

this lawsuit both alleging that EPB's proposed plan violates Tennessee law, and requesting a declaratory judgment that EPB's plans violate state law. Comcast thus requests injunctive relief, to the extent appropriate.

Presently, there are three Motions pending before the court. The first Motion was Comcast's Motion to Shorten Defendant's Time to Respond to Written Discovery, which motion was filed on May 9, 2008. EPB has objected to that Motion. Second, EPB filed a Motion for a Protective Order, on May 15, 2008, seeking a stay of all proceedings pending a decision on its Motion to Dismiss filed the same date. Third, EPB filed its Motion to Dismiss or, in the Alternative, to Stay. The motion to dismiss, if granted, would be dispositive of the Complaint. Comcast's case would be dismissed. In the alternative, EPB has requested the court to suspend any proceedings in this case until earlier, related litigation in Davidson County is finally decided and resolved. It appears to the court that the Davidson County litigation has been resolved, at least at the trial court level.

Basically, EPB bases its motion to dismiss on three legal positions. First, EPB contends that this court has no jurisdiction because there is a prior suit pending in Davidson County. Second, EPB argues that Comcast filed this lawsuit prematurely and that the case is not ripe for decision. Third, EPB asserts that the Tennessee Valley Authority's approval of EPB's electric plan and the inclusion of certain TVA - mandated terms and conditions on EPB acts to pre-empt state law because TVA is a federal agency.

Comcast has various responses. First, Comcast points out the standard to be used for motions to dismiss. The allegations of the complaint are deemed true and correct. Second, Comcast denied the applicability of the doctrine of prior suit pending. Third, the Complaint

has merit because EPB is, or will be, subsidizing its cable/Internet services by use of revenues generated by the sale of electricity. Comcast alleges that such subsidization would be a direct violation of law. Fourth, the TVA-EPB contracts do not pre-empt state law.

The parties argued the Motion to Dismiss or Stay on June 9, 2008. The attorneys for both sides were informative and eloquent in their presentations. The court pretermitted acting on Comcast's Motion to Shorten Time and impliedly granted EPB's Motion to Stay Discovery pending a ruling on the Motion to Dismiss. The court took the matter under advisement to await the decision in Davidson County and to study the parties' factual and legal arguments.

II. THE ISSUES

First, should Comcast's Complaint be stayed pending a final order in the Davidson County case? Second, should Comcast's Complaint be dismissed for any one or more of the reasons advanced by EPB? Third, should EPB's Motion to Dismiss or for a Stay be denied, for one or more of the reasons advanced by Comcast, thus permitting the discovery process to begin pending further hearings?

III. THE DISCUSSION

A. The Factual Background.

EPB is going to construct a fiber optic network for its electric service. The new system is supposed to contain over 6,900 miles of fiber optic network that will be state-of-the-art. Later, EPB can use the same fiber optic network to deliver cable and Internet services, when offered, to the homes and businesses of its electric customers. Exhibit A to the Complaint is a copy of EPB's Business Plan for Providing Fiber to the Home. The fiber to

the home network is going to be financed through a bond offering for \$219,830.00. The cost of the new fiber optic network is approximately 169 million dollars. The description of the bond offering is set forth in Exhibit A to Comcast's Motion to Shorten Time to Respond to Written Discovery.

Then, EPB's Electric Division will loan 60 million dollars to the EPB Cable and Internet Division to fund the cable/Internet's portion of the fiber network system and initial operating expenses. The record contains references to the various filings EPB has made with the comptroller and meetings, mandated by law, which have been held on EPB's plan to offer cable/Internet Services. EPB has been authorized to proceed with the cable/Internet project. EPB's proposed fiber optic network for its electric system has been proceeding notwithstanding the filing of the two lawsuits against EPB.

This lawsuit was filed to prevent EPB's entry into the cable/Internet industry on the basis of EPB's alleged violation Tennessee law on subsidization. Comcast attacks EPB's proposed plan as illegal for several basic reasons. First, Comcast asserts EPB is violating the law by using the Electric Division to construct the fiber optic network. The Electric Division is paying the entire cost of building the network. Comcast asserts that EPB's Cable and Internet Division is getting a huge financial (illegal) break because it is not having to pay initially for the cost of constructing the fiber optic network. EPB replies that it would still construct the fiber optic network for only its electrical system regardless of whether or not it was going to offer cable/Internet services in the future.

