

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 8, 2006

IN RE:

**PETITION OF FRONTIER COMMUNICATIONS, INC.
FOR A DECLARATORY RULING**

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**DOCKET NO.
04-00379**

**ORDER DENYING PETITION
OF FRONTIER COMMUNICATIONS, INC.**

This matter came before Director Deborah Taylor Tate, Director Pat Miller and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on November 7, 2005 for consideration of the *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* and the *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.*

BACKGROUND

On June 27, 1996, an Order was entered by the Tennessee Public Service Commission ("TPSC") in Docket No. 96-00779 approving the Initial Order of an Administrative Judge and granting a certificate of public convenience and necessity ("CCN") to Citizens Telecommunications Company d/b/a Citizens Telecom ("Citizens") to operate as a competing telecommunications service provider. The Order of the TPSC specifically adopted the findings and conclusions in the Administrative Judge's Initial Order entered on May 30, 1996. The Initial

Order stated that the application of Citizens sought a CCN to offer “a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company” on a statewide basis.¹ Specifically, the *Initial Order* reflected that Citizens agreed to adhere to TPSC policies, rules and orders and stated that “the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. § 65-4-201(d).”²

On January 10, 2003, the TRA issued an *Order Approving Merger* which approved a merger between Frontier Communications of America, Inc. (“Frontier”) and Citizens. As a result of this merger, Citizens’ name was changed to Frontier.

Frontier’s Petition

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* (“*Petition*”). Frontier requests declaratory relief pursuant to Tenn. Code Ann. § 4-5-223, § 29-14-103, and § 65-2-104 and TRA Rule 1220-1-2-.05. Frontier (formerly Citizens) identifies itself as a competing local exchange carrier (“CLEC”) and contends that it has statewide authority from the TRA to provide telecommunications services based on the Order entered in TPSC Docket No. 96-00779. The *Petition* describes Ben Lomand Rural Telephone Cooperative, Inc. (“Ben Lomand”) as a telephone cooperative serving customers in White, Warren, Van Buren, Grundy and portions of Franklin, Coffee and Bedford counties. The *Petition* states that Ben Lomand is also the owner and affiliate of Ben Lomand Communications, Inc. (“BLC”) which provides telecommunications services to customers in McMinnville and Sparta and is fifty percent owner of Volunteer First

¹ *Initial Order, Application of Citizens Telecommunications Company, d/b/a Citizens Telecom for a Certificate of Public Convenience and Necessity as Competing Telecommunications Service Provider*, TPSC Docket No. 96-00779, p. 1 (May 30, 1996) (“*Initial Order*”).

² *Id.* at 3.

Services, Inc., a certificated CLEC in Crossville, Tennessee. Frontier, as an affiliate of Citizens Telecommunications Company of Tennessee, LLC, serves customers in White, Warren, Weakley, Putnam and Cumberland counties and competes with BLC in McMinnville and Sparta. Frontier also serves customers outside of Ben Lomand's territory in White and Warren counties.

Frontier and Ben Lomand petitioned for and obtained TRA approval of an Interconnection Agreement dated August 2, 2004. By its own terms, the Agreement becomes effective upon the following conditions:

- (a) issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies; and

- (b) approval of this Agreement by the Commission.

The Parties recognize that, in the absence of a final order under subsection (a) . . . a question of law exists with respect to whether the state commission has statutory authority to authorize Citizens or any other carrier to provide local exchange and/or local exchange access services in the areas of the State of Tennessee served by [Ben Lomand] or other telephone cooperatives.³

Through its *Petition* and its Interconnection Agreement with Ben Lomand, Frontier is seeking to compete in the territory being served by Ben Lomand. Frontier alleges that the two conditions necessary to render the Agreement effective have been met. Ben Lomand does not agree that the conditions have been met. Nevertheless, according to the *Petition*, "Until this dispute is decided by the TRA, Frontier is prevented from competing in the area served by Ben Lomand."⁴

³ Exhibit B to the *Petition*, p. 8.

⁴ *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* p. 3 (October 26, 2004) ("*Petition*").

Ben Lomand's Answer and Motion to Dismiss

On December 8, 2004, Ben Lomand filed the *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.* ("Answer and Motion to Dismiss"). In its *Answer and Motion to Dismiss*, Ben Lomand responded to the allegations in the *Petition*, specifically denying that Frontier has the authority to compete in Ben Lomand's service territory. Ben Lomand asserts that, as a cooperative, it is not subject to the jurisdiction of the TRA with the exception of resolving territorial boundary disputes as specified in Tenn. Code Ann. § 65-29-130.⁵ Ben Lomand moved to dismiss the *Petition* on the grounds of lack of subject matter and personal jurisdiction and failure to state a claim upon which relief can be granted.

