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FROM: Chancellor Lyle's Office

DATE: April 14, 2008

SUBJECT: *07-2145-III -Tennessee Cable Telecommunications Association vs. Electric  
Power Board of Chattanooga*

PAGES: 17, including a cover sheet

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEE CABLE  
TELECOMMUNICATIONS  
ASSOCIATION,

Plaintiff,

VS.

ELECTRIC POWER BOARD OF  
CHATTANOOGA,

Defendant.

NO. 07-2145-III

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MEMORANDUM AND ORDER

This lawsuit was filed by a trade organization of owners and operators of franchise cable systems in Tennessee. They seek for this Court to invalidate a proposal of the municipal electric system of the City of Chattanooga, the Electric Power Board ("EPB"), to provide cable television and high speed Internet access to its customers. EPB's proposal is competitive to the plaintiff's members, and the plaintiff claims unfairly competitive. The plaintiff asserts that the financing projections for the network stated in EPB's business plan submitted to the State Comptroller are unrealistic and that the City's electric system will ultimately be called upon to subsidize the cable/Internet system in violation of anticompetitive protections provided in Tennessee Code Annotated section 7-52-603.

Preliminary to the merits, however, is the issue of the authority of a Davidson County court to decide a lawsuit concerning municipal cable and internet service in Chattanooga. It is this threshold issue which first brought the case before this Court and on which the proceedings are now stalled.

At first the Court concluded, in ruling on a preliminary motion filed by the defendant for improper venue and failure to join the City of Chattanooga as an indispensable party, that this Court had subject matter jurisdiction and that venue was proper in Davidson County.

The defendant, then, filed a motion to reconsider pursuant to 54.02 of the Tennessee Rules of Civil Procedure, along with other motions for dismissal. The motion to reconsider contained new and supplemental authorities which led the Court to conduct further research. From these sources, the Court concludes that its initial analysis was incorrect and for several reasons this lawsuit cannot be maintained in Davidson County.

Although those reasons are detailed below, the essence of the Court's decision is simple. Usually when lawsuits pertaining to out-of-county matters are filed in Davidson County Chancery Court it is because there is a regulatory component to the cause of action: compliance with or action by a branch of State Government related to the subject of the lawsuit is based or occurs in Davidson County thereby providing jurisdiction and venue in this Court.

When first reviewing this case, the Court concluded that the case contained a regulatory aspect which supplied jurisdiction and venue to this Court. After the supplemental

filings, though, the Court concludes otherwise. The Court concludes that the requirement of Tennessee Code Annotated section 7-52-602(1) and (2) that a municipal electric system file a business plan for proposed cable and Internet service with the State Comptroller is a directory provision in the statute, not a mandatory one. "Directory" under Tennessee law denotes action required to assist in orderly compliance with a statute and is not essential to the main objective of the statute. The legal significance of the "directory" or "mandatory" distinction is that failure to comply with a directory requirement does not have the effect of invalidating governmental action to which the requirement relates.

Thus, even if the effect of the business plan filed by the defendant with the Comptroller ultimately results, as the plaintiff claims, in an illegal cross-subsidy in violation of the Act, the filing of the plan with the Comptroller, being only directory, does not provide a basis for invalidating subsequent action by the local government. Accordingly, if the action in Davidson County—filing with the Comptroller—can not furnish a basis for invalidating the defendant's cable/Internet proposal, there exists no illegality or cause of action which has occurred in Davidson County to provide this Court with subject matter jurisdiction or venue. Under these circumstances, the defendant's motion to reconsider resulting in dismissal of this case must be granted.

The authorities and detailed reasoning on which the Court bases its decision are as follows.

**Facts, Plaintiff's Legal Theory, Prior Motions**

The City of Chattanooga proposes to build a fiber optic communications network for the area served by EPB. Among the services and benefits of the proposal is for the network to provide cable television and high speed Internet access to EPB customers. As noted above, that service results in competition for the present operator of the franchise cable television system for the area.

