S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

March 12, 2012

Opinion No. 12-34

Authority of Municipal Electric Boards to Provide Telecommunications Services

QUESTION

Do Tenn. Code Ann. §§ 7-52-401 to -611 authorize an electric power board to provide telecommunications services, and to borrow money from a financial institution and pledge property that is not utilized to provide electric power as security for a debt incurred to provide telecommunications services?

OPINION

An electric power board may exercise powers with regard to telecommunications services – including borrowing money and pledging assets as security – if the legislative body of the city, county, or metropolitan government on whose behalf the power board was created has authorized it to do so, and the board's action is subject to any limitations contained in that authorization.

ANALYSIS

This opinion concerns the scope of an electric power board's authority under Chapter 531 of the Public Acts of 1997 ("1997 Act"), now codified at Tenn. Code Ann. §§ 7-52-401 to -611. Section 7-52-401 authorizes a municipality to offer telecommunications services through an electric board it operates, stating in relevant part:

> Every *municipality* operating an electric plant, whether pursuant to this chapter, any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality *acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant*, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality, in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and

> regulations. *A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant.* A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant and equipment used to provide such services except upon compliance with the procedures set forth in § 7-52-132.

Tenn. Code Ann. § 7-52-401 (emphasis added). Section 7-52-402 generally prohibits the municipality from providing subsidies for the services authorized by Tenn. Code Ann. § 7-52-401, stating:

> A *municipality* providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services. Notwithstanding that limitation, a municipality providing such services shall be authorized to:
>
> (1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and
>
> (2) Lend funds, at a rate of interest not less than the highest rate then earned by the municipality 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 authorized under § 7-52-401; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes. Any loan of funds made pursuant to this section shall be approved in advance by the comptroller of the treasury or the comptroller's designee and shall contain such provisions as are required by the comptroller of the treasury or the comptroller's designee.

Tenn. Code Ann. § 7-52-402 (emphasis added). Finally Section 7-52-403(a) defines the power and obligations granted to a municipality furnishing telecommunications services, stating:

> To the extent that it provides any of the services authorized by § 7-52-401, *a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee.* To the extent that such authority and powers do not conflict with title 65, chapter 4 or 5, and any rules, regulations, or orders issued under title 65, chapter 4 or 5, a municipality providing any of the services authorized by § 7-52-401 has all the authority and powers with respect to such services as are enumerated in this chapter.

Tenn. Code Ann. § 7-52-403(a) (emphasis added).

Thus, it is clear these statutes grant a "municipality" the broad authority to provide telecommunications services. A "municipality" is defined under Tennessee law as follows:

> As used in this part, unless the context otherwise requires:

* * * *

> (10) "Municipality" means any county, metropolitan government, incorporated city or town in the state of Tennessee.

Tenn. Code Ann. § 7-52-102(10).

The statutory scheme related to the provision of telecommunications services at Tenn. Code Ann. §§ 7-52-401 to -611 primarily addresses the powers and actions of a "municipality" to provide such services. *See* Tenn. Code Ann. § 7-52-402 (municipality may not subsidize telecommunications services); Tenn. Code Ann. § 7-52-403(a) (municipality has powers, obligations and authority granted other entities providing telecommunications services); Tenn. Code Ann. § 7-52-404 (municipality shall make tax equivalent payments); Tenn. Code Ann. § 7-52-405 (municipality must allocate certain service costs); Tenn. Code Ann. § 7-52-406(a) (statute does not permit municipality to provide services for which a license is required under Title 62, Chapter 32, Part 3). There are three exceptions in these statutes that refer to an entity other than a municipality. First, under Tenn. Code Ann. § 7-52-401, every "municipality" operating an electric plant is authorized "on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant" to, among other actions, "mortgage, pledge or otherwise dispose of any system" for the provision of telecommunications services. The same statute also states that "[a] municipality shall only be authorized to provide . . . telecommunications services *through* its board or supervisory body having responsibility for the municipality's electric plant." (emphasis added). Second, Section 7-52-403(b) provides:

> Notwithstanding the authorization granted in subsection (a), *a municipal electric system* shall not provide any of the services authorized by § 7-52-401 unrelated to its electric services within the service area of an existing telephone cooperative with fewer than one hundred thousand (100,000) total lines organized and operating under title 65, chapter 29, and therefore shall adhere to those regulations of the 1995 Tennessee Telecommunications Act and rules of the Tennessee regulatory authority that are applicable to the telephone cooperatives, and specifically, §§ 65-4-101 and 65-29-130.

