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

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Opinion No. 12-71

Tennessee Regulatory Authority

QUESTIONS

1. Is the Tennessee Regulatory Authority ("TRA") a self-perpetuating legal entity, or do the extensive changes to the TRA's authority under Chapter 1070 of 2012 Tennessee Public Acts ("Chapter 1070") equate to the creation of an entirely new Authority?

2. Is the confirmation of each director by the General Assembly required by Chapter 1070 as a condition which must be met prior to serving as a TRA director?

3. Are the directors described in Tenn. Code Ann. § 65-1-101(h)(2) & (3), as amended by Chapter 1070 effective July 1, 2012, considered new appointments and, if so, could these positions be filled as vacancies pursuant to Tenn. Code Ann. § 65-1-101(g)? If the positions cannot be filled as vacancies, how would this impact any decisions the directors render between July 1, 2012, and January 2013?

4. If the positions can be filled as vacancies, and the directors described in Tenn. Code Ann. § 65-1-101(h)(2) & (3) are not confirmed by the General Assembly when they go back into session, would the decisions the directors render between July 1, 2012, and January 2013 be subject to challenge?

OPINIONS

1. The TRA, first created by 1995 Tenn. Pub. Acts, ch. 305, was not abolished by 2012 Tenn. Pub. Acts, ch. 1070, and is thus a continuing legal entity of Tennessee government.

2. No. Confirmation by the General Assembly is not required for the two current TRA directors whose terms continue until June 30, 2014. A director appointed after Chapter 1070 takes effect will begin service of his or her term upon appointment but ultimately must be confirmed within thirty days of appointment or, if the General Assembly is not in session at that time, within thirty days after the General Assembly convenes following the appointment.

3. The director position described in Tenn. Code Ann. § 65-1-101(h)(2) is not new. Because the position is currently vacant, it will be filled as a vacancy. The positions described in Tenn. Code Ann. § 65-1-101(h)(3) are new positions and thus must be filled as vacancies. Because all positions described in Tenn. Code Ann. § 65-1-101(h)(2) and (3) will be filled as

vacancies, confirmation will be required for those appointees. Decisions made between July 1, 2012, and January 2013 by any directors properly appointed after July 1, 2012, will be valid. Such decisions will not be subject to challenge solely on the basis that a director appointed and serving between July 1, 2012, and January 2013 was appointed subject to confirmation after the General Assembly convenes in January 2013, even if such a director fails to be confirmed.

4. The decisions made by any director properly appointed between July 1, 2012, and January 2013 will not be subject to a legal challenge based solely on the director's authority to hold office.

ANALYSIS

1. & 2. In 1995 the General Assembly abolished the Tennessee Public Service Commission and created the Tennessee Regulatory Authority to assume many of the Commission's functions. *See* 1995 Tenn. Pub. Acts, ch. 305. The TRA originally had three directors appointed individually by the Governor, the Speaker of the Senate, and the Speaker of the House of Representatives. *Id.* §§ 4 & 5.

In 2002 the General Assembly amended the TRA's originating statute to add a fourth director appointed jointly by the Governor and the two Speakers. 2002 Tenn. Pub. Acts, ch. 826. Unlike the 1995 legislation, which clearly indicated that the old Public Service Commission was being abolished, the 2002 legislation did not abolish the original TRA and create a new agency.

In 2012, the General Assembly enacted Chapter 1070, which became effective on July 1, 2012. 2012 Tenn. Pub. Acts, ch. 1070. This enactment makes substantial changes in the composition, compensation, qualifications, and duties of the TRA directors. *Id.*

Like the 2002 legislation, this enactment does not indicate any intent by the General Assembly to abolish the existing TRA and create a new agency; rather Chapter 1070 reconstitutes the method of appointment of the directors, creates an executive director of the TRA, and requires the filing of an annual report by the TRA with certain designated legislative and executive officials. *See id.* §§ 1-11. Nor does Chapter 1070 change the key duties performed by the TRA, which remain essentially the same as before passage of Chapter 1070. *See* Tenn. Code Ann. § 65-1-113.

