of a Contested Case" filed by the Jackson Energy Authority ("JEA") on August 7, 2014.

Summary

There has been a sea-change over the last nine months in the regulatory landscape in regard to broadband services. In January, the United States Court of Appeals for the District of Columbia Circuit held that Section 706(a) of the Federal Telecommunications Act (codified as 47 U.S.C. 1302(a)) grants the FCC and state regulatory commissions "the power to regulate broadband providers' economic relationships with edge providers" based on a standard of "commercial reasonableness." *Verizon v. FCC,* 740 F.3d 623, 643 and 657 (D.C. Cir. 2014). The FCC is now considering the adoption of rules to implement that decision. Notice of Proposed Rulemaking, GN Docket No. 14-28, adopted and released May 15, 2014 (hereafter referred to as the "2014 NPRM"). The FCC has tentatively decided to "adopt a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the proposed commercially, reasonable legal standard." *Id.*, at paragraph 136. Under

the *Verizon* ruling, the Tennessee Regulatory Authority has the statutory power and duty to do the same.

Proceedings at the FCC

There is apparently no dispute among the principal parties submitting comments in the FCC's 2014 NPRM proceeding that Section 706(a) grants the FCC and the state commissions co-equal jurisdiction to regulate broadband providers. The language of the statute equally applies to both federal and state regulators. Section 706(a) states, "The Commission and each state Commission with jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capabilities to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market." As FCC Commissioner Ajit Pai noted, "[S]ection 706 gives state commissions authority equal to the FCC." (See the dissenting statement of Commissioner Pai, at 3. Commissioner Pai dissented because he said, the FCC's reliance on Section 706(a) would empower "parochial" state commissioners to regulate broadband providers.)

Parties in the FCC proceeding also recognize that Section 706(a) grants jurisdiction to the FCC—and therefore the states—to require that commercial relationships between broadband providers and edge providers be "commercially reasonable." For example, Comcast "supports the application of such standard" to be "determined case-by-case based on 'the totality of circumstances.'" Comments of Comcast Corporation, filed July 15, 2014, at 24. Comcast explained that the *Verizon* Court suggested that "this formulation of the 'commercially reasonable' standard would be legally sound." *Id.* Similarly, AT&T Services, Inc. noted that the *Verizon* Court held "that Section 706(a) is an affirmative grant of statutory authority" which would permit regulators to allow "many innovative arrangements" between broadband providers and edge

providers "provided that they were commercially reasonable." Comments of AT&T Services, Inc., filed July 15, 2014 at 32 and 35. In the same vein, Comptel, the trade association which represents competitive carriers, wrote, "The Commission has ample authority to encourage advanced services deployment through measures that promote competition in the local telecommunications marketplace under Section 706—by promoting competitor access." Comments of Comptel, filed July 15, 2014, at 26. Finally, the National Association of Regulatory Utility Commissioners ("NARUC") adopted a resolution "encourag[ing] the Commission to rely strongly upon the authority conveyed by Section 706 of the Telecommunications Act of 1996 to support the adoption of open Internet rules that promote enhanced competition for broadband Internet access service and address potential market abuses." Comments of The NARUC, p. 20. The NARUC commented that the *Verizon* Court "held that the Commission could utilize that section 706 authority to regulate broadband Internet access service" and noted that the Court affirmed the Commission's reasoning that the adoption of rules regulating the economic relationship between last-mile broadband providers and edge providers would "preserve and facilitate the 'virtuous cycle' of innovation, demand for Internet services, and deployment of broadband infrastructure." *Id.* at 5.

EPB's Complaint

Six months after the Court's *Verizon* decision was announced, the Electric Power Board of Chattanooga ("EPB") filed a complaint at the FCC, asking the Commission to preempt a Tennessee statute which keeps EPB from offering broadband internet access to customers located outside EPB's service area (for electric customers). EPB's complaint relies primarily on the *Verizon* Court's reading of Section 706:

> In Section 706(a), Congress required both the Commission and the States to encourage the deployment of advanced telecommunications capability on a reasonable and timely

> basis. It also directed both the Commission and the States to use all measures and regulating methods at their disposal to remove barriers to broadband investment and competition.