EBP is pledging it electric revenues as the source of payment for the bonds that were issued to finance the construction of the new fiber optic network. Comcast asserts that the

projections for EPB's cable/Internet business are not well grounded. If the cable and Internet Division obtains a smaller share of the market than projected by EPB, *i.e.*, 35%, then EPB's cable and Internet revenues will be insufficient for the Internet and Cable Division to repay its loan to the Electric Division. Then, electric revenues will have to be used (instead of increasing cable/ Internet rates) to repay the bonds. Such repayment of cable/Internet costs by electric revenue would be a cross-subsidization of the operations of the cable/Internet Division. This is another way EPB is violating the law. EPB responds that no one can predict the future; however, EPB feels its projections are solid and that the Cable and Internet Division will be able to meet its financial commitments.

B. The Prior Suit Pending Doctrine.

EPB argues that this court does not have jurisdiction to consider Comcast's Complaint under the prior suit pending doctrine. Earlier in 2007, the Tennessee Cable Telecommunications Association ("TCTA"), of which Comcast is a member, sued EPB in the Chancery Court for Davidson County, case number 07-02145. The case was assigned to Chancellor Ellen Hobbs Lyle. She dismissed the case on April 14, 2008, as a result of EPB's second effort.

Then, this case was filed in Hamilton County by Comcast. However, TCTA filed a Motion to Alter or Amend Judgment in Davidson County on May 12, 2008. Counsel for EPB argued that the pendency of the Davison County litigation deprived this court of subject matter jurisdiction. There were two lawsuits in two State courts seeking the same basic relief.

The court rejects this ground as a basis for relief to EPB. First, Chancellor Lyle has denied TCTA's Motion to Alter or Amend Judgment by Order filed June 27, 2008. There is a question about whether the TCTA lawsuit is pending or not. EPB filed a Supplemental Memorandum on June 30, 2008, that sets forth its contention that the first case is always pending until there is a Final Order entered and/or the time for appeal has expired. The Order of Chancellor Lyle was filed on June 27, 2008, overruling TCTA's Motion to Alter or Amend Judgment, may or may not be final before this case in Hamilton County is finally resolved. The Davidson County decision may be appealed, which EPB contends means the first case filed in Davidson County is still pending.

Second, this court does not believe that the TCTA lawsuit would bar this lawsuit, even though it seeks the same relief as Comcast does in this case, because Tenn. Code Ann. § 7-52-609 provides:

Civil actions. - A franchisee under chapter 59 of this title operating in the service area of the municipal electric division providing services under this part may bring a civil action for injunctive or declaratory relief for a violation under this part, and may recover actual damages upon a showing of a willful violation under this part. Jurisdiction and venue for such action shall be in the chancery court in the county where the alleged violation is occurring or will occur. Such actions shall be scheduled for hearing as a priority by the court.

Based upon this statute, the court would not dismiss or stay Comcast's Complaint for two reasons. One, TCTA is not a franchisee under chapter 59. TCTA is composed of franchisees, including Comcast. TCTA has the same interest and points of view as its members, who are franchisees. However, TCTA is not a franchisee. In this court's view,

TCTA did not have “standing” to file the lawsuit in Davidson County. Section 609 limits lawsuits to franchisees.

Two, jurisdiction and venue for any such civil action are in the county where the alleged violation “is occurring or will occur.” If there is, or will be, a violation of the law by EPB, such will occur in Hamilton County, not Davison County, in this court’s view.

It is upon this second reason, § 7-52-609, that the court strongly relies upon in reaching its decision on the first legal position advanced by EPB. The court makes this ruling despite TCTA’s seeking the same basic ruling and relief in Davidson County that Comcast is seeking in this court. TCTA is the wrong plaintiff that filed in the wrong court.

