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Opinion No. 02-060

Appointment and Confirmation of Tennessee Regulatory Authority Directors

## QUESTIONS

1. If the Tennessee Regulatory Authority's current directors are not reappointed, and if there are no new appointments to the director positions, who would be responsible for executing the duties of the Tennessee Regulatory Authority?

2. If no reappointments or new appointments are made, what would be the next opportunity for the General Assembly to confirm appointments?

## OPINIONS

1. If the TRA's current directors are not reappointed, and if no new director appointments are made, the current directors will continue to hold their offices and to exercise their powers and perform their duties until their successors are duly appointed and confirmed.

2. If no reappointments or new appointments are made, the current directors will continue to hold their offices until appointments for the new terms of office are confirmed by the General Assembly. If one of the current directors refuses to continue in office, however, thereby creating a vacancy, the appointing authority may fill the vacancy by appointment. If the General Assembly is in session when the vacancy occurs, the new appointment must be confirmed in the same manner as the original appointment. If the General Assembly is not in session when the vacancy occurs, the appointee may serve until the General Assembly reconvenes and votes on confirmation of the appointment.

## ANALYSIS

In 1995, the General Assembly created the Tennessee Regulatory Authority (TRA) by enacting the following statute:

> (a) There is created the Tennessee regulatory authority consisting of three (3) directors to be appointed by the governor, the speaker of the senate and the speaker of the house of representatives.
>
> (b) The directors of the authority shall be state officers and shall serve for six-year terms.
>
> (c) No later than March 1, 1996, and every March 1 prior to the expiration of the terms of office of the directors thereafter, the governor, the speaker of the senate and the speaker of the house of representatives shall each appoint one (1) director of the authority.
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> (d) All such appointments shall be confirmed by joint resolution adopted by each house of the general assembly prior to the commencement of the term of office to which such director is appointed.
>
> (e) Any vacancy on the authority shall be filled by appointment by the original appointing authority for such position to serve the unexpired term and such appointment shall be confirmed in the same manner as the original appointment. However, if the general assembly is not in session and a vacancy occurs, the appropriate appointing authority shall fill such vacancy by appointment and the appointee to such vacancy shall serve the unexpired term unless such appointment is not confirmed within thirty (30) days after the general assembly convenes following the appointment to fill such vacancy.
>
> (f) The term of office of each director shall commence on July 1 following such director's appointment.

Tenn. Code Ann. § 65-1-201 (Supp. 2001).

As set forth in the statute, the TRA consists of three directors who serve concurrent six-year terms and are considered "state officers." *See* Tenn. Code Ann. § 65-1-201(a), (b) (Supp. 2001). The Governor, the Speaker of the Senate, and the Speaker of the House of Representatives are each responsible for appointing one director of the TRA. *See* Tenn. Code Ann. § 65-1-201(a), (c) (Supp. 2001). These appointments are subject to confirmation by the General Assembly by joint resolution. *See* Tenn. Code Ann. § 65-1-201(d) (Supp. 2001).

As a general rule, the individual responsible for making an appointment, *i.e.* the Governor, the Speaker of the Senate, or the Speaker of the House of Representatives, makes the appointment for a new term by March 1 prior to the July 1 expiration of the current director's term. *See* Tenn. Code Ann. § 65-1-201(c) (Supp. 2001). Before the appointee takes office, the General Assembly must confirm the appointment by joint resolution adopted by each house. *See* Tenn. Code Ann. § 65-1-201(d) (Supp. 2001).

A somewhat different procedure applies if a vacancy occurs at any time during a director's term when the General Assembly is not in session. In that event, the individual responsible for making the appointment may immediately fill the vacancy by appointing a replacement. *See* Tenn. Code Ann. § 65-1-201(e) (Supp. 2001). The appointee serves the remainder of the director's unexpired term, unless the General Assembly fails to confirm the appointment within thirty days after it reconvenes. *Id*.