EPB also wrote that if states did not act promptly in fulfilling their statutory obligations under Section 706(a), the FCC could and should preempt state barriers to the deployment of advanced telecommunications capabilities. EPB told the FCC:

> Here, Section 706(a) requires both the Commission and the States to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis and to use all means at their disposal to remove barriers to broadband investment and competition. The Commission is solely responsible for defining the relevant terms and standards. Furthermore, as the legislative history of Section 706 makes clear, the Commission has authority to preempt States that it believes are acting too slowly to fulfill their duties under Section 706(a).

"Petition of the Electric Power Board of Chattanooga, Tennessee, pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of Barriers to Broadband Investment and Competition," FCC Docket WC 14-116, filed July 24, at pp. 48 and 52.

JEA's Arguments

JEA appears unaware of these developments in the regulation of broadband providers, arguing that Aeneas "has plucked dicta from one United States Court of Appeals case on an unrelated matter and attempted to present it as legally binding precedent for the Authority to consider." JEA Motion at 6. JEA argues that (1) there is "no underlying state law jurisdiction" that gives the TRA the power to regulate JEA's broadband service, (2) that there is no logical connection between requiring JEA to offer "commercially reasonable" terms to Aeneas and the statutory goal of "encourag[ing] the deployment . . . of advanced telecommunications capability to all Americans," and (3) the relief requested by Aeneas is "plainly out of step with the general structure of long-standing telecommunications law" because JEA is not an "incumbent" provider under Section 251 of the federal Telecommunications Act. *Id.*, at 8-9.

These arguments indicate that JEA has not read the *Verizon* opinion, the FCC's 2010 and 2014 "Open Internet" rulemakings or, it seems, any trade publication written in the last nine months on the subject of federal and state jurisdiction over broadband providers.

To take JEA's last argument first, this case has nothing to do with the "general structure of long-standing telecommunications law" or the TRA's jurisdiction over incumbent providers of traditional, wireline telephone services under Section 251. That statute does not apply to broadband services, such as high-speed Internet access and VOIP telephone services. Section 706 does not address traditional telephony but "advanced telecommunications capability" which is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. § 1302(d)(1)[1].

"Long-standing telecommunication law" as understood by JEA did not apply to broadband service. That has changed. In 1998, the FCC held at Section 706(a) did not "constitute an independent grant of authority" for the FCC and the states to regulate broadband providers. *Verizon*, 740 F.3d at 636-638. In 2010, however, the Commission changed its mind about Section 706(a) and the *Verizon* Court upheld "the Commission's current understanding of Section 706(a) . . . as a reasonable interpretation of an ambiguous statute." *Id.*

Implicit in JEA's argument is that under traditional regulatory law, the TRA has no jurisdiction over broadband services. The same argument was made by Verizon and answered by the Court which expressly addressed the issue of whether or not Section 706(a) granted both the FCC and the states co-equal jurisdiction over broadband providers. Because of the

[1] Both the *Verizon* court and the FCC use "broadband" and "broadband Internet access service" interchangeably and use "broadband provider" and "broadband Internet access provider" interchangeably. See the FCC's 2010 "Report and Order" in GN Docket 09-191, Released December 23, 2010, footnote 2; the 2014 NPRM, footnote 3; and *Verizon, supra,* 740 F.3d at 628-629. This brief also uses these terms interchangeably.

importance of this ruling in understanding the TRA's jurisdiction over JEA, the Court's explanation is quoted here in full:

> Section 706(a)'s reference to state commissions does not foreclose such a reading. Observing that the statute applies to both "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services," 47 U.S.C. § 1302(a) (emphasis added); Verizon contends that Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities. But Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here. (*See, e.g., id.* § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); *id.* § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission); *see also AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 385-86, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (describing the Commission's power and responsibility to dictate the manner in which state commissions exercise such authority). Thus, Congress has not "directly spoken" to the question of whether section 706(a) is a grant of regulatory authority simply by mentioning state commissions in that grant. *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778.

