

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

IN RE:

**PETITION OF FRONTIER
COMMUNICATIONS OF AMERICA, INC.
TO AMEND ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY.**

No. 07-00155

**PETITION OF FRONTIER COMMUNICATIONS OF AMERICA, INC.
TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY**

Frontier Communications of America, Inc. ("Frontier") formerly known as "Citizens Telecommunications Company," by its undersigned counsel and pursuant to Tennessee Code Annotated, Sections 65-2-103 and 65-4-201 through Section 65-4-204; Chapter 1220-4.8 of the Tennessee Regulatory Authority's ("Authority") Rules and Regulations; and pursuant to the request of the Authority as set forth herein, hereby applies to modify and/or clarify its Certificate of Public Convenience and Necessity ("CCN"), granted by Order dated June 27, 1996, a copy of which is attached hereto as Exhibit A.

To the extent that its CCN does not already so provide, by this Petition Frontier seeks authority to provide telecommunications services on a statewide basis in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone Cooperative ("Ben Lomand").¹

The relief requested herein will provide significant benefits to Tennessee telecommunications consumers in terms of increased carrier choices, competitive pricing, increased reliability, responsiveness, and the introduction of new and innovative services. It will also stimulate investment in Tennessee's telecommunications infrastructure,

¹ As is explained in more detail below, the Authority has ruled that Frontier's existing CCN does not allow Frontier to compete in the territory currently served by Ben Lomand. (Docket No. 04-00379, Order, March 8, 2006). Frontier disputes this ruling, and it has sought relief from this ruling before the Federal Communications

resulting in economic development.

Frontier requests expedited approval of this Petition in order to permit Frontier to offer a competitive choice for customers who currently lack the ability to chose competitive services.

I. Introduction and Summary of Prior Authority Action Relating To This Matter.

1. Frontier, formerly known as Citizens Telecommunications Company, is a competing local exchange carrier (“CLEC”) as defined by T.C.A. § 65-4-101. The TRA’s predecessor, the Tennessee Public Service Commission, granted Frontier a statewide CCN as a competing telecommunications provider by Order, dated June 27, 1996 (Docket No. 96-00779), a copy of which is attached hereto as Exhibit A. Frontier is regulated by the TRA pursuant to T.C.A. §§ 65-4-101 and 65-4-104. Frontier’s CCN allows Frontier to provide “all the services that may be provided by a Competing Telecommunications Provider as that term is defined in Section 3 of Chapter 408, T.C.A. § 65-4-101(e); those services include, but are not limited to toll, local exchange, access, private line, paging, and enhanced services, Centrex services, measured business lines, voice mail, ISDN, and vertical factors; . . .” (CCN, ¶ 3).

2. Frontier is an affiliate of Citizens Telecommunications Company of Tennessee, LLC (“Citizens”). Citizens is an incumbent local exchange carrier (“ILEC”) as defined in T.C.A. § 65-4-101, serving customers in White, Warren, Weakley, Putnam, and Cumberland counties in Tennessee.

3. Ben Lomand is a telephone cooperative as defined by T.C.A. § 65-29-102, and as such, it is largely unregulated by the TRA. *See* T.C.A. § 65-29-130. Ben Lomand serves customers in White, Warren, Van Buren, Grundy, and portions of Franklin, Coffee and Bedford

counties in Tennessee.

4. Ben Lomand also owns Ben Lomand Communications, Inc, (“BLC”), a CLEC, which aggressively competes with Citizens in McMinnville and Sparta, Tennessee. Ben Lomand also owns 50% of Volunteer First Services, Inc. (“VFS”), which was recently certificated by the Authority to operate as a CLEC in Crossville, Tennessee, another market served by Citizens. (TRA Docket No. 03-0067)

5. The primary purpose of this Petition is Frontier’s intention to compete in the territory served by Ben Lomand. However, Ben Lomand has taken the position that Frontier is statutorily prohibited from competing in Ben Lomand’s territory.

6. On October 11, 2004, the Authority approved an interconnection agreement (the “Interconnection Agreement”) between Frontier and Ben Lomand, dated August 2, 2004, a copy of which is attached hereto as Exhibit B (Docket No. 04-00233). The Interconnection Agreement provides as follows:

13.1 This Agreement will become effective upon:

(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) immediately above, 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 BLTC or other telephone cooperatives. Notwithstanding this uncertainty, the Parties have acted in good faith to negotiate this Agreement and fulfill their obligations under the Act in order to avoid unnecessary dispute and delay. By executing this Agreement, neither Party waives any right with respect to issues related to the position either Party may assert in any forum with respect to issues related to the matter of the state

commission's statutory authority with respect to geographic areas served by telephone cooperatives or any other matters.