C. The Violation/Ripeness Issues.

Comcast contends that EPB’s planned cable/Internet business will violate Tenn. Code Ann. §7-52-603(a)(1)(A), which provides:

A municipal electric system shall establish a separate division to deliver any of the services authorized by this part. The division shall maintain its own accounting and record-keeping system. A municipal electric system may not subsidize the operation of the division with revenues from its power or other utility operations.

Comcast asserts that EPB is violating this provision because EPB’s Electric Division is paying for the entire cost of the fiber network. Thus, Comcast charges that the playing field of competition becomes tilted in EPB’s favor because the cost of installing the fiber optic network is the primary capital outlay for entry into the cable/Internet market.

The court has not found any appellate decisions on these statutes.¹ Therefore, this court will provide some issues for appellate construction. The court holds that the term “the operation of the division” does not include the construction of the fiber optic network. There are two reasons for this decision. First, Tenn. Code Ann. § 7-52-601(a) grants a municipal electric board the right “[t]o acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of cable service...Internet services....” Thus, the General Assembly used just one word, “operate”, in § 603(a)(1)(A), instead of the entire laundry list of words used in § 601(a). The various words in § 601(a) have different meanings. The principle of *expressio unius* applies. The prohibition set forth in § 603(a)(1)(A) applies to “operation” and not all of the other words used in § 601(a). Thus, EPB’s using electric revenues for the construction of the fiber network does not violate § 603(a)(1)(A)’s prohibition of using power or other utility revenues to “subsidize the operation of” the cable/Internet business.

Second, subsection (a)(1)(A) does not control the “construction” of the network , just the “operation” of the Cable and Internet Division of EPB. Subsection § 603(a)(1)(B) applies and controls the “construction” of the network. This subsection reads as follows:

(B) A municipal electric system may lend funds, at a rate of interest not less than the highest rate then earned by the municipal electric system on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services

¹ However, Judge Koch has considered the prohibition against cross-subsidization, contained in Tenn. Code Ann. § 7-52-402. He spoke of the general meaning of a subsidy and the harm that could occur through cross-subsidization. The court affirmed a hearing officer’s determination that the Electric Division had not cross-subsidized EPB Telecom, EPB’s Telephone Division. *US LEC of Tennessee, Inc. v. Tennessee Regulatory Authority*, No. M2004-01417-COA-R12-CV, 2006 Tenn. App. LEXIS 243 (April 17, 2006).

authorized by this part; provided, that such interest costs shall be allocated to the cost of such services.

This is what EPB proposes to do: the Electric Division will loan funds to the Cable and Internet Division. EPB is doing what the General Assembly specifically authorized.

This conclusion leads the court to discuss EPB's major point: ripeness. The lawsuit filed by Comcast is a declaratory judgment action. These type cases are permitted by Tenn. Code Ann. § 29-14-101 *et. seq.* The appellate courts have repeatedly held that there must be a real, present controversy before a court can declare the parties' rights.

For example, in *Nashville Trust Co. v. Dake*, 36 S.W.2d 905 (Tenn. 1931), our Supreme Court, speaking through Justice Chambliss, made the following pronouncements.

The expectancy of Mrs. Wilson, forty-seven years of age on the filing of this bill, is stated to be something more than twenty years. Obviously, if this were all, the bill would be premature, either under the Declaratory Judgments Act, set up in the bill, or under the general authority of a Trustee to seek the aid of the Court. "The statute does not contemplate declarations upon remote contingencies," or upon abstract, remote or incidental questions. *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901. Nor will a bill lie by a trustee to construe a will unless the Court can afford immediate relief. The Court will not declare future rights, or decide upon and determine contingencies which may or may not ever arise. *White v. Kelton*, 144 Tenn. 327, 232 S.W. 668.

Id. See also *McClung v. City of Elizabethton*, 105 S.W.2d 95, 100 (Tenn. 1937).

