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September 29, 2014

Via Electronic Filing and
Via Federal Express

Ms. Sharla Dillon, Docket Manager
Dockets and Records Office
Tennessee Regulatory Authority
502 Deaderick Street, 4th Floor
Nashville, Tennessee 37243

RE: *Complaint of Aeneas Communications, LLC against Jackson Energy Authority* – Docket No. 14-00070

Dear Ms. Dillon:

We have enclosed for filing an original and four (4) copies of the *Reply Brief of Jackson Energy Authority to Response of Aeneas Communications, LLC to Motion To Dismiss and Motion in Opposition To Commencement of a Contested Case* for filing in the above-captioned docket.

If you have any questions about the attached, please do not hesitate to contact us.

Sincerely,

Mark W. Smith

MWS:cjb
Enclosures
cc: Henry Walker, Esq.
Teresa Cobb, Esq., JEA General Counsel

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

COMPLAINT OF AENEAS COMMUNICATIONS, LLC AGAINST JACKSON ENERGY AUTHORITY	)))	Docket No. 14-00070

REPLY BRIEF OF JACKSON ENERGY AUTHORITY TO RESPONSE OF AENEAS COMMUNICATIONS, LLC TO MOTION TO DISMISS AND MOTION IN OPPOSITION TO COMMENCEMENT OF A CONTESTED CASE

Jackson Energy Authority ("JEA") respectfully submits the following reply to the *Response of Aeneas Communications, LLC to Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case* (the "*Response*") filed by Aeneas Communications, LLC ("Aeneas") on September 8, 2014.

SUMMARY

The fundamental question in this case is whether Section 706(a) of the Federal Telecommunications Act of 1996, 47 U.S.C. § 1302(a) authorizes the Tennessee Regulatory Authority (the "Authority") to force JEA to provide wholesale transport services to Aeneas. JEA respectfully submits that the answer to that question is no. As JEA stated in its *Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case*, neither Section 706(a) nor the D.C. Circuit Court of Appeals' decision in *Verizon v. FCC*, 740 F.3d 623 (2014) support Aeneas' requested relief because of (i) the manner in which the Tennessee General Assembly has defined the Authority's subject matter jurisdiction, (ii) the failure of Aeneas to show that the proposed relief would "encourage the deployment on a reasonable and timely basis

of advanced telecommunications capability to all Americans, and (iii) the manner in which the requested relief would conflict with federal law.[1]

While Aeneas' Complaint, as initially filed, appeared to frame its request for relief under a broad application of the language of Section 706(a), based upon the arguments set forth in Aeneas' *Response*, it now appears that Aeneas believes that the services it is requesting from JEA are "broadband Internet access services" and that it is an "edge provider" seeking to provide services over JEA's broadband Internet access service. In Aeneas' *Response*, it appears that Aeneas believes that it falls within the scope of the Federal Communication Commission's (FCC) pending rulemaking proceeding.[2]

This characterization is simply wrong. Aeneas is not requesting broadband Internet access service as that term is defined in the FCC's proposed rules. Instead, Aeneas seeks to force JEA to provide certain wholesale broadband services that are basically the broadband equivalents of a local loop and a high speed data connection to support Aeneas' own retail telephone and Internet service offerings. Aeneas' requested relief is well beyond the scope of the pending rulemaking proceeding at the FCC and the matters addressed in the *Verizon* case, and the Authority should accordingly dismiss Aeneas' Complaint. The FCC has expressly limited the application of the proposed rules to certain retail services, and the proposed rules do not apply to wholesale transport services at all. As a result, Aeneas' requested relief directly contradicts the approach that the FCC has taken in the pending rulemaking proceeding and could not be the basis for the Authority to utilize Section 706(a) to grant the relief that Aeneas seeks.

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[1] See *Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case* at pp. 6-9.

[2] In the Matter of Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28, 29 F.C.C.R. 5561 (May 15, 2014) (the "*2014 NOPR*").

Additionally, to the extent that Aeneas is urging the Authority to assume jurisdiction over the Complaint based upon an argument for a broader application of Section 706(a), the Authority should reject that argument as well for the reasons more fully addressed in JEA's *Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case* and set forth below.

ANALYSIS

Section 706(a), as applied in the FCC's pending rulemaking, is not applicable to the services that Aeneas has requested.

