

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 22, 2003

IN RE:

APPLICATION OF IMAGE ACCESS, INC. D/B/A
NEWPHONE FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO PROVIDE
COMPETING LOCAL TELECOMMUNICATIONS
SERVICES IN THE STATE OF TENNESSEE

DOCKET NO. 03-00270

INITIAL ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a Hearing held on July 15, 2003, to consider the *Application for Certificate to Provide Competing Local Telecommunications Services* (the "*Application*") for a certificate of public convenience and necessity to provide competing resold and facilities-based local exchange telecommunications services in Tennessee filed by Image Access, Inc. d/b/a NewPhone ("NewPhone") on April 10, 2003.

Legal Standard for Granting Certificate of Public Convenience and Necessity

NewPhone's *Application* was made pursuant to, and was considered in light of, the criteria for granting a Certificate of Public Convenience and Necessity ("CCN") as set forth in Tenn. Code Ann. § 65-4-201, which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application

and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

* * *

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.¹

¹ Notwithstanding the existence of subsection (d), the Federal Communications Commission ("FCC") has expressly preempted the Authority's enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d). *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, (Memorandum Opinion and Order) 14 F.C.C.R. 11,064 (May 27, 1999); (Memorandum Opinion and Order) 16 F.C.C.R. 1247 (January 8, 2001). The Authority has since issued an order expanding a competing local exchange carrier's CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. *See In re: Application of Level 3 Communications, LLC to Expand its CCN to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in all Tennessee Service Areas*, Docket No. 02-00230, *Order Approving Application of Level 3 Communications, L.L.C. to Amend Its Certificate of Public Convenience and Necessity* (June 28, 2002).

Furthermore, pursuant to Tenn. Code Ann. § 65-5-212, a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

The July 15, 2003 Hearing

Pursuant to Tenn. Code Ann. § 65-4-204, public notice of the Hearing in this matter was issued by the Hearing Officer on July 1, 2003. No persons sought intervention prior to or during the Hearing. At the Hearing held on July 15, 2003, Mr. Jim Dry, Vice President of NewPhone, participated in the Hearing, presented testimony, and was subject to examination by the Hearing Officer. Upon NewPhone's conclusion of the presentation of its proof, the Hearing Officer granted NewPhone's *Application* based upon the following findings of fact and conclusions of law:

I. NewPhone's Qualifications

1. NewPhone is a corporation originally organized under the laws of the State of Louisiana on April 7, 1997, and was qualified to transact business in Tennessee on May 18, 1998.

2. The complete street address of NewPhone's corporate service provider is 3525 Causeway Boulevard, Suite 501, Metairie, Louisiana 70002. The telephone number is (504) 834-9363 and the facsimile number is (504) 833-9419.

3. The *Application* and supporting documentary information existing in the record indicate that NewPhone has the requisite technical and managerial ability to provide competing local exchange telecommunications services within the State of Tennessee. Specifically,

NewPhone's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience.

4. NewPhone has the necessary capital and financial ability to provide the services it proposes to offer.

5. NewPhone has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. Proposed Services

NewPhone intends to provide competing resold and facilities-based local exchange service within the State of Tennessee.²

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon a review of the *Application* and the record in this matter, the Hearing Officer finds that approval of NewPhone's *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

1. NewPhone has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

2. NewPhone has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

² In Docket No. 98-00460, by Order dated June 14, 1999, NewPhone was granted authority to resell telecommunications services in Tennessee.

V. Compliance with Tennessee's County-Wide Calling Requirements

1. NewPhone has indicated its awareness of, and its obligation to comply with, the requirements of county-wide calling as set forth in Tenn. Code Ann. § 65-21-114.

IT IS THEREFORE ORDERED THAT:

1. The *Application for Certificate to Provide Competing Local Telecommunications Services* of Image Access, Inc. d/b/a NewPhone is approved; and
2. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration within fifteen (15) days from and after the date of this Order.


Randal Gilliam, Hearing Officer