

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 18, 2014

Opinion No. 14-33

Authority of Electric Cooperative to Provide Broadband Internet Service

QUESTIONS

1. May a cooperative presently providing electric service to county residents provide hardwire broadband Internet service (hereinafter “Internet service”) to county residents with or without fee or charge?

2. May a county government, through a private act of the General Assembly, enable such a cooperative to provide Internet service for a fee or charge to residents?

3. May a county that has wireless access to the Internet provided by a private business entity enter into a joint venture with a cooperative pursuant to Tenn. Code Ann. § 7-59-316 to provide Internet service to county residents via an existing dark fiber network?

4. If enacted as introduced, would House Bill 2364/Senate Bill 2428 of the 108th General Assembly (hereinafter “HB2364”) be constitutional?

5. If HB2364 became law, would the answer to Question 1 change?

OPINIONS

1. Except in the case of a cable joint venture, the providing of Internet service is neither a “primary” nor a “secondary” purpose in which electric cooperatives may engage, as defined in Tenn. Code Ann. § 65-25-204(a). A cable joint venture established under Tenn. Code Ann. § 65-25-205(c) by an electric cooperative and a current holder of a cable television franchise may provide Internet service.

2. No. Such a private act would conflict with the general statutory plan that authorizes the activities of electric cooperatives.

3. Yes, but only after a determination by the Tennessee Regulatory Authority that the county qualifies as an “historically unserved area” as defined in Tenn. Code Ann. § 7-59-316.

4. Yes.

5. No. The bill does not authorize any cooperative to provide Internet service.

ANALYSIS

1. Electric cooperatives may exercise only those powers expressly granted by the General Assembly in the Rural Electric and Community Services Cooperative Act, Tenn. Code Ann. §§ 65-25-201 to -235 (the “Act”). In addition to the “primary” purpose of selling electric power, a cooperative may also carry out “secondary” purposes, which include “[s]upplying or furnishing other community utility services as provided in §§ 65-25-202(3), 65-25-205(c) and 65-25-231.” Tenn. Code Ann. § 65-25-204(a)(2)(A). Under Tenn. Code Ann. § 65-25-202(3), common utility services include telecommunications services, but Internet service is not a “telecommunications service” as defined in Tenn. Code Ann. § 65-25-202(3), (13); that defined term is most clearly linked to cable television service. Nor does Internet service constitute a “telecommunications joint venture” under Tenn. Code Ann. § 65-25-231. The term “telecommunications” does not inherently include Internet service. Cable broadband Internet service, for example, has been classified as an information service, not a telecommunications service as defined in 47 U.S.C. § 153. *See National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 987-88 (2005); *see also Level 3 Communications, LLC v. Roberts*, No. M2012-01085-COA-R3-CV, 2013 WL 5373143, at *9 (Tenn. Ct. App. Sept. 20, 2013) (holding that broadband Internet service is not a taxable “telecommunication service” under Tennessee law). Unless the term “telecommunications” is expressly defined to include Internet services, therefore, that term cannot be construed as including such services.

Internet service can be provided by a cable joint venture established pursuant to Tenn. Code Ann. § 65-25-205(c). That section authorizes an electric cooperative to “contract to establish a cable joint venture with an entity that is a current franchise holder under title 7, chapter 59, within the cooperative’s service area and has been operating, either itself or its predecessor franchise holder, for not less than three (3) years at the time of the establishment of the cable joint venture.” Any such cable joint venture “shall comply in all respects with the requirements of § 65-25-230,” and “[t]he authority to establish a cable joint venture shall not apply to areas served by any existing telephone cooperative that has been providing cable service for not less than ten (10) years under the authority of the federal communications commission.” Tenn. Code Ann. § 65-25-205(c). Formation of a cable joint venture is the only means by which an electric cooperative is authorized to provide Internet service.

2. Electric cooperatives are creatures of State law, and the Act is the source of authority under which all such cooperatives in Tennessee operate. Private acts are superseded to the extent necessary to give effect to a general statutory plan. *State ex rel. Strader v. Word*, 508 S.W.2d 539, 546 (Tenn. 1974). The Act

places a number of restrictions on the ability of electric cooperatives to engage in activities beyond their primary purpose of selling electric power, all of which are designed to ensure that that primary purpose is reliably performed. A private act that authorizes a county to grant to a cooperative the authority to provide Internet service would conflict with the Act, which does not confer such authority. Such a private act would override the safeguards built into the Act and at the same time would deny similar opportunities to cooperatives not covered by the private act.

