

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

May 10, 2021

Opinion No. 21-06

Territorial Limits on the Provision of Broadband and Other Utility Services by an Energy Authority

QUESTION

Is an energy authority allowed by state law to extend broadband, or other utility services, outside its electric service area?

OPINION

Generally, an energy authority may extend water and wastewater services outside its electric service area with the consent of any municipality or utility district into which service is to be extended. Tenn. Code Ann. §§ 7-36-107(a)(4)-(6). An energy authority may provide telecommunications service—which includes telephone, cable television, and Internet (broadband) service—only within its electric service area and with the permission of any other municipality located within its service area, into which service is to be extended. Tenn. Code Ann. § 7-52-601(a).

ANALYSIS

The Municipal Energy Authority Act, Tenn. Code Ann. §§ 7-36-101 to -132 (“the Act”), authorizes an “associated municipality” to form, through an approved “certificate of incorporation,” an “energy authority” to provide various utility services. An “associated municipality” is “a municipality that is located in a county having a population of three hundred thirty-five thousand (335,000) or less, according to the 2010 federal census or any subsequent federal census.” Tenn. Code Ann. §§ 7-36-102(2), -103(a).

An energy authority is authorized under Tenn. Code Ann. § 7-36-107(a)(3)–(6) to provide electric, water, wastewater, and “telecommunications” services. Telecommunication services include telephone, cable television, and Internet (broadband) service. Tenn. Code Ann. § 7-36-102(20). Tennessee Code Annotated § 7-36-107 imposes territorial limits on energy authorities that provide these utility services.

Electric Service

An energy authority may be created only by a municipality that already “operates an electric system under the authority of chapter 52 of [title 7]; the municipality’s charter; or otherwise applicable law.” Tenn. Code Ann. § 7-36-102(2). The Municipal Electric Plant Law of 1935, Tenn. Code Ann. §§ 7-52-101 to -135, grants to any “municipality” the power and authority to operate an “electric plant.” “Municipality” is defined as “any county, metropolitan government,

incorporated city or town in the state of Tennessee.” Tenn. Code Ann. § 7-52-102(10). An “electric plant” is defined as

generating, transmission, or distribution systems, together with all other facilities, equipment and appurtenances necessary or appropriate to any such systems for the furnishing of electric power and energy for lighting, heating, power or any other purpose for which electric power and energy can be used.

Tenn. Code Ann. § 7-52-102(3).

Specifically, a municipality is authorized to

[a]cquire, improve, operate and maintain *within or without the corporate or county limits of such municipality*, and *within the corporate or county limits of any other municipality, with the consent of such other municipality*, an electric plant and to provide electric service to any person, firm, public or private corporation, or to any other user or consumer of electric power and energy, and charge for the electric service.

Tenn. Code Ann. § 7-52-103(a)(1) (emphasis added). Although the 1935 Law authorizes municipalities to provide electric service, it also contemplates that municipalities may provide electric service under private acts, Tenn. Code Ann. § 7-52-133, and some systems have been created in that manner, *see, e.g., Tennessee Pub. Serv. Co. v. City of Knoxville*, 170 Tenn. 40, 91 S.W.2d 566, 571 (1936); *Nashville Elec. Serv. v. Luna*, 185 Tenn. 175, 184, 204 S.W.2d 529, 532–33 (1947).

An energy authority is empowered

[t]o acquire, construct, improve, furnish, equip, finance, own, operate, and maintain *within or outside the corporate limits of the associated municipality*, a system for the furnishing of electrical service and to provide electric service to any person, governmental entity, or other user or consumer of electric services within or outside the associated municipality. The system shall be operated as a financially separate system independent of, and financially separate from, the other utility systems of the authority, and, *except to the extent the authority succeeds to the rights and powers of the municipal electric system, the authority shall not exercise any of the powers granted in this subdivision (a)(3) wholly or partly within the legal boundaries of an incorporated city or town or electric cooperative, except as allowed by law.*

Tenn. Code Ann. § 7-36-107(a)(3) (emphasis added). If an energy authority succeeds to the rights and privileges of a municipal electric system, the territorial limits under which it must operate in providing electric service are determined based on the law under which the municipal electric system was created. If the municipal electric system was created under the 1935 Law, the energy authority that succeeds it is authorized to provide service “within or without the corporate or county limits of such municipality, and within the corporate or county limits of any other

municipality, with the consent of such other municipality.” Tenn. Code Ann. § 7-52-103(a)(1). If the municipal electric system was created by private act, the energy authority that succeeds it is subject to the limitations, if any, set forth in the private act.

