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June 15, 2005

Via Hand Delivery

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: In Re. Citizens Telecommunications Company of Tennessee, LLC's d/b/a
Frontier Communications of Tennessee
Docket No. 04-00379

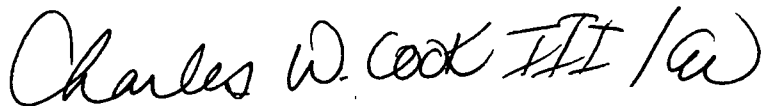
Dear Chairman Miller:

Enclosed for filing in the above-referenced proceeding are an original and fourteen copies of Frontier Communications, Inc.'s Reply Brief Addressing Issues in Pending Motion to Dismiss

Should you have any questions, please do not hesitate to call.

Very truly yours,

STOKES BARTHLOMEW
EVANS & PETREE P A



Charles W. Cook, III

CWC/eu
Enclosures

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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**IN RE: PETITION OF FRONTIER
COMMUNICATIONS, INC. FOR
DECLARATORY RULING**

)
)
) **No. 04-00379**

**FRONTIER COMMUNICATIONS OF AMERICA, INC.'S REPLY BRIEF
ADDRESSING ISSUES IN PENDING MOTION TO DISMISS**

Frontier Communications of America, Inc ("Frontier") respectfully submits this brief in response to the briefs submitted by Ben Lomand Rural Telephone Cooperative, Inc ("Ben Lomand") and the intervening telephone cooperatives (the "Intervening Cooperatives") in accordance with the TRA's procedural order, dated May 27, 2005

INTRODUCTION AND SUMMARY OF ARGUMENT

As is stated in Frontier's initial brief, Frontier has a Certificate of Convenience and Necessity ("CCN") to operate state wide (Docket No 96-00779) The TRA has also approved the Interconnection Agreement between Frontier and Ben Lomand, stating "The Agreement is in the public interest as it provides consumers with alternative sources of telecommunications services within the service area of Ben Lomand" (Docket No 04-00233)

Notwithstanding the TRA's rulings cited above, in connection with the negotiation of that agreement, Ben Lomand asserted and continues to assert that Frontier cannot compete within Ben Lomand's territory In the exercise of caution rather than an admission to the legitimacy of Ben Lomand's position, Frontier agreed in the Interconnection Agreement that it would first

obtain confirmation from an appropriate governmental agency before the agreement would become effective. Accordingly, Frontier filed this petition to determine that it had the authority necessary to make the Interconnection Agreement effective¹

Frontier's petition is opposed by Ben Lomand and the Intervening Cooperatives. In its brief, Ben Lomand continues to assert that the TRA lacks jurisdiction to determine this matter under T.C.A. § 65-29-130. The Intervening Cooperatives argue that Frontier's petition should be dismissed because Citizens has at all times been precluded from competing in Ben Lomand's territory pursuant to either T.C.A. § 65-2-102 (which precludes a cooperative from providing service where "reasonably adequate telephone service is available") and T.C.A. § 65-4-201(d) (which attempts to exclude an ILEC with less than 100,000 access lines from competition).

The Intervening Cooperatives further argue that Frontier has admitted that it is precluded from competing in Ben Lomand's territory by virtue of the fact that (a) in 1996 it acknowledged the existence of T.C.A. § 65-4-201(d) and stated that it did intend to provide service in areas served by a telephone cooperative "unless otherwise permitted by the Commission or by applicable federal or state statutes, rules or regulations" (Intervening Cooperatives' Brief, p. 4) and (b) acknowledged the existence of a question of law with respect to the current dispute in the Interconnection Agreement (Intervening Cooperatives' Brief, p. 5).