Verizon, supra, 740 F.3d at 638. The Court concluded that section 706(a) "constitutes an affirmative grant of regulatory authority" (*id.,* at 636) giving both the FCC and the states express jurisdiction over broadband services and broadband providers. The regulatory landscape has changed indeed.

JEA's second argument—that requiring JEA to deal with Aeneas on "commercially reasonable" terms is not authorized by Section 706(a)—is also addressed, at length, by the *Verizon* Court. Just as Verizon and others challenging the FCC's interpretation of Section 706(a) argued that Congress could not have intended to give the states jurisdiction over broadband, those same parties argued that Section 706(a) was intended to encourage broadband "deployment" and did not "encompass the power to regulate broadband providers' economic relationship with edge providers." *Verizon, supra,* 740 F.3d at 643.

Here, again, the *Verizon* Court addressed this precise issue (at pp. 642-650), concluding that Section 706 "grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers." In sum, the Court accepted the Commission's reasoning that broadband providers of "last mile," high-speed transmission lines "have incentives to interfere with the operation of third-party Internet based services that compete with the providers' revenue-generating telephony and/or pay-television services." 2010 Report and Order, paragraph 22; see also paragraphs 23-35. The Commission, as noted by the Court, cited specific examples of market abuses, including an allegation that a broadband provider that also provided telephone service had blocked Internet ports used by competitive VOIP providers. *Id.,* at paragraph 35. The FCC observed, "By interfering with the transmission of third parties' Internet-based services or raising the cost of online delivery for particular edge providers, telephone and cable companies can make those services less attractive to subscribers in comparison to their own offerings." *Id.,* at 22. The ability of last-mile broadband providers to discriminate against edge providers, such as competing providers of Internet access and VOIP services, has a direct impact on "the development and dissemination of Internet based services and applications" which, in turn, impact consumer demand and, ultimately, infrastructure development. *See Verizon, supra,* 740 F.2d. at 644. The Court concluded, "The record amassed by the Commission contains many similar examples . . . [and we have] no basis for questioning the Commission's determination that the preservation of Internet openness is integral to achieving the statutory objectives set forth in Section 706." *Id.,* at 645. The Court has answered JEA's argument. Economic regulation of last-mile providers of broadband services does, in fact, "encourage the deployment . . . of advanced telecommunications capability" and therefore falls within Section 706(a).

JEA's final argument is that there "is no underlying state law" basis for the TRA to exercise this federal delegation of authority over broadband providers in Tennessee. JEA bases this argument on Chapter 681 of the Public Acts of 2006, codified at T.C.A. § 65-5-202 and 203. A copy of Chapter 681 is attached to this brief.

Section 4 of the Act states that in order to promote "investment in broadband technology" and to insure that the TRA acts "consistent with the decisions of the federal communications commission," the TRA "shall not exercise jurisdiction of any type over or relating to broadband services."

Section 3 of the Act states, however, "Nothing in this Act shall alter or affect any jurisdiction or authority of the Tennessee Regulatory Authority to act in accordance with federal laws or regulations of the Federal Communications Commission. . . ." In light of the FCC's change-of-heart and the *Verizon* decision interpreting Section 706(a), those two sections are now in conflict with each other.

The Act was written, of course, during the period when the FCC had ruled that Section 706(a) did not grant the FCC and the state commissions jurisdiction over broadband services. That interpretation changed in 2010. As previously discussed, the agency's new reading of Section 706(a) has now been affirmed by the *Verizon* Court and accepted, seemingly, by incumbents, competitors, and state regulatory commissions. Today, "federal law" delegates to the TRA jurisdiction over broadband providers and broadband services just as other sections of the federal Telecommunications Act delegate responsibilities to the TRA over traditional telecommunications providers. Under Section 3 of the Act, the TRA may now proceed to regulate broadband services, as long as it does so in a manner consistent with the Court's ruling.

The *Verizon* Court explained that Section 706(a) does not allow regulators to treat broadband providers as "common carriers" but does allow regulators to apply the less stringent standard of "commercial reasonableness." The FCC has indicated in the 2014 NPRM that it will adopt that standard and apply it on a "case-by-case" basis. Under Section 706(a), the TRA has exactly the same statutory authority as the FCC and, therefore, may also adopt and apply that same standard of "commercial reasonableness on a "case-by-case" basis.