The same issue was recently addressed in *Mills v. Shelby County Election Com'n*, 218 S.W.3d 33 (Tenn. Ct. App.), *perm. app. denied* (2006). Mr. Mills filed a lawsuit and alleged that legislation authorizing the use of electronic voting machines would violate the Tennessee

Constitution. The trial court dismissed the lawsuit. The Court of Appeals affirmed the trial court's decision by saying (among other things):

[T]he Declaratory Judgment Act exists to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." T.C.A. § 29-14-113. Although the statute is to be liberally construed, *id.*, it is well settled that "certain limitations must be placed upon the operation of the statute." *Johnson City v. Caplan*, 194 Tenn. 496, 253 S.W.2d 725, 726 (Tenn. 1952). Several of these limitations were discussed by our Supreme Court in *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186 (Tenn. 2000), to wit:

[A] declaratory judgment action cannot be used by a court to decide a theoretical question, *Miller v. Miller*, 149 Tenn. 463, 261 S.W. 965, 972 (1924), render an advisory opinion which may help a party in another transaction, *Hodges v. Hamblen County*, 152 Tenn. 395, 277 S.W. 901, 902 (1925), or "allay fears as to what may occur in the future," *Super Flea Mkt.*, 677 S.W.2d 449 at 451. Thus, in order to maintain an action for a declaratory judgment a justiciable controversy must exist. *Jared v. Fitzgerald*, 183 Tenn. 682, 195 S.W.2d 1, 4 (1946). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake. *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913, 915 (1949). If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable. *Story v. Walker*, 218 Tenn. 605, 404 S.W.2d 803, 804 (1966). If the rule were otherwise, the "courts might well be projected into the limitless field of advisory opinions."

Id. at 193.

Id. at 39-40.

Comcast has the same problem here. The cable business of EPB has not started operating. EPB's limited Internet service does not use the new fiber optic network, which has not yet been finished. We do not know what will happen in the future. For example, EPB projects that it will be able to provide cable/Internet service to 35% of its electric customers. Comcast opines that EPB's share of the market will be less than 35%. Thus, if Comcast is correct, then EPB's funding from the cable/Internet Division will not be sufficient to pay its debt, at least at its projected rates, thus requiring the use of electric funds to cover the shortfall. Such "covering" of debt would violate the cross-subsidization provision and result in higher electric rates. However, we will not know the answer to the questions until EPB offers the services, customers accept or contract for the services, and revenues and expenses are counted.

The court concedes that Tenn. Code Ann. § 7-52-609, quoted above, uses the term "where the alleged violation is occurring or will occur." It is important that this phrase is contained in the sentence providing for jurisdiction and venue of the court. The court interprets the phrase to place venue in the chancery court where such a violation "is occurring or will occur." This phrase does not mean the court can decide declaratory judgments on hypothetical projections or theoretical arguments.

On Page 17 of EPB's Memorandum in Support of Its Motion to Dismiss, filed on May 15, 2007, EPB points to Comcast's use of the future tense of verbs used by Comcast in its Complaint. The court agrees that the issues presented by Comcast are not ripe for decision. They are theoretical, contingent and speculative. The court's view in this regard can be seen

by a quote from page 12 of Comcast's Memorandum of Law in response to EPB's Motion to Dismiss or Stay, which was filed on June 4, 2007. "[I]f EPB uses electric revenues to subsidize its cable/Interest venture, as averred, its electric customers will pay the cost of the subsidy in the form of higher rates." [Emphasis added.] The same "if" word is also above, in the first full paragraph on page 12.

As indicated above, Comcast relies upon standards governing motions to dismiss. The standard of review for a motion to dismiss has been discussed many times. For example, Judge Swiney wrote the following in *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999):

Our standard of review of a trial court's decision on a motion to dismiss under Rules 12.02(6) and 12.03, T.R.C.P. is well-settled. We are to construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. Our review of the lower court's legal conclusions is *de novo* with no presumption of correctness. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997).

Further, the following was stated in *Dobbs v. Guenther*, 846 S.W.2d 270 (Tenn. Ct. App. 1992):

While it is not our role to create claims where none exist, *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977), we must always look to the substance of a pleading rather than to its form. *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977). Thus, when a complaint is tested by a Tenn. R. Civ. P. 12.02(6) motion to dismiss, we must take all the well-pleaded, material factual allegations as true, [n.4] and we must construe the complaint liberally in the plaintiff's favor. [Citations omitted.]

n.4 We are not required to consider factual inferences or legal conclusions as true. *Elliott v. Dollar Gen. Corp.*, 225 Tenn. 658, 664, 475 S.W.2d 651, 653 (1971).