Tenn. Code Ann. § 7-52-403(b) (emphasis added). Third, Section 7-52-406(b) states:

> Nothing in this part and § 7-52-102(10) or § 7-52-117(d), as amended by chapter 531 of the Public Acts of 1997, or any private act, charter, metropolitan charter, or amendments to any private act, charter or metropolitan charter, shall allow a *municipality, county, metropolitan government, department, board or other entity of local government* to provide any service for which a license, certification, or registration is required under title 62, chapter 32, part 3 or to provide pager service.

Tenn. Code Ann. § 7-52-406(b) (emphasis added). This subsection was not in the original 1997 Act, but was added in 1999. 1999 Tenn. Pub. Acts Ch. 481, § 4.

While these statutes contemplate that a municipality offering telecommunications services will provide those services through the board that supervises the municipal electric plant, they do not expressly empower such board to act on behalf of the municipality without first having gained its authorization. Thus, the legislative body of the city, county, or metropolitan government must authorize the board or other supervisory body operating the electric system to exercise any of the powers enumerated in Tenn. Code Ann. §§ 7-52-401 to -611. This includes any of the powers granted under Tenn. Code Ann. § 7-52-403(a).

The legislative history of the 1997 Act confirms this conclusion. Representative Kisber was one of the House sponsors of the 1997 Act. On May 19, 1997, the House approved an amendment that rewrote the bill. This amendment provided that "[e]very municipality operating an electric plant . . . has the power, and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant" to form and operate a business corporation to provide telecommunications services. Tenn. H. Journal, 100th General Assembly, pp. 1482-83 (1997).[1] In discussing this version of the bill, Representative Kisber stated:

> Let me use my home town. *The city of Jackson, the electric company would have to go to the city council. The city council would have to pass an ordinance to allow, would have to have public hearings and go through all those procedures and then they would be able to proceed within the corporate structure of setting up whatever kind of operation.* In my community, we've had problems in the past and I hope they've been worked out, where we had very poor cable TV service. I think there were probably ten percent of the people who liked what they got and were thinking they were paying a reasonable fee. They went to the city and wanted something done about it, but the city's hands were tied. Under the deregulation that the federal government has now allowed, if this act passes, it opens up opportunities for them to joint venture, which I think would be the most likely scenario, with other private sector companies to create advanced services that could then benefit consumers, and as I said earlier, competition ends up breeding a market, and the consumer benefits.

House Session. 100th General Assembly, Tape H-75 (May 19, 1997) (remarks of Representative Kisber) (emphasis added). The House, therefore, intended the phrase "is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant" to mean that the legislative body of the municipality would have to authorize the board or supervisory body operating the electric plant to provide telecommunications services.

The Senate extensively amended the bill. *See* Tenn. S. Journal, 100th General Assembly, pp. 1356-58; 1469-74 (1997). Nonetheless, the final version still retained the language that the "municipality" is authorized to act "through the authorization of the board or supervisory body

[1] This publication is available at http://www.capitol.tn.gov/house/archives/100GA/Publications/JournalArchive.htm.

having responsibility for the municipal electric plant" to provide telecommunications services. *Id.* Further, on May 26, 1997, the Senate added the following language to Section 2:

> A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant.

This sentence is now the second sentence of Tenn. Code Ann. § 7-52-401. Senator Gilbert, who proposed the amendment, explained it as follows:

> This amendment makes it clear that a *municipality that is going to engage in telephone, telegraph or telecommunications services* must do so through its board or supervisory body having responsibility for the municipality's electric plant. And with that explanation I move its adoption.

Senate Session, 100th General Assembly, Tape S-92 (May 26, 1997) (remarks of Senator Gilbert) (emphasis added).

Thus, the General Assembly intended that the decision to engage in telecommunications services would be made by the legislative body of the city, county, or metropolitan government, not by the supervisory board responsible for the system. For all these reasons, an electric power board may exercise any of the powers with regard to telecommunications services – including borrowing money and pledging assets as security – if the legislative body of the city, county, or metropolitan government on whose behalf it was created has authorized it to do so, and its action is subject to any limitations contained in that authorization.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

The Honorable Gerald McCormick
State Representative
18A Legislative Plaza
Nashville, Tennessee 37243-0126