Finally, JEA argues that the TRA must adopt rules before it can exercise its jurisdiction under Section 706(a). The TRA did not adopt rules before implementing other sections of the federal Telecommunications Act (although it eventually adopted rules governing arbitration proceedings) and is not required to do so here. Like the FCC, the Authority may address complaints against broadband providers on a case-by-case basis, applying the "commercially reasonable" standard outlined by the *Verizon* Court. In fact, if the Authority were to apply any standard other than the "light touch" of "commercial reasonableness," it is likely that the agency's actions would be subject to judicial challenge, just as the FCC's original attempt to apply common carrier standards to broadband providers was held to exceed the agency's authority under Section 706. Unless the FCC reclassifies broadband providers as common carriers, the FCC is bound by the lesser standard of "commercial reasonableness." Since the TRA is required to "interpret and apply federal, not state, substantive law" for the purpose of adjudicating complaints of anti-competitive conduct (T.C.A. § 65-5-104(m)), the TRA is also bound to the same "commercial reasonableness" standard. Therefore, the applicable legal standards are clear and there is no requirement that the TRA adopt rules before hearing this complaint that JEA has acted in a commercially unreasonable manner towards a competitor.

Standard of Review for Motions to Dismiss

JEA filed its *Motion to Dismiss* pursuant to TRA Rule 1220-1-2-.03(2)(e) which allows certain defenses, including a failure to state a claim upon which relief can be granted, to be made by motion. The language of TRA Rule 1220-1-2-.03(2)(3) mirrors the Tennessee Rules of Civil Procedure 12.02(6). The standards for granting a motion to dismiss filed under Tenn. R. Civ. P. 12.02(6) have been well established in Tennessee and provide the framework for the panel's analysis of JEA's motion. In *Indiana State District Council of Laborers v. Brukardt, et al.*, the court offers a general overview of the standard of review and the rules governing consideration of a Tenn. R. Civ. P. 12.02(6) motion. It provides:

> A rule 12.02(6) motion to dismiss admits the truth of all of the relevant and material averments contained in the complaint, but it asserts that the averments nevertheless fail to establish a cause of action. *See, e.g. Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). Therefore, when reviewing a dismissal of a complaint under Rule 12.02(6), this Court must take the factual allegations contained in the complaint as true and review the trial court's legal conclusions de novo without giving any presumption of correctness to those conclusions. *See, e.g. Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). Because a motion to dismiss a complaint under Tennessee Rule of Civil Procedure 12.02 (6) challenges only the legal sufficiency of the complaint, courts should not dismiss a complaint for failure to state a claim based upon the perceived strength of a plaintiff's proof. *See, e.g. Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). As Rule of Civil Procedure 8.01 only requires that a complaint set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief,' courts should liberally construe the complaint in favor of the plaintiff when considering a motion to dismiss for failure to state a claim. *See, e.g., Pursell v. First Am. Nat. Bank*, 937 S.W.2d 838, 840 (Tenn. 1996). Although the allegations of pure legal conclusions will not sustain a complaint, *see Ruth v. Ruth*, 213 Tenn. 82, 372 S.W.2d 285, 287 (1963), courts should grant a motion to dismiss only when it appears that a plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, *see, e.g., Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).[2]

[2] *See Indiana State District Council of Laborers v. Brukardt, et al.*, 2009 WL 426237, at *5 (Tenn. Ct. App. 2009).

A motion to dismiss filed under TRCP 12.02(6) must challenge the legal sufficiency of the petition and not the strength of the Complainant's evidence.[3] When evaluating a motion to dismiss, the TRA should construe the Complaint liberally presuming all factual allegations to be true. In addition, the Complainant should be given the benefit of all reasonable inferences drawn from the facts.[4] A Respondent who files a motion to dismiss "'admits the truth of all of the relevant and material allegations contained in the complaint but asserts that the allegations fail to establish a cause of action.'"[5]

If the allegations alleged in the Complaint are presumed to be true as required in an analysis of a motion to dismiss, Aeneas has made a claim upon which relief can be granted and the *Motion to Dismiss* must be denied.