Id. at 273.

The term “fact” is first defined in Black’s Law Dictionary, Eighth ed. (2004) at 628, as “something that actually exists; an aspect of reality.” The main problem with Comcast’s arguments on the standard is a lack of present “facts.” Thus, the allegation that future events may occur is not a fact. The rules do not require the court to accept all allegations and legal assertions as true. The court should not treat an allegation as a present fact, *i.e.*, deemed to be presently true. Thus, the liberality of the standard does not stretch enough to avoid the rule of law discussed above, which govern declaratory judgment actions.

It would be inconsequential for this court to order EPB to follow the law. EPB is already under a duty to follow the law. Therefore, the court refuses to enter a declaratory judgment pursuant to the terms of Tenn. Code Ann. § 29-14-109.

D. The TVA Preemption Argument.

EPB’s third and final argument in support of its Motion to Dismiss is the preemption argument. EPB is a party to a Power Contract with TVA. The power contract was dated January 17, 1989, and is between TVA and the City of Chattanooga, through the EPB. Because TVA regulates the sale of electricity to EPB and the funds EPB receives from its sale of electricity, EPB argues that this court has no power to review, modify or change the terms of any TVA-EPB agreement.

The purpose of the Power Contract is set forth in the first-numbered provision of the 1989 document, as follows:

1. Purpose of Contract. It is hereby recognized and declared that, pursuant to the obligations imposed by the TVA Act, Municipality's operation of a municipal electric system and TVA's wholesale service thereto are development of the fullest and widest use of electricity at the lowest possible cost. Toward that end, Municipality agrees that the electric system shall be operated on a nonprofit basis, and that electric system funds and accounts shall not be mingled with other funds or accounts of Municipality. Municipality may, as hereinafter provided, receive from the operation thereof for the benefit of its general funds only an amount in lieu of taxes representing a fair share of the cost of government properly to be borne by such system. In accordance with these principles, which are mutually recognized as of the essence of this contract, Municipality agrees that the electric system shall be operated and the system's financial accounts and affairs shall be maintained in full and strict accordance with the provisions of this contract.

Thus, EPB contends that EPB is bound by the terms of the TVA Power Contract and that Tennessee law and this court cannot vary or void the terms of the original Power Contract or any amendments thereto.

The Power Contract also regulates EPB's use of the money it receives from the sale of electricity. Paragraph 6 of the Power Contract provides:

6. Use of Revenues.

(a) Municipality agrees to use the gross revenues from electric operations for the following purposes:

(1) Current electric system operating expenses, including salaries, wages, cost of materials and supplies, power at wholesale, and insurance;

(2) Current payments of interest on System Indebtedness, and the payment of principal amounts, including sinking fund payments, when due;

(3) From any remaining revenues, reasonable reserves for renewals, replacements, and contingencies; and cash working capital adequate to cover operating expenses for a reasonable number of weeks; and

(4) From any revenues then remaining, payments in lieu of taxes, as more particularly provided in section 2 of the Schedule of Terms and Conditions hereinafter referred to.

(b) All revenues remaining over and above the requirements described in subsection (a) of this section shall be considered surplus revenues and may be used for new electric system construction or the retirement of System Indebtedness prior to maturity provided, however, that resale rates and charges shall be reduced from time to time to the lowest practicable levels considering such factors as future circumstances affecting the probable level of earnings, the need or desirability of financing a reasonable share of new construction from such surplus revenues, and fluctuations in debt service requirement....

A copy of the Power Contract is Exhibit I to EPB's Motion to Dismiss.