If an energy authority does not succeed to the rights and powers of the municipality’s electric system, it is prohibited from “exercis[ing] any of the powers granted in [§ 7-36-107(a)(3)] wholly or partly within the legal boundaries of an incorporated city or town or electric cooperative, except as allowed by law.”¹ Tenn. Code Ann. § 7-36-107(a)(3). Since large portions of the unincorporated areas of the State are served by electric cooperatives, this provision puts definite limits on any expansion of electric service beyond an energy authority’s corporate boundary.

Water and Wastewater Service

With regard to the provision of water and wastewater services, the Act does not limit an energy authority to the territory within which it provides electric service, although it does impose some restrictions. For both water and wastewater services an energy authority is empowered

[t]o acquire, construct, improve, furnish, equip, finance, own, operate, and maintain, *within or outside the corporate limits of the associated municipality*, a system for the furnishing of water service and to provide water service to any person, governmental entity, or other user or consumer of water services within or outside the associated municipality; provided, the system shall be operated as a financially separate system independent of, and financially separate from, the other utility systems of the authority and managed by the water division of the authority; and provided, further, *the authority shall not exercise any of the powers granted in this subdivision (a)(4) wholly or partly within the legal boundaries of a utility district incorporated pursuant to the Utility District Act of 1937, compiled in chapter 82 of this title, or any other municipality, except to the extent the authority succeeds to the rights and powers of a municipal water system or except as allowed by law, without the consent of the governing body of such utility district or municipality.*

Tenn. Code Ann. § 7-36-107(a)(4) (emphasis added) (dealing with water service); *see* Tenn. Code Ann. § 7-36-107(a)(5) (using exactly the same language for wastewater service).

Thus, an energy authority may not provide water or wastewater service within the boundaries of a utility district or any other municipality without the consent of that other district or municipality. But the statute does allow for the possibility that the already-existing water system to which the energy authority succeeds has expanded service beyond the municipality’s boundaries. And, again, one situation in which the phrase “as allowed by law” may apply is through an intergovernmental agreement pursuant to the Interlocal Cooperation Act.

¹ For example, an intergovernmental agreement pursuant to the Interlocal Cooperation Act, Tenn. Code Ann. §§ 12-9-101 to -112, might provide an exception “allowed by law.”

Telecommunications, Including Internet, Services

The Act limits the geographical scope of an energy authority's telecommunications services by reference to a provision authorizing municipal electric plants to offer cable television and Internet service:

Notwithstanding this chapter to the contrary, the authority shall be subject to the territorial limitations set forth in § 7-52-601 in the same manner and to the same extent as such limitations apply from time to time to a municipal electric system providing services pursuant to § 7-52-601.²

Tenn. Code Ann. § 7-36-107(a)(6)(D).

Tennessee Code Ann. § 7-52-601(a) states in relevant part:

Each municipality operating an electric plant described in § 7-52-401 has the power and is authorized *within its service area*, under this part and on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, sometimes referred to as “governing board” in this part, to 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, two-way video transmission, video programming, Internet 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*.

Tenn. Code Ann. § 7-52-601(a) (emphasis added).

The overall focus of title 7, chapter 52, is on providing electric service. The restrictions on providing other services are designed to safeguard the fiscal interests of electric power customers, as are many of the provisions governing electric service. This supports the conclusion that the term “service area” refers to a municipal electric plant's electric service area and not the area within which it provides telephone service as allowed by Tenn. Code Ann. § 7-52-401. That it has been authorized to provide other services does not change or enlarge its “service area” for electricity, its primary reason for existence.³

Tennessee Code Annotated § 7-52-608 states that part 6 of title 7, chapter 52, granting authority to provide Internet service, “supersedes any conflicting provisions of general law, private act, charter or metropolitan charter provisions.” Under Tenn. Code Ann. §§ 7-52-601(a) and -608, therefore, no private act or charter provision is effective to allow an electric plant to provide cable

² The section referenced here, Tenn. Code Ann. § 7-52-601, relates to the offering by a municipal electric plant of cable television and Internet services but not to the offering of telephone service, which is separately authorized by Tenn. Code Ann. § 7-52-401.

³ A municipal electric plant's service area for electricity is established by the municipality's election at various times to expand service as allowed by Tenn. Code Ann. § 7-52-103(a)(1).

television or Internet service outside its electric service area. Thus, if an energy authority replaces an existing electric system, no private act or charter provision related to that system can authorize the new entity to provide “telecommunications” services, including cable television and Internet, beyond the original entity’s electric service area. And, since all energy authorities are created exclusively through the certificate process in Tenn. Code Ann. § 7-36-103(a), no private act or charter provision could authorize an energy authority to provide “telecommunications” services in an area beyond its own electric service area, under the referenced terms of Tenn. Code Ann. § 7-52-601(a).

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JONATHAN N. WIKE
Senior Assistant Attorney General

Requested by:

The Honorable Chris Todd
State Representative
425 Rep. John N. Lewis Way
Suite 608 Cordell Hull Bldg.
Nashville, TN 37243