The arguments of Ben Lomand and the Intervening Cooperatives are without merit. Consistent with its position in 1996, Frontier is entitled to compete in Ben Lomand's territory by applicable federal and state statutes, and the TRA has jurisdiction to decide this dispute. T.C.A. § 65-29-130 gives the TRA jurisdiction to determine disputes "relative to and concerning

¹ The Intervening Cooperatives appear to argue that the mere fact that Frontier agreed to submit this dispute to the TRA is an admission that Frontier does not have authority to compete in Ben Lomand's territory. However, common sense suggests that, absent exigent circumstances, a more prudent course under the circumstances is for Frontier to confirm its position with the TRA before incurring expenses relating to competing in Ben Lomand's territory.

territorial disputes” The nature of this dispute is clearly “relative to and concerning” a dispute over territory (not boundaries) Moreover, by convening a contested case in this matter, the TRA effectively has already denied Ben Lomand’s motion to dismiss

Likewise, the statutes cited by the Intervening Cooperatives do not prohibit Frontier from competing in Ben Lomand’s territory As is stated in Frontier’s initial brief, T C A § 65-2-102 limits a telephone cooperative from competing outside its territory but does not apply in reverse 47 U S C § 253 preempts T C A § 65-4-201(d) and T C A § 65-4-201(d) Finally, T C A § 65-4-201(d) does not apply to a telephone cooperative such as Ben Lomand particularly since it has entered into an interconnection agreement with Frontier Otherwise, neither Ben Lomand nor the Intervening Cooperatives have cited any authority that prevents Frontier from competing in Ben Lomand’s territory

LEGAL ANALYSIS

I. The TRA Has Already Adjudicated The Motion To Dismiss.

BLC filed its Motion to Dismiss on December 8, 2004 Notwithstanding the pending Motion to Dismiss, the TRA issued an order convening a contested case by Order, dated February 16, 2005 In its Order, dated February 16, 2005, the TRA acknowledged the motion to dismiss and convened a contest case Therefore, the TRA has already denied the motion to dismiss²

² Tenn Comp R & Regs 1220-1-2- 02(5) provides

If the Authority determines, on its own motion, not to convene a contested case in response to a complaint or initial petition, the Authority shall enter an order dismissing the complaint or petition and state the basis of the Authority’s action

Implicit within this rule is that if it decides to convene a contested case, it need only issue a notice of contested case proceeding or other process If it denies the motion, it needs to enter an order

II. The TRA Has Jurisdiction Over This Matter.

T C A § 65-29-130 provides that the TRA may exercise jurisdiction over telephone cooperatives such as Ben Lomand for “ (2) the hearing and determining of disputes between . telephone cooperatives and any other type of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes, . . .” T C A § 65-29-130(a)(2) (emphasis added) Contrary to the continued arguments of Ben Lomand, this portion of T C.A § 65-29-130(a) does not employ the word “boundary” but gives the TRA the jurisdiction to adjudicate disputes “relative to and concerning territorial disputes ” This language is clearly broad Otherwise, the legislature could have limited its applicability to “boundary disputes ”

Moreover, the Attorney General for the State of Tennessee has opined that if a telephone cooperative wants to provide service within an area served by a municipality, the TRA (then the “Public Service Commission”) has jurisdiction to decide the dispute pursuant to T C.A § 65-29-130 See Op Atty Gen No 90-83, Aug 27, 1990 (copy previously submitted with initial brief) Notwithstanding Ben Lomand’s tortured interpretation of the Attorney General’s Opinion, the case at hand presents the same form of territorial dispute, namely one entity seeking to provide service within another entity’s boundary without regard to a dispute about the boundary itself

In this case, Frontier wants to provide services in Ben Lomand’s territory, and Ben Lomand contends that Citizens cannot enter its territory notwithstanding the fact that Frontier has approval from the TRA to provide state-wide coverage (which would include Ben Lomand’s territory) and the fact that the TRA has approved the Interconnection Agreement based on its stated desire to see competition in Ben Lomand’s territory

III. T.C.A. § 65-29-102 Does Not Protect Ben Lomand's Territory From Competition.

The Intervening Cooperatives attempt to argue that Ben Lomand is protected by T C A § 65-29-102, which states "Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; provided, that there shall be no duplication of service where reasonably adequate telephone service is available " T C.A. § 65-29-102 However, this statute has been construed by the Tennessee Attorney General to prohibit telephone cooperatives from providing service where "reasonably adequate service is available," not as a means for a telephone cooperative to protect its own territory See Op Atty Gen No. 90-83, Aug. 27, 1990 One court, faced with a similar statute, ruled, "Private telephone companies are free to compete at any time Telephone cooperatives may compete when no 'reasonably adequate service' is available " *Intermountain Telephone and Power Co v Department of Public Service Regulation*, 201 Mont. 74, 78, 651 P 2d 1015, 1017 (Mont 1982) (copy previously submitted with initial brief) Thus, in this case, Frontier is free to compete in the State of Tennessee in accordance with its Certificate of Convenience and Necessity