Frontier filed a Response to Ben Lomand's *Answer and Motion to Dismiss* on May 6, 2005.⁶ In that *Response*, Frontier asserted that the TRA has jurisdiction to determine a dispute such as that raised in this docket, pursuant to Tenn. Code Ann. § 65-29-130.⁷ Frontier argues that Tenn. Code Ann. § 65-29-102 should not be construed "as a means for a telephone cooperative to protect its own territory. See Op. Atty. Gen. No. 90-83, August 27, 1990."⁸ Further, Frontier states that the Federal Communications Commission ("FCC") has determined that Tenn. Code Ann. § 65-4-201(d), which exempts from competition incumbent carriers with less than 100,000 access lines, is preempted by 47 U.S.C. § 253(a) and that federal statute should also preempt Tenn. Code Ann. § 65-29-102.⁹

Travel of Case

During the December 13, 2004 Authority Conference, after reviewing the filings of the parties, the panel voted unanimously to convene a contested case proceeding in this matter and

⁵ *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 2 (December 8, 2004).

⁶ *Frontier Communications, Inc.'s Response to Motion to Dismiss Filed by Ben Lomand Rural Telephone Cooperative, Inc.* (May 6, 2005) ("Response").

⁷ *Response*, pp. 2-3.

⁸ *Response*, p. 3.

⁹ *Response*, pp. 3-4.

appointed a Hearing Officer to establish a procedure for framing and resolving the issues raised in the *Petition*. The panel did not address the *Answer and Motion to Dismiss* in determining to convene a contested case. Intervention was granted by the Hearing Officer to Twin Lakes Telephone Cooperative Corporation (“Twin Lakes”) and North Central Telephone Cooperative, Inc. (“North Central”) on January 12, 2005 and January 13, 2005, respectively.

During a Status Conference held on April 27, 2005, the Hearing Officer confirmed that the panel had not addressed the threshold issues raised in the *Answer and Motion to Dismiss*,¹⁰ and the parties agreed that the central issue of the *Answer and Motion to Dismiss* is whether the TRA has the jurisdiction to authorize Frontier to enter the Ben Lomand’s service territory. The Hearing Officer established a procedural schedule requiring initial and reply briefs due on June 8, 2005 and June 15, 2005, respectively, and oral arguments addressing the threshold issues to be decided by the panel in ruling on the *Answer and Motion to Dismiss*. The Hearing Officer stated that the remainder of the procedural schedule would be determined by the decision of the panel regarding the threshold issues.

On May 27, 2005, the Hearing Officer issued orders granting intervention to the following parties: Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., West Kentucky Rural Telephone Cooperative Corporation, and Yorkville Telephone Cooperative, Inc. (collectively, with Twin Lakes and North Central, referred to as the “Intervening Cooperatives”).

The parties and the Intervening Cooperatives filed briefs according to the schedule established by the Hearing Officer. Oral argument was presented to the panel on June 27, 2005.

¹⁰ Frontier did not agree with this finding. Frontier asserted the position that in convening a contested case, the panel had determined not to dismiss based on the initial pleadings. See Transcript of Proceedings. pp. 3-4 (April 27, 2005).

POSITION OF PARTIES

Frontier

Frontier asserts that the TRA has already determined it has jurisdiction over this type of matter through its approval of the interconnection agreement between Frontier and Ben Lomand in Docket No. 04-00233. Frontier characterizes the issue in this docket as falling within the territorial dispute authority granted to the TRA in Tenn. Code Ann. §65-29-130.¹¹ Frontier argues that Tenn. Code Ann. §65-29-102 relates to a telephone cooperative offering service in an area where telephone service is deemed to be reasonably adequate but does not protect the territory of the cooperative.¹² Frontier also asserts that even if it is prohibited by state law from entering the cooperative territory, that state law is preempted by 47 U.S.C. § 253(a), which provides,

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any utility to provide any interstate or intrastate telecommunications service.

Frontier argues that state law prohibiting Frontier from competing in Ben Lomand's territory would be preempted under the FCC's application of Section 253(a) in the Hyperion case.¹³

Ben Lomand

Ben Lomand's arguments against the *Petition* focus on the limited jurisdiction of the TRA over cooperatives within the state. Specifically, Ben Lomand asserts the only jurisdiction granted to the TRA is to determine whether adequate service is being provided pursuant to Tenn. Code Ann. §65-29-102, to establish territorial boundaries of cooperatives pursuant

¹¹ *Frontier Communications of America, Inc.'s Brief Addressing Issues in Pending Motion to Dismiss*, p. 3 (June 8, 2005).

¹² *Id.* at 4.