While the FCC has not yet completed its rulemaking proceeding on this issue, the FCC's proposed definition of "broadband Internet access services" applies only to "mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints . . . ." Aeneas' Complaint asks that the Authority order JEA to provide "wholesale telecommunications services," and not mass market retail services.[3] Additionally, Aeneas seeks services that do not include direct connectivity to the Internet. Aeneas admits in paragraph 4 of its Complaint that "JEA's wholesale product is merely a transmission service and does not actually provide Internet access"[4]. Because the JEA services at issue are wholesale services and do not provide Internet access, the services that Aeneas requests are not "broadband Internet access services" as the FCC proposes to define that term.

Since the December 21, 2010 Report and Order (the "*2010 Open Internet Order*") that was the subject of the *Verizon* case, it has been clear that the FCC's rules only apply to mass-market retail services. The rules would not even apply to retail enterprise services, much less wholesale carrier to carrier services. In the *2010 Open Internet Order*, the FCC described the

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[3] *Complaint and Request for Interim Relief* (the "*Complaint*"), paragraph 14.

[4] *Complaint*, paragraph 4. See also *Complaint*, footnote 6 ("JEA does not provide Aeneas with "Internet access service" but only provides broadband transport from the customer's premises to JEA's operations center and then to the Aeneas Network Center. Aeneas itself provides Internet access service to the customers...".)

"common understanding" of broadband Internet access service "as a service that enables one to go where one wants on the Internet, and communicate with anyone else online."[5] In that Order, the FCC found that open Internet rules should apply to "broadband Internet access service," which it defined as:

> A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.[6]

The FCC, in turn, defined "mass market" as "a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries," but also expressly excluded enterprise service offerings.[7] The FCC went on to state that broadband Internet access service did not include "virtual private network services, content delivery network services, multi-channel video programing services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service)."[8] In explaining its reasoning behind excluding these services, the FCC stated that the excluded services "typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."[9]

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[5] 25 F.C.C.R. at 17931, ¶ 43.

[6] 25 F.C.C.R. at 17932, ¶ 44.

[7] *Id.* at ¶ 45.

[8] *Id.* at 17933, ¶ 47.

[9] *Id.*

In the May 15, 2014 Notice of Proposed Rulemaking that the FCC released in response to the *Verizon* opinion, the FCC proposes to retain the definition of "broadband internet access service" as set forth in the *2010 Open Internet Order*, noting that the *Verizon* decision "upheld the Commission's regulation of broadband Internet access service pursuant to section 706 and did not disturb this aspect of the *Open Internet Order*."[10] In the *2014 NOPR*, the FCC has similarly proposed to exclude enterprise services and other services that are typically not mass market services and/or do not provide the capability to transmit data and receive data from all or substantially all Internet endpoints.[11] In light of this clear rulemaking history, it is obvious that the wholesale broadband local loop and data services that are the subject of Aeneas' Complaint are not included within the current definition of "broadband Internet access service" or the scope of the FCC's proposed rules. In fact, those services and others have been excluded.

A careful analysis of the rulemaking comments that Aeneas has cited in its *Response* point to the same conclusion. In fact, some of the comments that Aeneas itself cites actually demonstrate that Aeneas' request is not covered by the proposed rules. In its *Response*, Aeneas cites the comments of Comcast Corporation and AT&T Services, Inc. for the general proposition that Section 706(a) grants jurisdiction to require "commercially reasonable" relationships between broadband Internet access providers and edge providers.[12] Aeneas fails to mention, however, that these comments were offered in the context of the *2014 NOPR* and, more specifically, several were simply offered within the context of the FCC's authority to adopt rules addressing "paid prioritization" between broadband Internet access service providers and edge providers pursuant to Section 706(a).

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[10] 29 F.C.C.R. 5561 at *16, ¶¶ 54 & 55.

[11] *Id.* at ¶ 58.

[12] *Response* at pp. 2-3.