Chattanooga's proposal is addressed in Tennessee law. Recognizing the potential to broaden the access of citizens of all income levels to broadband communications, the Tennessee General Assembly enacted Tennessee Code Annotated section 7-52-601 *et seq.* (the "Cable Act"). The statute authorizes municipalities, operating an electric plant, to construct and operate a system for the provision of cable and Internet services within the municipality's service area. Recognizing, though, the potential for anticompetitive conduct, given the power of municipalities in the market and their ability to generate revenue, the Tennessee General Assembly, in section 7-52-603 of the Cable Act, precludes municipal electric systems from cross-subsidizing the operation of the cable/Internet with revenues from the municipality's power or other utility operations.

In challenging the legality of the Fiber Optic Broadband Business Plan proposed by EPB, TCTA asserts in paragraphs 15-20 of its Complaint that the Plan unrealistically underestimates costs and overestimates gross revenue such that it is inevitable that the cable/Internet will not be able to repay its loans from the electric system. This shortfall will

require the latter to subsidize the former in contravention of the Cable Act. The cause of action TCTA asserts to redress this alleged statutory violation is a declaratory judgment action, Tennessee Code Annotated sections 29-14-101, *et seq.*

This case was first before the Court on a motion to dismiss filed by the defendant. That motion was not a direct challenge of a motion to dismiss for failure to state a claim but, instead, a challenge to the lawsuit being filed in Davidson County, as an improper venue, and for failure to join the City of Chattanooga as an indispensable party. The defendant asserted that the municipal system and its financing of the network are located in Chattanooga; hence venue is improper in Davidson County.

The motion to dismiss required the plaintiff to identify its precise legal theory for declaratory judgment. The plaintiff's opposition to the motion to dismiss for improper venue and failure to join the City identified that the statutory vehicle it is using to establish venue in Davidson County is Tennessee Code Annotated sections 7-52-602 and 7-52-609. The former requires a municipal electric system to file a detailed business plan with the State Comptroller of the Treasury located at the State Capitol in Nashville:

**§ 7-52-602. Required procedures to offer services**

To provide the services authorized under this part, the governing board of the municipal electric system shall comply with the following procedure:

- (1) Upon the approval and at the direction of the governing board, the municipal electric system shall file a detailed business plan with the office of the comptroller of the treasury that includes a three-year cost benefit analysis and that identifies and discloses the total projected direct cost and indirect cost of and revenues to be derived from providing the proposed

services. The plan shall also include a description of the quality and level of services to be provided, pro forma financial statements, a detailed financing plan, marketing plan, rate structure and any other information requested by the director of the division of local finance;

(2) After review of the plan, the comptroller of the treasury shall provide a written analysis of the feasibility of the proposed business plan to the chief legislative body of the municipality in which the municipal electric system is located and the governing board within sixty (60) days; provided, that the calculation of the time to file the comptroller's written analysis shall not commence until the business plan is complete. Upon expiration of the sixty-day period, the governing board may proceed without the written analysis of the comptroller;

(3) If the governing board determines to proceed, it shall publish, in a newspaper of general circulation within that area, a notice of its intent to proceed with the offering of additional services. The notice shall include a general description of the business plan and a summary of the governing board's findings on such plan. The notice shall also specify a date on which the governing board shall conduct a public hearing on the provision of such services;

(4) The governing board shall conduct a public hearing on the provision of such services. No sooner than fourteen (14) days after such public hearing, the governing board may consider authorizing the provision of additional services. A municipal electric system may provide additional services only after approval by a two-thirds ( 2/3 ) majority vote of the chief legislative body of the municipality in which the municipal electric system is located or by a public referendum held pursuant to subdivision (5); and

(5) Upon a majority vote by the chief legislative body of the municipality in which the municipal electric system is located that a public referendum should be held on the question of whether the municipal electric system may provide additional services, the chief legislative body of such municipality may direct the county election commission to hold a referendum on such question. In order for the question to be placed on the ballot, the chief legislative body shall so direct not less than sixty (60) days before a regular general election. Upon receipt of such direction from the chief legislative body, the county election commission shall place the question on the ballot.