JEA competes with Aeneas as a provider of high-speed internet access services and voice telephone service. Aeneas has alleged that JEA, through its control of the "last-mile" transmission lines that connect Aeneas to its customers, has both the ability and the incentive to discriminate against Aeneas and in favor of JEA's own retail telephone and Internet access services. Aeneas has alleged that JEA is charging Aeneas for wholesale transmission services the same as—or more than—JEA charges its own retail customers for comparable telephone and internet access services. JEA also refuses to make available to Aeneas many of the transmission options that JEA offers at retail. For purposes of these motions, these allegations have to be regarded as true. Under Section 706(a), the TRA now has the statutory power and obligation to investigate these matters further.

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[3] *See Webb v. Nashville Area Habitat for Humanity,* 346 S.W.3d 422, 426 (2011) (citations omitted).

[4] *See Indiana State District Council of Laborers v. Brukardt, et al.,* 2009 WL 426237, at *6 (Tenn. Ct. App. 2009) (citing *Trau-Med of America v. Allstate,* 71 S.W.3d 691, 696 (Tenn. 2002)).

[5] *See Webb v. Nashville Area Habitat for Humanity,* 346 S.W.3d 422, 426 (2011) (citations omitted).

Conclusion

The Motions should be denied, and the TRA should assign this matter to a Hearing Officer to set a procedural schedule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2014, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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HENRY WALKER

CHAPTER NO. 681

HOUSE BILL NO. 3635

By Representatives McDaniel, Curtiss, Hargett, Todd, Baird, Pleasant

Substituted for: Senate Bill No. 3207

By Senators Tracy, Norris, McLeary

AN ACT to amend Tennessee Code Annotated, Title 65, Chapter 5, and to enact the "Broadband Business Certainty Act of 2006".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, Chapter 5, is amended by inserting Sections 2 through 4 below as a new, appropriately designated part thereto.

SECTION 2. This part shall be known and may be cited as, the "Broadband Business Certainty Act of 2006".

SECTION 3.

(a) As used in this part, "broadband services" means any service that consists of or includes a high-speed access capability to transmit at a rate that is not less than two hundred (200) kilobits per second, either in the upstream or downstream direction and either:

(1) Is used to provide access to the Internet; or

(2) Provides computer processing, information storage, information content or protocol conversion, including any service applications or information service provided over such high-speed access service.

"Broadband services" does not include intrastate service that was tariffed with the Tennessee regulatory authority and in effect as of the effective date of this act.

Furthermore, such intrastate service shall not be reclassified, bundled, de-tariffed, declared obsolete or otherwise re-characterized to avoid the imposition of inspection fees by the Tennessee Regulatory Authority.

(b) Nothing in this act shall permit any carrier to treat services that constitute telecommunications services under federal law as non-telecommunications services for any purpose under state law.

(c) Nothing in this act shall alter or affect the jurisdiction of the Tennessee regulatory authority to arbitrate or hear complaints related to anti-competitive pricing of regulated services or interconnection agreements between carriers pursuant to Section 251 and 252 of the Federal Telecommunications Act.

(d) Nothing in this act shall alter or affect any jurisdiction or authority of the Tennessee regulatory authority to act in accordance with federal laws or regulations of the Federal Communications Commission, including, without limitation, jurisdiction granted to set rates, terms, and conditions for access to unbundled network elements and to arbitrate and enforce interconnection agreements.

(e) Nothing in this act shall alter or affect in any manner the regulation of cable television as established elsewhere in Tennessee law.

SECTION 4. In order to ensure that Tennessee provides an attractive environment for investment in broadband technology by establishing certainty regarding the regulatory treatment of such technology, consistent with the decisions of the federal communications commission to preempt certain state actions that are not in accordance with the policies developed by the federal communications commission, the Tennessee regulatory authority shall not exercise jurisdiction of any type over or relating to broadband services regardless of the entity providing the service except as provided in Section 3(a) of this act.

SECTION 5. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 4, 2006

JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 15th day of May 2006

PHIL BREDESEN, GOVERNOR