Lastly, it is worth noting that despite T C.A. § 65-29-102's prohibition, Ben Lomand through its wholly owned subsidiary, Ben Lomand Communications, Inc ("BLC"), is competing in McMinnville and Sparta, Tennessee, territory that is reasonably and adequately served by an affiliate of Frontier

IV. T.C.A. § 65-4-201(d) Is Not Applicable In This Case.

T C A § 65-4-201(d) purports to protect from competition any "incumbent exchange company ["ILEC"] 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 the ILEC applies for a CCN for territory outside its service area T C A § 65-4-201(d)

This statute is inapplicable for several reasons. First, Ben Lomand and other telephone cooperatives are not ILECs. T C A § 65-4-101(d) defines “incumbent local exchange telephone company” as a “public utility offering and providing basic local exchange telephone service pursuant to tariffs approved by the [TRA] ” T C.A. § 65-4-101(d). A “cooperative organization” is not a “public utility.” T C A § 65-4-101(a)(5). Moreover, Ben Lomand and other telephone cooperatives do not file tariffs with the TRA.

Second, Ben Lomand has voluntarily entered into an interconnection agreement with Frontier.

Third, as stated above, Ben Lomand, through its wholly owned subsidiary, BLC, has applied for and obtained a CCN to provide service in an area outside Ben Lomand’s territory, which is territory served by an affiliate of Frontier. (See Docket No. 98-00600)

V. 47 U.S.C. § 253(a) Precludes Any Limitations Imposed By Either T.C.A. § 65-29-102 Or T.C.A. § 65-4-201(d).

Even assuming that either T C A § 65-29-102 or T C.A. § 65-4-201(d) provides Ben Lomand with the ability to exclude a competing provider from entering its territory, 47 U.S.C. § 253(a) unequivocally states, “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 entity to provide any interstate or intrastate telecommunications service ” 47 U.S.C. § 253(a). Accordingly, the FCC has ruled that this statute preempts T C A § 65-4-201(d), which was supposed to protect the territory of ILECs with less than 100,000 lines. *In The Matter Of 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, 1999 WL 335803 (F C C), 14 F C C Rcd 11064 (1999), *pet for reh'g den* , 2001 WL 12939 (F C C), 16 F C C Rcd 1247 (2001) (Copies attached to Petition Exhibit C).

Consistent with 47 U S C § 253(a) and the FCC's ruling cited above, Tennessee's legislature has stated that it is the policy of this state "to foster the development of an efficient, technologically advanced, statewide system of telecommunication services by permitting competition in all telecommunications services markets " T C A § 65-4-123 In fact, when the TRA approved, the CCN for Ben Lomand's wholly owned subsidiary, BLC, to compete outside Ben Lomand's territory, it held that the "application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State . " See TRA Order, dated April 28, 1999 (Docket No 98-00600) Likewise, as cited above, the TRA also cited the benefits of additional competition in Ben Lomand's territory when it approved the Interconnection Agreement (Docket No 04-00233)

In this case, Ben Lomand and the Intervening Cooperatives appear to favor competition competing outside its territory, but contrary to the policies set forth by U.S. Congress, the Tennessee legislature, the FCC and the TRA, it resists competition when it comes knocking on its own door

CONCLUSION

For the reasons set forth herein, Ben Lomand's Motion to Dismiss should be denied, and Frontier should be granted the relief it seeks.

Respectfully submitted,



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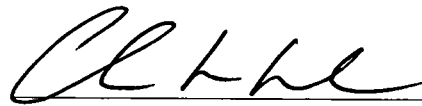
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the 15th day of June, 2005.

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A handwritten signature in cursive script, appearing to read 'Charles W. Cook, III', written over a horizontal line.

Charles W. Cook, III