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May 8, 2003

The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: Petition of Citizens Telecommunications Company of Tennessee, LLC for
Exemption under Tenn. Code Ann. 65-5-208 (c)

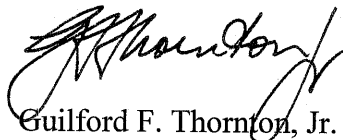
Docket No. 03-0021 03-00211

Dear Chairman Kyle:

I am enclosing with this letter an original and thirteen copies of Citizens Telecommunications Company's response to the motion filed by Ben Lomand Communications, Inc. to intervene and/or dismiss the petition for exemption under T.C.A. § 65-5-208(c). Copies have been served on counsel for all parties in this matter.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,



Guilford F. Thornton, Jr.

cc: Mike Swatts
Gregg Sayre

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF CITIZENS TELECOMMUNICATIONS COMPANY OF TENNESSEE,
LLC FOR EXEMPTION UNDER TENN. CODE ANN. 65-5-208(c)**

DOCKET NO. 03-0021

**RESPONSE OF CITIZENS TELECOMMUNICATIONS COMPANY OF
TENNESSEE, LLC TO MOTION FILED BY BEN LOMAND
COMMUNICATIONS, INC. TO INTERVENE AND/OR DISMISS THE
PETITION FOR EXEMPTION UNDER T.C.A. § 65-5-208(c)**

Petitioner, Citizens Telecommunications Company of Tennessee, LLC, ("Citizens"), by its counsel, files this response to the petition to intervene and/or dismiss (the "Intervention Petition") filed by Ben Lomand Communications, Inc. ("BLC").

Citizens commenced this action by Petition (the "Petition") filed pursuant to T.C.A. § 65-5-208(c) to exempt its tariffed services offered in McMinnville and Sparta, Tennessee from the price floor set therein. BLC seeks to intervene and dismiss the Petition based on its assertion that the issue should be addressed by the TRA through a rule making proceeding.

Although Citizens does not object to BLC's intervention in this matter, Citizens does dispute the motion to dismiss and the statements in BLC's response. BLC cites no legal authority in support of its position, and it appears that BLC seeks to use this case to argue the merits of its position in another matter pending before the Authority.

I. RESPONSE TO PETITION TO INTERVENE

Citizens does not object to BLC's petition to intervene.

II. MOTION TO DISMISS

The primary basis for BLC's motion to dismiss is its assertion that "this issue should be decided by the TRA through a rule making proceeding." (Intervention Petition, p. 3 at ¶ 1). BLC provides no legal authority for this position. Moreover, even if that bare assertion is determined to have merit, it does not justify a dismissal of Citizens' petition.

BLC also asserts that Citizen's request is "not in the public interest." (Intervention Petition, p. 4 at ¶ 2) (*citing* T.C.A. § 65-5-208(c) ("[w]hen shown to be in the public interest, the Authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor.")). The operative provision in T.C.A. § 65-5-208 (c) was placed in the statute with the foresight that conditions could exist in a competitive situation where adherence to a price floor could place an ILEC at a distinct disadvantage. The TRA already has recognized on numerous occasions that this situation currently exists in McMinnville and Sparta. (*See* Order Convening Contested Case and Appointing A Pre-Hearing Officer, Docket No. 02-01221, copy attached)

A central premise of BLC's motion is its assertion that if Citizens "is allowed to price below the cost floor, then it will use its market predominance to subsidize predatory pricing through other services." (Intervention Petition, p. 5 at ¶ 4). This assertion fails to consider the fact that Citizens does not have market predominance in McMinnville and Sparta, and its pricing is not and will not be predatory.

The United States Supreme Court has interpreted Section 2 of the Sherman Act, to condemn predatory pricing only when it poses “a dangerous probability of actual monopolization.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 884, 890, 113 S.Ct. 884, 890, 122 L.Ed.2d 247 (1993). Accordingly, in addition to showing pricing below cost, a plaintiff alleging predatory pricing must also show that the alleged predator has a “dangerous probability of recouping its investment in below-cost prices.” *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)). This recoupment must take the form of “producing the intended effects on the firm’s rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within a disciplined oligarchy.” *Id.* “This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will.” *Id.*

“Even if circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the question whether [the pricing] would likely injure competition in the relevant market.” *Id.* In this regard, the plaintiff “must demonstrate that there is a likelihood that the predatory scheme would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on predation.” *Id.* Furthermore, determining whether recoupment of predatory losses is likely “requires an estimate of the cost of predation and a close analysis of both the scheme alleged and conditions of the relevant market.” *Id.* at 226.

As is stated in Citizens’ Petition, Citizens is not facing a struggling start-up CLEC but rather a well-established cooperative that should not enjoy any pricing advantages over an ILEC. In a highly competitive market such as this, the marketplace should determine rates.

Despite the incentives that Citizens already has offered in McMinnville and Sparta, which are currently subject to and in compliance with T.C.A. § 65-5-208 (c), Citizens has continued to lose business to BLC. Specifically, Citizens has lost over 73% of residence lines and 65% of business lines in McMinnville since 1999 and 61% of residence and 44% of business in Sparta since 4th quarter 2000. These facts alone serve as sufficient evidence to establish that Citizens does not have monopoly power in McMinnville or Sparta or even a remote likelihood that it will become the only provider in that market in the near future.

Further it is worth noting that each time Citizens loses a customer that uses Citizens' basic flat rate service, Citizens loses additional services that customer may be buying from Citizens as well as the opportunity to sell that customer additional discretionary services and features to supplement the basic service (e.g. call waiting, caller id, voice mail). These additional features and services (which are offered under rates approved by the TRA) represent a broad revenue stream and are generally more profitable for Citizens than the basic flat rate service. In addition, Citizens loses all associated USF support associated with each access line it loses.

Contrary to the unfounded accusations made by BLC, Citizens does not subsidize its services in McMinnville and Sparta from earnings from customers outside those two areas, nor is that issue in dispute in Docket No. 02-1221; nor is there any admission by Citizens or proof that Citizens is currently violating T.C.A. § 65-5-208 (c). Further, as a price regulated company, Citizens must work within the parameters outlined in T.C.A. 65-5-101 *et seq.* and the applicable regulations promulgated by the TRA when imposing any rate increase. Citizens has been under price regulation since April 12, 1996, and has yet to increase rates for applicable services in Tennessee.

Given the current state of affairs, competition in McMinnville and Sparta may soon disappear. Under the current restrictions placed on Citizens as an ILEC, BLC ultimate will become the dominant telecommunication provider in McMinnville and Sparta, and Citizens will be driven out of those markets. Accordingly, public interest favors the relief sought by Citizens.

CONCLUSION

For the reasons stated herein, as well as in Citizens' original petition, Citizens requests that BLC's motion to dismiss be denied, and that the TRA grant the relief requested in Citizens' petition.

Respectfully submitted,



Gullford F. Thornton, Jr. (No. 14508)

Charles W. Cook, III (No. 14274)

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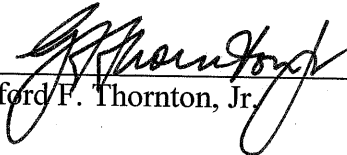
*Attorneys for Citizens Telecommunications
Company of Tennessee*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the 8th day of May, 2003.

H. LaDon Baltimore
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The Office of the Attorney General for the State of Tennessee
Consumer Advocate Division
P.O. Box 20207
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Guilford F. Thornton, Jr.