EPB's basic plan was discussed with TVA. Then TVA, in a letter dated February 15, 2008, from Kenneth R. Breeden, Executive Vice President of TVA, to L. Joe Ferguson, Chairman of EPB, set forth the specific understanding and agreement between TVA and the EPB. This "Agreement" is the essence of EPB's plan:

It is understood and agreed that:

1. Fiber Optic Network. EPB intends to deploy a fiber optic network in the EPB service area, which will be funded by an electric system capital investment consisting of approximately \$169 million in Electric Division bonds to be backed by revenues of the Electric Division. As set forth in section 10 of EPB's "Business Plan For Providing Fiber To The Home," as supplemented by a further EPB study provided by EPB to TVA in October of 2007, EPB is making such an investment in the fiber optic network for the express electric system purpose of implementing an Advanced Distribution Automation (ADA) infrastructure within the EPB service area. The implementation of such ADA infrastructure will provide a direct and substantial benefit to the Electric Division, and accordingly such investment is consistent with the requirements of the wholesale power contract.

2. Joint Use. EPB's business plan for the Communications Services Division anticipates that the fiber optic network will also be used to provide video, Internet, telephone, and similar services to EPB's customers. The Communications Services Division's anticipated joint use of the fiber optic network with the Electric Division is expected to reduce the Electric Division's total costs for such ADA infrastructure. (It is recognized that the EPB Communications Service Division will have two financially discrete divisions – the Cable and Internet Division and the Telecommunications Division.)

3. Joint Use Contract Standard. Such joint use is authorized by and subject to the terms of section 1(a) of the Schedule of Terms and Conditions of the wholesale power supply contract entered into by TVA and the City of

Chattanooga, Tennessee, acting by and through the Electric Power Board of Chattanooga, on January 17, 1989, which provides in part:

In the interest of efficiency and economy, Municipality may use property and personnel jointly for the electric system and other operation, subject to Agreement between Municipality and TVA as to appropriate allocations, based on direction of effort, relative use, or similar standards, of any and all joint investments, salaries and other expenses, funds, or use of property or facilities.

4. Allocation of Fiber Optic Network Costs. In connection with the joint use of the fiber optic network, EPB will allocate annual operating costs on a usage based method that allocates costs among its various Divisions according to the number of customers of each Division that receive services over the fiber optic network. A more detailed description of the allocation methodology is attached as Exhibit A. In addition to the costs that will be allocated to the Communications Services Division, EPB expects that, upon maturity of the business plan for the Communications Services Division, the Communications Services Division will make additional payments to the Electric Division in the form of supplemental customer charges. While not required from a cost allocation standpoint, EPB expects that these customer charges will further reduce the Electric Division's cost of ownership of the fiber optic network, thereby further benefiting customers of the Electric Division....

This letter agreement goes further to describe other allocation of costs, records, and other details of the proposed use by the Cable and Internet Division of the Electric Division's fiber optic network. This letter agreement is Exhibit J to EPB's Motion to Dismiss. Indeed, EPB's Cost Allocation overview is set forth as Exhibit A to the letter. Exhibit J was signed by Mr. Ferguson on behalf of EPB.

Because of its intention with regard to the proposed cable/Internet venture, it was necessary for EPB to amend and modify the terms of the Power Contract. EPB's discussions led to TVA-EPB's supplement to the Power Contract, as set forth in (another) TVA letter dated February 15, 2008. The relevant portions of the letter, which was accepted by and agreed to by the EPB and the City of Chattanooga, are as follows:

EPB and Municipality have represented to TVA that:

- A. The Electric Division retains a portion of the revenues collected under the resale rates and charges provided for by the Power Contract as "reasonable reserves for renewals, replacements, and contingencies" in accordance with the provisions of section 6(a)(3) of the Power Contract.
- B. The Electric Division wishes to invest a portion of such retained funds (Reserve Funds) by making interdivision loans to the Cable and Internet Division, and the Electric Division expects to financially benefit from such loans.
- C. More specifically, these funds will be used to make loans from the

Electric Division to the Cable and Internet Division not to exceed an aggregate interdivision loan amount of Sixty Million Dollars (\$60,000.00) to be used for capital expenditures and for working capital for the Cable and Internet Division.

- D. The General Assembly of the State of Tennessee enacted Tennessee Code Annotated, Title 7, Chapter 52, Part 6, which authorizes municipal electric plants to own and operate cable and Internet plant and to provide cable and Internet services. Under this part, the Electric Division is authorized to lend funds to the Cable and Internet Division.
- E. Any such interdivision loan will only be made subject to and in accordance with the terms and conditions set forth in the numbered paragraphs 1 through 6 below.