Chapter 1070 added Tenn. Code Ann. § 65-1-101(h), which establishes the terms of the five part-time directors who will head the TRA after July 1, 2012. 2012 Tenn. Pub. Acts, ch. 1070, § 1. Subsections (h)(1) and (2) declare that the existing directors appointed by the two Speakers and the Governor will continue to serve as two of the five part-time directors until June 30, 3014, which is a further indication that the previously-constituted TRA will continue to exist. *Id.* Subsection (h)(3) provides for the terms for the two directors who will be appointed jointly by the Governor and Speakers. *Id.* The single jointly-appointed director position that existed under the 2002 law is currently vacant. Tennessee Regulatory Authority Organization Structure, *located at* http://www.tn.gov/tra/TRAorgchart.pdf (last visited June 27, 2012) (hereinafter "TRA

Structure"). The new law indicates that the two positions to be appointed jointly are to be considered entirely new, given they are referred to not as "existing" directors but rather as directors with "terms commencing on July 1, 2012." 2012 Tenn. Pub. Acts, ch. 1070, § 1. *See also* Tenn. Code Ann. § 65-1-101(h)(3).

In sum, currently two directors are in office — a director appointed in 2008 by the Speaker of the House and a director appointed in 2009 by the Speaker of the Senate to complete the unexpired term of a director appointed in 2008. Tenn. Regulatory Authority Leadership, *located at* http://www.tn.gov/tra/leadership.shtml (last visited June 27, 2012). Tenn. Code Ann. § 65-1-101(h)(1) reflects this situation. The position appointed by the Governor is vacant. *See* TRA Structure. Accordingly, that position and the two positions filled by joint appointment are currently vacant and need to be filled.

Chapter 1070 provides for the continuation in office, without reappointment, of the two currently-serving directors. 2012 Tenn. Pub. Acts, ch. 1070 § 1. *See also* Tenn. Code Ann. § 65-1-101(h)(1). Confirmation is not required for those two individuals. *Id.* Upon expiration of their terms on June 30, 2014, or should a vacancy occur in the normal course of events, confirmation will be required for the Speakers' subsequent appointments. *See* Tenn. Code Ann. § 65-1-101(g).

3. & 4. Since the position of the "existing director appointed by the governor" is vacant, it will be filled as a vacancy in accordance with the new law, as will the positions appointed jointly. *Id.* Thus, all positions except those currently held by the two directors previously appointed by the two Speakers will be filled as vacancies, and all such appointments will require confirmation.

If an appointment is made while the General Assembly is in session, Tenn. Code Ann. § 65-1-101(f) provides that it "shall be confirmed by joint resolution adopted by each house of the general assembly within thirty (30) days after the appointment." Subsection (g) further provides:

> Any vacancy on the authority shall be filled by the original appointing authority for such position to serve the unexpired term and each appointment shall be confirmed in the same manner as the original appointment. If, however, the general assembly is not in session and a vacancy occurs, the appropriate authority shall fill such vacancy by appointment and the appointee shall serve the unexpired term, unless the appointment is not confirmed within thirty (30) days after the general assembly convenes following the appointment to fill such vacancy.

Tenn. Code Ann. § 65-1-101(g) provides for the filling of any vacancies between July 1, 2012, and the reconvening of the General Assembly in January 2013 and contemplates the possibility that an appointee could fail to win confirmation, either within thirty days of the appointment or thirty days of the reconvening of the General Assembly following the appointment.

Tenn. Code Ann. § 65-1-101(g) states that any director appointed while the General Assembly is out of session "shall serve the unexpired term," thus permitting an appointee to serve until he or she fails to be confirmed. Given the statute cloaks these directors with full authority to perform their statutory responsibilities until and unless they fail to be confirmed, any actions such directors take while in office will not be subject to legal challenge on the basis that the directors are not authorized to hold office.

As to the two new directors who will be jointly appointed to complete the terms beginning on July 1, 2012, their appointments while the General Assembly is not in session must be filled as vacancies under Tenn. Code Ann. 65-1-101(g). These appointees awaiting confirmation will be TRA directors both *de facto* and *de jure*, and they will have the full powers of that office. *See State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995). Accordingly, any official decisions rendered by such properly-appointed directors awaiting confirmation will be valid.

ROBERT E. COOPER, JR.
Attorney General

WILLIAM E. YOUNG
Solicitor General

JONATHAN N. WIKE
Senior Counsel

Requested by:

The Honorable Craig Fitzhugh
State Representative
33 Legislative Plaza
Nashville, Tennessee 37243