For example, Comcast Corporation's comments, which are referenced on page 2 of Aeneas' *Response* focus on paid prioritization arrangements:

> A categorical ban on paid prioritization, which would be even *more* restrictive than the language in the *2010 Open Internet Order*, almost certainly would not pass muster.
>
> The [*Verizon*] court did suggest, however, that the Commission could lawfully apply a "commercial reasonableness" standard to govern these relationships. A requirement for all direct commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access services to be "commercially reasonable," determined case-by-case based on "the totality of the circumstances," would closely mirror the rule suggested in *Verizon*. It would leave sufficient room for "individualized negotiation" between broadband providers and edge providers, and would build in "considerable flexibility for providers to respond to the competitive forces at play in the [broadband Internet access] market." Under *Verizon* and *Cellco*, this formulation of the "commercially reasonable" standard would be legally sound.[13]

Similarly, the portion of the comments of AT&T Services, Inc. that Aeneas references on pages 2 and 3 of its *Response*, also focuses on paid prioritization arrangements:

> In short, there are many innovative arrangements that would still be permissible, provided that they were commercially reasonable. Broadband Internet access providers accordingly would not be categorically prohibited from entering into individual relationships with specific edge providers or compelled to carry edge providers' traffic on identical terms. Indeed, the Commission would not be banning all prioritization arrangements as an undifferentiated whole, but instead would be imposing restrictions on *when* such arrangements may be used (*i.e.*, at the direction of the end user).[14]

Placed in proper context, the referenced portions of the comments of Comcast Corporation and AT&T Services, Inc. are focused on paid prioritization and are not more generically applicable to the wholesale arrangements that Aeneas seeks in this case.

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[13] http://apps.fcc.gov/ecfs/document/view?id=7521479245 (last visited September 26, 2014).

[14] http://apps.fcc.gov/ecfs/document/view?id=7521679206 at p. 35 (last visited September 26, 2014).

This case, of course, is not about paid prioritization.

It is somewhat surprising that Aeneas has offered up the comments of Comcast in support of its position. In the very same comments that Aeneas relies upon in its *Response*, Comcast urges the FCC to limit the application of the rules (and therefore its exercise of Section 706(a) authority) to retail services:

> The Commission's NPRM also raises several questions regarding the scope of the new rules. When the Commission adopted its 2010 open Internet rules, it made clear that the rules applied only to "broadband Internet access service," defined as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service." The Commission determined that it was "appropriate to limit the application of the rules to broadband Internet access service" because the rules were "an outgrowth of the Commission's *Internet Policy Statement*," which the Commission and "private-sector stakeholders" had "always understood" to be aimed at ensuring openness for retail broadband subscribers. . . .
>
> Comcast agrees with the Commission's tentative conclusion that, as before, the new open Internet rules should address only the provision of "broadband Internet access service" to end users.[15] (Emphasis added).

This case is not about service to end users.

Finally, Aeneas' reference to a nine page section of the *Verizon* opinion is equally inapplicable to the question before the Authority. On page 7 of its *Response*, Aeneas discusses at some length the D. C. Circuit's evaluation of the FCC's basis for utilizing Section 706 to justify aspects of the *2010 Open Internet Order*. The FCC's basis for its findings and its extended evaluation of these issues in the rulemaking proceeding were in the context of the rules promulgated in the *2010 Open Internet Order*. Those rules, as shown above, are not directly applicable to the matters raised or the relief requested in Aeneas' Complaint.

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[15] http://apps.fcc.gov/ecfs/document/view?id=7521479245 at pp. 28-29 (last visited September 26, 2014).

CONCLUSION

For the reasons set forth in JEA's *Motion to Dismiss and Motion in Opposition to Commencement of a Contested Case* and this Reply, JEA respectfully requests that the Authority dismiss Aeneas' Complaint and decline to commence a contested case. Aeneas has asked that the Authority create a new, unprecedented regulatory structure for wholesale broadband services that would permit one carrier to force another carrier to provide it with wholesale broadband local loops and data connections. Aeneas' requested relief is not supported by state or federal law. Aeneas' reliance on the still pending *2014 NOPR* does not change that result.

Dated September 29, 2014.

Respectfully submitted,

JACKSON ENERGY AUTHORITY

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th 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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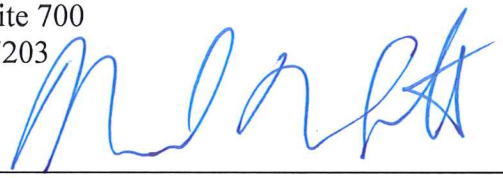

Mark W. Smith