Based on the above assurance by EPB and Municipality, this TVA letter, when accepted and agreed to by EPB and Municipality as provided below, shall confirm TVA's agreement that said loans will be consistent with the obligations of EPB and Municipality under the Power Contract.

TVA and Municipality hereby agree that:

- 1. EPB may make a loan or loans from the Electric Division of funds not to exceed an aggregate amount of up to Sixty Million Dollars (\$60,000,000) to the Cable and Internet Division provided, however, that the Electric Division shall have no obligation or responsibility to make or keep any funds available for this purpose. The date on which the Electric Division

makes any such loan shall be the "Initial Date" of the loan.

2. Principal and interest shall be paid in annual installments due on August 15 of each year (Annual Payment Date) as further provided for below in this section and in sections 3 through 5 below. EPB shall cause its Cable and Internet Division to pay to its Electric Division interest accruing on any such loan at the rate applicable under section 3 below. Interest on any such loan shall be paid annually in arrears to the Electric Division and shall be calculated on the basis of a 360 day year of twelve 30 days months, with any interest for a period of less than one year being calculated on a prorated basis. Such interest payments will include any interest accrued from and including the later of (a) the Initial Date of the loan or (b) the preceding interest payment date. Beginning 18 months after the Initial Date of each loan, EPB shall further cause its Cable and Internet Division to amortize the principal amount of the loan over the remaining term of each loan. The amount of such principal amortization will be included in all annual repayments beginning on the first Annual Payment Date falling at least 548 days after the Initial Date of each loan until such time as any such loan is fully repaid; provided, however, that the Cable and Internet Division shall complete repaying the Electric Division the principal amounts, together with all accrued and unpaid interest, in a term ending no later than August 15, 2028....

Other terms and conditions are set forth in the remaining paragraphs 3 through 6. This letter is Exhibit K to EPB's Motion to Dismiss. This letter was signed by Mr. Ferguson for EPB and Mayor Littlefield for the City of Chattanooga.

EPB asserts that the Power Contract and the supplemental agreements of February 15, 2008, effectively remove Comcast's theoretical issues from this court's jurisdiction under the preemption doctrine. Because TVA is a federal agency created under national law, state courts cannot consider, modify or undo contracts made by TVA regarding electricity and other related issues. Congress granted to TVA the right to determine the rates, as well as the terms and conditions associated with TVA's sale of electricity to third parties. Thus, according to the EPB, TVA's determination and acceptance of EPB's plan, for the fiber network, inter-division loan and allocation method is not subject to judicial review by this court.

Comcast argues the contrary point. State law has not been preempted.

This is a very interesting point of law. However, the court agrees with EPB that the court cannot second guess, review or modify the TVA-EPB agreements. Basically, the 2008 supplementary agreements appear to be the same as the general provisions of the Tennessee statutes and prior regulatory decisions.

The court bases its conclusion on *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399 (6th Cir. 2006). In that case, the Sixth Circuit said and held:

[T]he TVA Act authorizes the TVA to enter into contracts to sell its surplus power, and the Act provides that: "the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may

be necessary or desirable for carrying out the purpose of this chapter." 16 U.S.C. § 831i. Courts have acknowledged that "the TVA Act accords the TVA a great amount of discretion in its contractual relations with municipalities." *Matthews, 1991, U.S. App. LEXIS 9453, 1991 WL 71414, at *3*. The TVA acted within the scope of its authority under the TVA Act in entering into contracts with the Cooperatives. The contractual provisions that prevent the Cooperatives from distributing patronage refunds were created within the TVA's authority to set "resale rate schedules" pursuant to § 831i, because "determinations about the level of rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, . . . are part of TVA's unreviewable rate-making responsibilities." *4-County, 930 F. Supp. at 1138; see also Carborundum Co., 521 F. Supp. at 594* (holding that a contractual "minimum bill provision" was "simply an integral portion of the rates which TVA has fixed, pursuant to express congressional authority"). To the extent that Tennessee law imposes additional constraints on the TVA's authority, it is preempted by the TVA Act's express grant of discretion and the APA's prohibition on judicial review. *See Millsaps v. Thompson, 259 F.3d 535, 538 (6th Cir. 2001)* ("[F]ederal law preempts state law when the two actually conflict."). We thus decline to review any of the plaintiffs' challenges to the contractual term prohibiting the distribution of patronage refunds.