House Bill 2953 proposes to amend existing law by instituting staggered six-year terms for TRA directors. As introduced, the bill provides that

> (d) In order to stagger the terms of directors, the terms of directors appointed prior to March 1, 2002 to commence terms of office on July 1, 2002 shall expire as follows:
>
> (1) The term of the director appointed by the governor shall expire on June 30, 2004;
>
> (2) The term of the director appointed by the speaker of the senate shall expire on June 30, 2006;
>
> (3) The term of the director appointed by the speaker of the house of representatives shall expire on June 30, 2008.

H.R. 2953, 102d Gen. Assembly, 2d Reg. Sess. (Tenn. 2002).

Your request addresses the consequences of a failure to reappoint the current TRA directors or to appoint new directors. As "state officers," *see* Tenn. Code Ann. § 65-1-201(b) (Supp. 2001), TRA directors are subject to the provisions of Article VII, Section 5 of the Tennessee Constitution. *See generally* Tenn. Att'y Gen. Op. No. 84-080 (Mar. 7, 1984) (opining that commissioners of utility district created pursuant to state statute are "officers" subject to the provisions of Tenn. Const. art. VII, § 5). This constitutional provision requires that "[e]very officer shall hold his office until his successor is elected or appointed, and qualified." Tenn. Const. art. VII, § 5.

The Tennessee Supreme Court has held that, pursuant to this provision, "an incumbent shall, at the end of his term, continue to hold the office and exercise its powers and perform its duties until his successor has been duly appointed and qualified." *State ex rel. Gann v. Malone*, 131 Tenn. 149, 158-59, 174 S.W. 257, 260 (1915). When an incumbent holds over "until his successor has been appointed and qualified, there is no vacancy in the office at the expiration of the fixed term." *Id.* at 159; 174 S.W. at 260. Rather, the incumbent continues in office "under a provisional tenure, as a temporary officer." *State ex rel. Carey v. Bratton*, 148 Tenn. 174, 182, 253 S.W. 705, 707 (1923). The office is not considered vacant "so long as it is filled by a person in legitimate exercise of its functions." *Id*. at 181; 253 S.W. at 707.

In accordance with the foregoing authorities, if the TRA's current directors are not reappointed, and if no new director appointments are made, the current directors will continue to hold their offices and to exercise their powers and perform their duties until their successors are duly appointed and confirmed.

The expiration of the current directors' fixed terms will not result in vacancies in their offices. Instead, the current directors will continue in office as temporary officers under provisional tenures.

The Governor and the Speakers are responsible for appointing TRA directors, but such appointments are subject to confirmation by the General Assembly. *See* Tenn. Code Ann. § 65-1-201(a), (c), (d) (Supp. 2001). At the beginning of a new term, appointees to TRA director positions may not take office until the General Assembly adopts a joint resolution confirming their appointments. *See* Tenn. Code Ann. § 65-1-201(d), (e) (Supp. 2001). If the General Assembly fails to confirm the appointments by July 1, the current directors will continue in office until their successors are duly appointed and confirmed. If the General Assembly fails to confirm the new appointments before it adjourns, the General Assembly will not have another opportunity to vote on confirmation of appointments until it reconvenes. During the interim period, and until the appointments for the new term are made and confirmed, the current directors will continue in office.

Of course, a true vacancy might occur in the office of TRA director. For example, a vacancy could occur if one of the current directors refuses to continue in office as a holdover director pending confirmation of a new appointment. *See* Tenn. Code Ann. § 8-48-101 (1993) (listing events that may cause vacancy in state office, including, among other reasons, the incumbent's death, resignation, non-residency, incarceration, or insanity). If such a vacancy occurs by resignation, death, or other cause while the General Assembly is in session, the appointing authority must make a new appointment, but the appointee may not take office until confirmed by the General Assembly. If the General Assembly is not in session, the appointing authority may fill the director position by making a new appointment without seeking the General Assembly's prior confirmation. *See* Tenn. Code Ann. § 65-1-201(e) (Supp. 2001). The new appointee serves the remainder of the unexpired term, or at least until the General Assembly reconvenes. *Id*. If the General Assembly confirms the appointment within thirty days after it reconvenes, the new appointee serves the remainder of the unexpired term. *Id*. On the other hand, if the General Assembly fails to confirm the appointment within thirty days, the appointee does not continue to serve, and the appointing authority must again make an appointment for confirmation by the General Assembly.

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