3. Tenn. Code Ann. § 7-59-316(a)(1) provides:

[A] county or municipality, or any entity otherwise authorized by law to act on a county or municipality's behalf, or a cooperative is authorized to participate in a telecommunications joint venture that is created to provide broadband services to areas within the jurisdiction of the municipality, county or cooperative that has been determined to be an historically unserved area, meaning that the area does not have access to broadband Internet services, has been an area developed for residential use for more than five (5) years, and is outside the service area of a video or cable service local franchise holder or the franchise area of a holder of a state-issued certificate of franchise authority.

Further, “[a]ny municipality or county government seeking to establish a joint venture as provided in this part shall apply to the [Tennessee Regulatory Authority] for a finding that the area is historically unserved and that no private provider intends to serve that area.” Tenn. Code Ann. § 7-59-316(d). Accordingly, a county may participate in a joint venture that provides Internet service, including service via an existing dark fiber network,¹ but only in an area certified by the Tennessee Regulatory Authority as meeting the statutory criteria for “an historically unserved area.”²

4. HB2364 would amend the current definition of “telecommunications” in Tenn. Code Ann. § 65-25-202(13) to include “the furnishing of telephone service, either local or long distance, leased lines or equipment for the vocal or written transmission of messages, or any related services for which a charge is made” provided that: (1) “[t]he entity furnishing telecommunications is a cooperative”; (2) “[t]he cooperative provides electric service to any county having a population of no more than seven thousand nine hundred (7,900), according to the 2010 federal census or any subsequent federal census”; (3) “[t]he cooperative owns an existing

¹ See *infra* note 3.

² The joint ventures authorized by Tenn. Code Ann. § 65-25-205(c) may be established only between electric cooperatives and “current franchise holder[s] under title 7, chapter 59.” Since a county could not hold a franchise under Title 7, Chapter 59, except through a joint venture established under Tenn. Code Ann. § 7-59-316, a county would not be the proper entity to join in a cable joint venture under Tenn. Code Ann. § 65-25-205(c).

dark fiber network in the county set out in [(2)]”;³ and (4) “[t]he cooperative does not provide broadband Internet service to any residents of the county served by a rural telephone cooperative as of January 1, 2014.” HB2364, § 1. Accordingly, the bill would remove the current restriction on the type of telecommunications service a cooperative may provide for the seven smallest counties by population (Pickett, Van Buren, Moore, Hancock, Lake, Clay, and Trousdale). The bill also states that if these conditions are not met, the current restrictions on the definition of “telecommunications,” which exclude the furnishing of telephone service, would still apply.

This Office has opined that classifications identifying only a single county through the use of narrow population brackets are unconstitutional class legislation, absent a rational basis. See *Tenn. Att’y Gen. Op. 13-37* at 3 (May 2, 2013) (citing *Knoxville’s Cmty. Dev. Corp. v. Knox Cnty.*, 665 S.W.2d 704, 705 (Tenn. 1984); *Chattanooga Metro. Airport Auth. v. Thompson*, No. 03A01-9610-CH-00319, 1997 WL 129366, at *3 (Tenn. Ct. App. Mar. 24, 1997)). HB2364, however, applies to counties that are below a certain population rather than to a particular county, and a rational basis can be identified for limiting the scope of the proposed definition to the seven smallest counties by population. The residents of those counties likely receive fewer and less adequate modern communication and information services of all types than do residents in more densely populated areas, a fact that justifies allowing electric cooperatives to provide additional communication or information services in only those areas.

5. HB2364 does not authorize any cooperative to provide Internet service. For cooperatives in counties in the defined population range, the bill would merely amend the definition of “telecommunications,” which is an allowed “secondary purpose” under Tenn. Code Ann. § 65-25-204(a)(2)(A), to include rather than exclude “the furnishing of telephone service, either local or long distance, leased lines or equipment for the vocal or written transmission of messages, or any related services for which a charge is made.” HB2364, § 1. In order for that definition to apply, the cooperative must “not provide broadband Internet service to any residents of the county served by a rural telephone cooperative as of January 1, 2014.” *Id.* The bill defines “broadband Internet service” as “an asymmetrical connection to the Internet from a home computer with an expected download transfer rate of at least one and one half megabits per second (1.5 Mbps).” *Id.*

But the bill, even though it defines “broadband Internet service,” does not include “broadband Internet service” within the scope of “telecommunications.” As stated above, the term “telecommunications” does not inherently include Internet service. *Brand X Internet Services*, 545 U.S. at 987-88; *Level 3 Communications*,

³ The bill defines “dark fiber network” as “an existing network of fiber optic cables capable of hosting or facilitating the transmission of laser signals that is not in use.” HB2364, § 1.

2013 WL 5373143, at *9. “Broadband Internet service” is used in the bill only to help identify when the substituted definition of “telecommunications” would apply, not to include broadband Internet service within the term “telecommunications.” Accordingly, the bill as presently written fails to allow any cooperative to provide Internet service.

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