Our decision not to review the TVA's contract also extends to the Cooperatives' enforcement of that contract. *See Allen v. Elec. Power Bd., 422 F. Supp. 4, 6 (M.D. Tenn. 1976)* ("By parity of reasoning, the imposition of the rate adjustment schedules by TVA's distributors pursuant to their contracts with TVA are likewise not reviewable."). Federal law preempts Tennessee law on this point as well. *See Millsaps, 259 F.3d at 538* (stating that federal law preempts state law "when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*))). If we were to review the Cooperatives' actions in enforcing the contract, we would still be reviewing the TVA's actions and thus ignoring the APA's prohibition on judicial review.

Id. at 406-407

It seems to the court that TVA controls the sale of electricity to EPB and the use of electric revenues realized by the TVA. Because TVA has approved, for example, EPB's proposed allocation of costs based upon the number of customers in each division that use the fiber network, the court does not believe that it can second-guess TVA's approval and order EPB to adopt a different method of allocating costs, notwithstanding Comcast's attack on the basis for allocation and the allocation method itself.

Further, as required by Tenn. Code Ann. § 7-52-602(1), EPB submitted its Fiber Optic Broadband Business Plan to the Comptroller of the Treasury on August 17, 2007. This document was marked Exhibit F to EPB's Motion to Dismiss. EPB discussed the capital requirements on pages 11 and 12 of such submission. On page 12, EPB discussed its plan to pay the Electric Division for cable/Internet use. EPB described the method as "[s]preading the cost of owning and operating the network across all of the services that are using the joint use network on a per service basis." EPB estimated that the Electric Division's use will be 82% and the other divisions of EPB an 18% of total use. EPB asserts it cannot know the actual figure until the business is operational. Comcast, alleging that the fiber optic network's installation is a ruse, thinks much more (if not all) of the fiber network should be paid by the Cable and Internet Division.

David L. Bowling, director of the Division of Local Finance, Comptroller of the Treasury, responded to EPB and Chattanooga on August 21, 2007. An analysis of EPB's proposed plan was set forth in this letter. The letter also mentions "several additional items"

if EPB went forward with its plan. Part c set forth the prohibition that the electric system could :

[n]ot subsidize the activities of the telecommunications program by using revenues of its power or other utility operations. The only authority to use electric system funds is through the lending of funds on a temporary basis by the electric system. Such loans may be made to provide funds to meet working capital requirements and well as for capital improvements. The electric system must charge interest to the telecommunications program for any loans at a rate equal to the highest rate then earned by the electric system on its invested plant funds.

The Comptroller's office did not object to EPB's proposed allocation method. The August 21, 2007, response from Mr. Bowling is marked Exhibit G to EPB's Motion to Dismiss.

E. Miscellaneous.

In its brief Comcast argues that the court should give credence to its claim that EPB's Electric Division will be guilty of cross-subsidization because, Comcast charges, EPB's telephone division has not been profitable and has been "carried" by EPB. This issue was not pleaded in Comcast's Complaint. Such an argument is not on point as to the legality of EPB's plan, proposed loan, etc.

Tennessee Code Annotated § 7-52-602 requires a municipal electric supplier to do many things before it can offer cable/Internet services to the public. EPB has met all of the requirements mandated by the General Assembly, including a vote of the plan by the Chattanooga City Council.

IV. THE CONCLUSION

Based upon the foregoing, it is **ORDERED, ADJUDGED and DECREED:**

1. EPB's Motion to Dismiss is granted;
2. The Complaint filed by Comcast is dismissed; and
3. The Clerk's costs are adjudged against Comcast, for which execution may enter.

ENTER:



CHANCELLOR - PART 1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Memorandum

Opinion and Order has been sent by e-mail to each person listed below:

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This the 11th day of July, 2008.

S. Lee Akers, Clerk and Master

By: SA LN
Deputy Clerk and Master