¹³ *Id.* at 4-5 citing: *AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, FCC Docket No. 99-100, *Memorandum Opinion and Order*, 14 FCC Rcd. 11064 (1999) ("Memorandum Opinion and Order").

to Tenn. Code Ann § 65-29-130(a)(1), and resolve territorial disputes pursuant to Tenn. Code Ann. § 65-29-130(a)(2). Ben Lomand argues that it is not a public utility as defined in Tenn. Code Ann. § 65-4-101 and that the issue raised in the *Petition* is beyond the jurisdiction granted to the TRA in Tenn. Code Ann. § 65-29-130. In its Reply brief, Ben Lomand reiterates the position of the Intervening Cooperatives that when the CCN for Citizens was approved, it did not grant Citizens authority to enter Ben Lomand's territory.¹⁴

Intervening Cooperatives

The Intervening Cooperatives addressed the issue of whether the CCN granted to Citizens in Docket No. 96-00779 gives Frontier authority to enter the territory of Ben Lomand. The Intervening Cooperatives argue, based on the testimony of Mr. Spielman, Citizens' witness in Docket No. 96-00779, that Citizens was fully aware of the exception to statewide authority because "...incumbent local exchange telephone companies with fewer than 100,000 total access lines in Tennessee are exempt from local exchange competition...."¹⁵ For this reason, the Intervening Cooperatives argue that the intent of the TPSC in approving and the understanding of Citizens in obtaining its CCN was that the statewide approval was limited by the law in existence at that time which protected small rural areas from competition.¹⁶

Further, the Intervening Cooperatives note that the language in the Interconnection Agreement between Frontier and Ben Lomand reflects an understanding on the part of both parties that Frontier does not currently have the approval of the TRA to enter the territory of Ben Lomand. The Intervening Cooperatives specifically reference Section 13.1 of the

¹⁴ *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc. to the Initial Brief of Frontier Communications of America, Inc.*, p. 2 (June 15, 2005).

¹⁵ *Preliminary Brief of Intervening Cooperatives*, p. 4 (June 8, 2005), quoting from Direct Testimony of Bryan C. Spielman on Behalf of Citizens Telecommunications Company, D/B/A Citizens Telecom, *In Re: Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, TPSC Docket No. 96-00779, p. 3 (May 14, 1996).

¹⁶ *Id.* at 4-5.

Interconnection Agreement which shows that the parties acknowledged the existence of a “question of law” and “uncertainty” regarding the TRA’s authority to allow Frontier to compete in Ben Lomand’s service territory.¹⁷ The Intervening Cooperatives assert that state law in effect at the time “statewide” approval was granted to Frontier should determine what restraints, pursuant to state law, were inherent in that approval and that Frontier’s CCN was approved prior to any preemption of Tenn. Code Ann. § 65-4-201(d) by the FCC’s ruling in the Hyperion case.

DISCUSSION

Tennessee Statutes

Pursuant to Tenn. Code Ann. § 65-29-102, telephone cooperatives are non-profit corporations organized “for the purpose of furnishing telephone service in rural areas to the widest practical number of users provided that there shall be no duplication of service where reasonably adequate telephone service is available.”¹⁸ Under Tenn. Code Ann. § 65-4-101(6)(E), telephone cooperatives are excluded from the definition of public utilities.

Tenn. Code Ann. § 65-29-130 provides:

(a) Cooperatives and foreign corporations engaged in rendering telephone service in this state pursuant to this chapter fall within the jurisdiction of the Tennessee regulatory authority for the sole and specific purposes as set out below:

(1) The establishment of territorial boundaries;

(2) The hearing and determining of disputes arising between one (1) telephone cooperative and other telephone cooperatives, and between telephone cooperatives and any other type of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes; and

(3) The approval of sales and purchases of operating telephone properties.

(b) Cooperatives and foreign corporations engaged in rendering telephone service in this state pursuant to this chapter fall within the jurisdiction of the comptroller of the treasury for the sole and specific purpose of assessing the cooperative property for ad valorem taxes as provided in § 65-29-129.

¹⁷ *Id.* at 5.

¹⁸ Tenn. Code Ann. § 65-29-102 (2005).

(c) Either party shall have the right of appeal from any ruling, order or action by the authority or the comptroller of the treasury under the procedures established by §§ 4-5-322 and 4-5-323.

Tenn. Code Ann §65-4-201 clearly outlines the requirements of any telecommunications service provider seeking approval of a CCN for the purpose of offering services within the state and the duties of the TRA when reviewing any such petition. Based upon this statute, the TRA has the jurisdiction to consider a petition by a telecommunications service provider requesting a CCN, statewide or otherwise.

The TRA has jurisdiction over certain issues involving cooperatives. The authority of the TRA to review and approve requests for CCNs and the possibility that such approval may conflict with cooperatives' territory does not necessarily remove the matter from TRA jurisdiction.

FCC Hyperion Decision and Post Hyperion Dockets at the TRA

Frontier raises the FCC's decision in Hyperion as a basis for asserting preemption of certain Tennessee statutes, Tenn. Code Ann. § 65-4-201(d) and § 65-29-102.