The referendum shall only be held in conjunction with a regular general election being held in the municipality and only registered voters of such municipality may participate in the referendum. The question to appear on the ballot shall be:

"FOR THE MUNICIPAL ELECTRIC SYSTEM PROVIDING ADDITIONAL SERVICES" and "AGAINST THE MUNICIPAL ELECTRIC SYSTEM PROVIDING ADDITIONAL SERVICES."

TENN. CODE ANN. § 7-52-602 .

The second section, 7-52-609, is a statutory jurisdiction and venue provision specific to the Act which specifies that jurisdiction and venue shall be "in the chancery court in the county where the alleged violation is occurring or will occur."

Implicit in filing a plan with the Comptroller, the plaintiff argues, is that the plan comply with the Cable Act, including the prohibition in section 7-52-603 against cross-subsidizing. That EPB's Plan will result in a cross-subsidy to remedy the certain shortfall of the unrealistic projections, the plaintiff argues, renders the Plan noncompliant and violative of section 7-52-602(1) and (2) that the municipal electric system submit a detailed Plan to the Comptroller. Submitting a noncompliant plan to the Comptroller, the plaintiff argues, states a claim for a violation of the statute in Davidson County.

Upon initial consideration of argument of counsel and reviewing the statute, particularly section 7-52-602(1) and (2), the Court concluded that the Comptroller's role under the statute was not advisory but regulatory. In so concluding, the Court was persuaded by the plaintiff's policy argument that regulation to troubleshoot and identify violations and

problems on the front end before a cable/Internet plan is implemented makes sense and is needed. The Court was persuaded by the policy argument because section 7-52-602(1) and (2) is silent and does not characterize the Comptroller's role. In the absence of explication and case law, the Court defaulted to the policy argument made by the defendant. Further, misunderstanding the implications of the plaintiff's theory under section 7-52-602(1) and (2) and thinking that the plaintiff was asserting the Comptroller had erred in not halting the Plan for its alleged cross-subsidy effect, the Court concluded that exercise of the Comptroller's regulatory authority in violation of the statute or arbitrarily or capriciously provides a legal basis (subject matter jurisdiction and venue) for a declaratory action before this Court in Davidson County. Accordingly, the Court denied the motion to dismiss for improper venue and failure to joint the City of Chattanooga.

But now having conducted additional research from the new and supplemental authorities and reasoning provided on the motion to reconsider, and understanding that the plaintiff's focus is not on an error by the Comptroller but misconduct by the defendant in the act of submitting an illegal plan in Davidson County, the Court concludes that its legal analysis in distinguishing under section 7-52-602 between advisory and regulatory with reference to the Comptroller's role was the wrong legal analysis.

### Reasoning on Motion to Reconsider

The correct analysis is whether section 7-52-602(1) and (2) is "directory" or "mandatory." That designation is legally significant because it "denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating governmental action to which the procedural requirement relates." 73 AM. JUR. 2D:Statutes § 11 (2001). "If the prescribed duty is essential to the main objective of a statute, the statute ordinarily is 'mandatory,' and a violation will invalidate subsequent proceedings under it." *Id.* On the other hand, where the duty is "not essential to accomplishing the principal purpose of the statute but is designed to ensure order and promptness, the statute ordinarily is 'directory,' and a violation will not invalidate subsequent proceedings unless prejudice is shown." *Id.*

In determining whether the legislature intended a statutory provision to be mandatory or directory, the courts consider the plain meaning of the words used, as well as the entire act, its nature and object, the consequences that would follow from each construction, legislative history, and statutory context. Statutory requirements which are intended to serve primarily as guidelines for the orderly conduct of public business are more likely to be considered directory rather than mandatory.

Generally, courts construe a statutory provision as mandatory when the power or duty to which it relates is for the public good. Accordingly, a statute affecting the public interest and promoting justice which prescribes the manner of performance is generally mandatory.

On the other hand, where a construction which would impose an absolute duty would clearly militate against the interest of those in whose interest the law was enacted, the courts will construe the law as permissive. Moreover, where the dereliction of an individual can only have an adverse effect on that individual's own private rights, the individual will not be rescued

from the consequences of a callous indifference to, or willful disregard of, plain statutory requirements.

*Id.* Tennessee law is in accord. *Stiner v. Powells Valley Hardware Co.*, 4 Buler 99, 168 Tenn. 99, 75 S.W.2d 406 (1934); *State of Tennessee ex rel. Estep v. Shell*, 1992 WL 184690 (Tenn. Ct. App).

Applying these legal authorities to section 7-52-602, the Court concludes that the part of the statute, subsections (1) and (2), pertaining to submission of a business plan to the Comptroller is merely directory. Although helpful in ensuring the orderly financing and development of a municipal cable network, submission of a business plan to the Comptroller, the Court concludes, is not essential to accomplishing the principal purpose of the statute. In concluding that submission of the plan by the Comptroller is directory, the Court adopts herein by reference the reasoning and authorities at pages 5-10 of defendant's February 7, 2008 Memorandum in Support of Defendant's Motion to Reconsider. Particularly compelling to the Court is the defendant's emphasis on subsection 2 of section 7-52-602. That subsection provides that the municipal electric system can proceed with its public hearings and vote on the Plan even if the Comptroller fails to provide a timely analysis:

(2) After review of the plan, the comptroller of the treasury shall provide a written analysis of the feasibility of the proposed business plan to the chief legislative body of the municipality in which the municipal electric system is located and the governing board within sixty (60) days; provided, that the calculation of the time to file the comptroller's written analysis shall not commence until the business plan is complete. Upon expiration of the sixty-day period, the governing board may proceed without the written analysis of the comptroller; [emphasis added] . . . .

It follows, then, that if submitting a business plan to the Comptroller in Davidson County, under section 7-52-602(1) and (2), even if illegal or noncompliant with the Act is merely directory, that act of submission can not be used to invalidate the defendant's proposal to furnish cable services. There is, then, no action on the part of the defendant in Davidson County from which this Court can declare the defendant's plan invalid.

Accordingly, the Court grants defendant's motion to reconsider and dismisses this case for lack of jurisdiction which also deprives the Court of venue.

#### **Defendant's Additional Motions**

The Court's ruling that the plaintiff's cause of action for failure of the defendant to file a compliant plan with the Comptroller pursuant to section 7-52-602(1) and (2) fails to state a claim renders the other motions moot. If, however, it is decided on appeal that the plaintiff has stated a claim under section 7-52-602(1) and (2), under that alternative, the Court's ruling on the other motions is as follows.

(1) **Indispensable Party**—The Court denies the motion to alter or amend its January 8, 2008 memorandum and order and leaves intact its decision that the City of Chattanooga is not an indispensable party to the plaintiff's cause of action pursuant to Tennessee Code Annotated section 7-52-602(1) and (2) that the defendant filed a noncompliant plan with the Comptroller.

(2) **Ripeness**—With respect to ruling on the defendant's motion for judgment on the pleadings based upon ripeness, it is necessary at the outset to identify precisely the plaintiff's claims.

The first claim is stated in paragraphs 15-20 of the Complaint, where the plaintiff refers to the Plan and other exhibits to the Complaint for the assertion that the Plan underestimates the anticipated operating costs and overestimates the gross revenue with unrealistic projections of market penetration such that the cable/Internet operations will not provide sufficient revenues to pay loans made to it by the municipal electric system. This inability to pay the loans will necessarily require, the plaintiff asserts, EPB to subsidize the cable/Internet in violation of section 7-52-603.

Next, in its March 3, 2008 Response to defendant's motion for judgment on the pleading, the plaintiff derives an additional claim from the facts stated in and exhibits to the complaint. The plaintiff asserts at pages 5-6 that EPB's electric revenues will be used to support hundreds of millions of dollars of bonds and that the electric revenues are the vehicle by which funding for the cable/Internet system is being obtained. The plaintiff continues that electric revenues also provide the means by which more than \$200 million in debt will be serviced. The plaintiff asserts that EPB's action is a "financial slight of hand" because it enables the cable/Internet venture to obtain all necessary funding while avoiding servicing the debt. The plaintiff asserts, that the "fact that electric revenues are being pledged to obtain

the necessary financing and to fund debt service, standing alone, makes dismissal inappropriate.”