On May 29, 1998, Hyperion filed a Petition with the FCC asking the FCC to preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) as well as the Authority's April 9, 1998 Order denying Hyperion a CCN to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company. Hyperion also asked the FCC to direct the TRA to grant Hyperion's application for an expanded CCN. Hyperion asserted that the TRA's Order and Tenn. Code Ann. § 65-4-201(d) violated Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹⁹ and fell outside the scope of authority reserved to the states by Section 253(b) of the Act.

¹⁹ 47 U.S.C. § 253(a). Section 253 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*

On May 27, 1999, the FCC issued an Order granting in part and denying in part Hyperion's Petition. Specifically, the FCC preempted the enforcement of the TRA's Order of April 9, 1998 and Tenn. Code Ann. § 65-4-201(d), but declined to direct the TRA to grant Hyperion's CCN application. The FCC stated that upon a request from Hyperion, the Authority should reconsider Hyperion's application in a manner consistent with the Act and the FCC's Memorandum Opinion and Order.²⁰ Nevertheless, Hyperion never renewed its request.

Although Hyperion did not pursue its request to amend its CCN after the Hyperion decision, the TRA did receive petitions from telecommunications carriers seeking to amend their CCNs in light of the Hyperion decision. In a similar matter, the Authority granted a CCN to Level 3 Communications, LLC ("Level 3") in TRA Docket No. 98-00610 for statewide authority subject to the exemption in Tenn. Code Ann. § 65-4-201(d). Subsequent to the FCC's order in the Hyperion case, Level 3 filed an Application with the TRA to provide telecommunications services on a statewide basis in areas serviced by an incumbent carrier having fewer than 100,000 access lines in Tennessee. Level 3 filed its Application in compliance with Tenn. Code Ann. § 65-4-201(b) seeking an amendment to its CCN. On June 28, 2002, the Authority issued an *Order Approving Application of Level 3 Communications, L.L.C. to Amend Its Certificate of Public Convenience and Necessity* in which the Authority acknowledged that Level 3's request was the first such request by a CLEC since the FCC's preemption of the TRA's enforcement of Tenn. Code Ann. § 65-4-201(d).²¹ In another docket, XO Tennessee, Inc. applied for and obtained approval of an amendment to its CCN to allow it to provide telecommunications

²⁰ *In Re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 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 Docket No. 99-100, *Memorandum Opinion and Order*, 14 FCC Rcd. 2051, ¶ 22 (May 27, 1999).

²¹ *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*, p. 2 (June 28, 2002).

services to customers in the service territories of Concord Telephone Exchange, Tennessee Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company, all companies which fell within the rural exemption of Tenn. Code Ann. § 65-4-201(d) prior to the FCC's decision in Hyperion.²²

November 7, 2005 Authority Conference

At the Authority Conference on November 7, 2005, after reviewing the record in this docket, the panel unanimously determined that Frontier does not have statewide authority under its current CCN to permit it to serve customers in Ben Lomand's territory. The panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide a competing service only as allowable by state law at the time. The 1996 TPSC order did not extend Citizens' authority statewide to enter into territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives. The panel unanimously voted to dismiss the *Petition* of Frontier at this time on the ground that it asserts a claim for relief which cannot be granted pursuant to Frontier's current CCN.²³

IT IS THEREFORE ORDERED THAT:

1. The *Petition* of Frontier is dismissed on the ground that the *Petition* fails to state a claim upon which relief may be granted.

²² See *In re: Application of XO Tennessee, Inc. to Amend its Certificate of Public Convenience and Necessity to Provide Telecommunications Services in the State of Tennessee*, Docket No. 03-00567, *Initial Order Granting Amendment to Certificate of Public Convenience and Necessity* (February 23, 2004).

²³ Director Kyle's motion prevailed by a 3-0 vote. Director Miller made the following additional comments during the deliberations, "after reviewing the pleadings and applicable statutory provisions, I do not find specific language contained within existing state law that would permit the TRA to grant authority to CLECs to serve territories served by telephone cooperatives. I am also convinced that prior to the 1995 act this agency did not have authority to allow competitive entry into areas served by cooperatives." Transcript of Authority Conference, p. 12 (November 7, 2005) ("Transcript"). Director Tate pointed out that "at least two other companies have come before us to expand their CCNs to enable it to extend service into previously restricted areas. So I'm not in any way prejudging that issue and whether or not it might come before us in the future and that -- that there are other appropriate procedural avenues other than the ones that are before us today." Transcript, p. 13.

2. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order.

3. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

* * *

Deborah Taylor Tate, Director²⁴



Pat Miller, Director



Sara Kyle, Director

²⁴ Director Tate voted in agreement with the other directors but resigned her position as director before the issuance of this order.