With respect to the latter claim, the Court shall not consider it because the Court concludes from its review of the complaint and exhibits thereto that the plaintiff's claim mischaracterizes the information contained in the exhibits. As explained at pages 4-7 of the defendant's March 5, 2008 Reply, the benefits of the Network are not limited to or confined to usage for cable/Internet. The benefits will accrue to the electric system regardless of whether EPB uses the fiber network to provide cable/Internet or other non-electric services. The proceeds of the electric system bonds will be used solely for EPB's electric system fiber project. No portion of the bonds can be used to fund EPB's cable/Internet plan. Instead, EPB's cable/Internet plan will be funded through \$60 million of inter-division loans, permitted by section 7-52-603 of the Cable Act.

Putting aside, then, and not considering the latter claim, the Court returns to plaintiff's claim concerning unrealistic projections and an inevitable shortfall in cable/Internet revenues which will result in funding by the electric system. The Court concludes that this claim is not ripe. In so concluding the Court notes that plaintiff's Complaint does not allege a patent cross-subsidy ascertainable from the face of the Plan. Instead, the allegation in the Complaint is one of a resulting cross-subsidy. That allegation seeks for the Court to enter a ruling regarding events which may happen after the implementation of the Plan and, accordingly, which are hypothetical and do not present, at this time, a justiciable controversy.

The Court's additional reasoning is the defendant's authorities and arguments at pages 7-10 of its February 22, 2008 Memorandum in Support of Motion for Judgment on the Pleadings.

(3) **Failure to Exhaust Remedies**—Reiterating the premise stated at the beginning of this section—the alternative of the Court being reversed in its decision that filing a plan with the Comptroller under section 7-52-602(1) and (2) is directory and confers no substantive rights—under that alternative, the Court denies the defendant's motion for judgment on the pleadings for failure of the plaintiff to exhaust its administrative remedies in challenging the defendant's filing of an illegal business plan with the Comptroller. As stated *supra* at 8, the Court misunderstood the plaintiff's cause of action. The Court believed that the plaintiff was challenging conduct by the Comptroller in not halting the Plan. The plaintiff's challenge, instead, is to the defendant's submission to the Comptroller of an illegal Plan. The Court concludes that if on appeal the plaintiff is found to be correct that a cause of action is stated under section 7-52-602, then it is not an administrative proceeding. The Court adopts the plaintiff's argument that section 7-52-609 establishes a direct cause of action in chancery court if the Court of Appeals decides that section 7-52-602 provides the plaintiff a cause of action.

(4) **Standing**—Adopting the reasoning and authorities of the defendant's February 22, 2008 Memorandum in Support of its Motion for Judgment on the Pleadings at pages

12-15, and at pages 11-12 of its March 5, 2008 Reply, the Court concludes, from section 7-52-609 that the General Assembly defined and limited by statute standing to bring civil actions alleging violations of the Cable Act to a "franchisee . . . operating in the service area of the municipal electric division providing services." The face of the pleadings establish that TCTA is not a franchisee operating in EPB's service area but is instead, as stated at paragraph 1 of the Complaint, a "trade organization whose membership consists primarily of owners and operators of franchised cable television systems throughout the State of Tennessee." Under the explicit terms of the statute, TCTA does not have standing to file this lawsuit.

It is therefore ORDERED that pursuant to Rule 54.02 the Court reconsiders its January 8, 2008 memorandum and order, and holds that the above-captioned matter is dismissed for failure to state a claim from which it also follows that this Court lacks venue.

Alternatively, if on appeal it is determined that submission of a noncompliant plan to the Comptroller under section 7-52-602 furnishes the plaintiff a cause of action in Davidson County, the Court ORDERS, under that alternative, that the defendant's motion for judgment on the pleadings is granted on the basis that the lawsuit is not ripe and on the plaintiff's lack of standing.

This is a final order. Court costs are taxed to the plaintiff.

*Ellen Hobbs Lyle*  
ELLEN HOBBS LYLE  
CHANCELLOR

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William Hannah

Robert Littleton

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Mark W. Smith

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail  
upon all parties or their counsel named above.

CS  
Deputy Clerk and Master  
Chancery Court

4-14-08  
Date