7. The conditions set forth in Paragraph 13.1 (a) and (b) have been met. The TRA previously has certificated Frontier in its CCN to provide services statewide as a CLEC. In addition, the Authority now has approved the Interconnection Agreement. Ben Lomand disagrees and refuses to interconnect in the absence of additional regulatory or judicial action.

8. By Petition dated October 26, 2004, Frontier sought from the Authority a declaratory ruling to allow it to provide service in Ben Lomand's territory (Docket No. 04-00379) (the "Declaratory Judgment Action") in accordance with the terms of the Interconnection Agreement and its CCN. However, by Order, dated March 8, 1996, the Authority ruled that Frontier's CCN does not include territory served by Ben Lomand until and unless Frontier amends its CCN to include such territory (Docket No. 04-00379).

9. Frontier sought relief from the ruling in the Declaratory Judgment Action before the Federal Communications Commission (WC Docket No. 06-6). The TRA has appeared in that action and opposed Frontier's petition on the basis that, by failing to have its CCN amended, Frontier has failed to exhaust its administrative remedies. Although, Frontier disputes the TRA's position, in the exercise of caution and without waiving its position before the FCC, Frontier seeks to have its CCN amended to the extent that it is not statewide as it so provides.

10. Approval of this Petition is warranted for the following reasons:

a. T.C.A. §65-4-201, which protects ILECs with less than 100,000 access lines from encroachment, is not applicable because Ben Lomand is not an ILEC. 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 does not file tariffs with the TRA.

b. T.C.A. § 65-29-102 does not provide territorial protection to Ben Lomand. *See* Op. Atty Gen. No. 90-83, August 27, 1990 (Copy attached as Exhibit C).

c. Any territorial protection granted to Ben Lomand by state law (see T.C.A. § 65-29-102) is preempted and prohibited by 47 U.S.C. § 253(a), which 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.” The FCC has ruled that the above-cited T.C.A. § 65-4-201(d) is unenforceable as an unlawful prohibition against competition. *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 as Exhibit D).

d. T.C.A. § 65-4-123 sets forth Tennessee General Assembly’s legislative intent that the “policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services **by permitting competition in all telecommunications services markets...**” (emphasis added). In addition, the relief requested is equitable given the fact that Ben Lomand, through its subsidiaries, is competing in areas served by Frontier’s affiliate ILEC. Thus, it would be unfair to prevent Frontier from providing competing services in Ben

Lomand's territory.

- e. Frontier is otherwise qualified to provide the services.

11. As is evidenced by the certificate of service appended hereto, a copy of this Petition has been served on all telephone cooperatives identified as Tier 1 Members of the Tennessee Telecommunications Association at <http://www.tenntel.org/o2membersT1.htm> and to LaDon Baltimore and Melvin Malone, counsel for Ben Lomand and the Intervening Cooperatives in TRA Docket No. 04-00379.

II. Additional Information Relating to Petition and Qualifications of Frontier As Set Forth in TRA Rule 1220-4-8-.04

A. Corporate Information

1. Legal Name: Frontier's legal name is Frontier Communications of America, Inc. Frontier maintains its principal place of business at:

3 High Ridge Park
Stamford, CT 06905

2. Contact Persons: Correspondence or communications pertaining to this Petition should be directed to:

Gregg Sayre
Frontier Communications Solutions
180 South Clinton Avenue
Rochester, NY 14646
Telephone: (585) 777-7270
Facsimile: (585) 263-9986

with a copy to:

Guilford F. Thornton, Jr.
Charles W. Cook, III
Adams and Reese LLP
434 Church Street, Suite 2800
Nashville, Tennessee 37219
Telephone: (615) 259-1450

Facsimile: (615) 259-1470

3. Corporate Liaisons: Questions concerning the ongoing operations of Frontier

following certification should be directed to:

J. Michael Swatts
Frontier Communications Solutions
300 Bland Street
Bluefield, WV 24701
Telephone: 304-325-1216
Facsimile: 304-325-1483

4. Registered Agent: Frontier's registered agent in the State of Tennessee is:

C T Corporation System
530 Gay Street
County of Knox
Knoxville, TN 37902

5. Officers and Directors

Frontier's Directors are:

Mary Agnes Wilderotter
Donald Shassian
Daniel McCarthy

Frontier's Officers are:

Mary Agnes Wilderotter	Chairman
Daniel J. McCarthy	President and Chief Operating Officer
Donald R. Shassian	Vice President and Chief Financial Officer
John H. Casey, III	Vice President
Robert J. Larson	Vice President and Chief Accounting Officer
Hilary E. Glassman	Vice President, General Counsel and Secretary
Donald B. Armour	Vice President and Treasurer
Michael Golob	Vice President, Engineering
Ann Burr	Vice President, Regulatory
David G. Schwartz	Assistant Secretary
Gregg C. Sayre	Assistant Secretary

The officers and managers may be reached at the following address and phone number:

3 High Ridge Park
Stamford, CT 06905
Telephone: 203-614-5600
Facsimile: 203-614-4651

6. Tennessee Operations: The person responsible for Frontier's operations in Tennessee is as follows:

David Byrd
Frontier Communications Solutions
250 South Franklin
Cookeville, TN 38501
865-947-8240

7. Toll Free Number: Frontier's toll-free customer service telephone number for customer inquiries is: 1-800-921-8101.

8. Corporate Structure: Frontier is a corporation organized on July 1, 1993 under Delaware law. Frontier is wholly-owned by its parent, Citizens Communications Company. A copy of Frontier's Articles of Incorporation, Certificate to Do Business in Tennessee and its Organizational Chart for Citizens Communications Company is attached hereto as Exhibit E, F and G respectively.

9. Frontier is authorized and operating as a long distance reseller in all 50 states. Frontier is operating as a CLEC only in New York State. To the best of its knowledge, Frontier has never been refused permission to operate in any state.

B. Qualifications

1. Managerial and Technical Qualifications: The Authority granted Frontier its current CCN based in part upon finding that Frontier possessed the requisite managerial and

technical qualifications to provide telecommunications services in Tennessee, including services as a CLEC. Since the grant of that application, Frontier has supplemented its staff of experienced senior managers, as listed in paragraph 5 above. Together, Frontier's officers have decades of experience in the telecommunications industry. This experience provides the technical and operational foundation necessary to execute the company's business plan, to provide its proposed telecommunications services, and to operate and maintain Frontier's facilities over which the proposed services will be deployed. Frontier remains managerially and technically qualified to provide telecommunications services throughout the State of Tennessee.

2. Financial Qualifications: The Authority granted Frontier its current CCN based in part upon finding that Frontier possessed the requisite financial qualifications to provide telecommunications services in Tennessee. Since the grant of its certificate, Frontier has remained profitable and maintained access to working capital necessary to fund its in-state operations.

3. Financial information relating to Citizens Communications Company and its subsidiaries is available for inspection online at:

<http://www.czn.net/Invest/AnnualReport.aspx>

C. Proposed Services

1. Description of Proposed Services: Frontier is currently authorized to provide all services authorized by its CCN on a statewide basis, including but not limited to toll, local exchange, access, private line, paging, and enhanced services, Centrex services, measured business lines, voice mail, ISDN, and vertical features.

2. Description of Additional Service Area, As is set forth in the historical background, Frontier intends to provide services in the service territory of Ben Lomand and

then potentially other telephone cooperatives to the extent that its CCN does not already permit it to provide services in these areas. The potentially affected telephone cooperatives known to Frontier are identified in the Certificate of Service, filed herewith as Exhibit H.

3. Description of Proposed Facilities: Frontier intends build its own facilities in areas where Citizens (its ILEC affiliate) does not have facilities and lease facilities from Citizens when operating within Citizens' service territory.

D. Description of Regulatory Obligations and Commitments.

1. Frontier Communications of America does not presently operate as a CLEC in Tennessee. Frontier anticipates a need for an NXX code or possibly a one-thousand block(s) of numbers in each rate center in which it decides to provision CLEC service. Those plans are not finalized therefore the specific number of codes or locations is not available at this time.

2. Frontier is familiar with and will adhere to all applicable Authority rules, policies and orders governing the provisions of local exchange telecommunications services in the State of Tennessee, including those set forth in Rule 1220-4-8-.04(3).

3. Frontier submits a Small and Minority Owned Telecommunications Business Participation Plan annually with the TRA. Frontier will adhere to its most current Small and Minority Owned Telecommunications Business Participation Plan on file with the Authority.

4. In compliance with the Authority's rules, Frontier shall either directly or through other arrangements, provide the emergency, directory, blocking, support, interconnection and other services mandated by the Authority as required and applicable.

5. Customers with service, billing and repair questions, and complaints may reach Frontier twenty four (24) hours per day, seven (7) days per week using the following toll free customer service number: 1-800-921-8101. Inquiries about customer service issues may be directed to:

David Byrd
Frontier Communications Solutions
250 South Franklin
Cookeville, TN 38501
Telephone: 865-947-8240
Facsimile: 865-938-2850

6. Frontier will handle repair and maintenance in Tennessee as follows: Frontier's customers may call the toll free number above to report service problems requiring repair or maintenance. Frontier will respond to repair and maintenance calls promptly and, where necessary, dispatch a service technician or otherwise responds to the trouble ticket as soon as possible. Because customer satisfaction is extremely important to Frontier and to its success in the competitive marketplace, all commercially reasonable efforts will be made to address and resolve customer concerns as quickly as possible.

7. Frontier will determine the need for and the amount of customer deposits on a case-by-case basis. To the extent that Frontier does collect deposits, Frontier will comply with the Authority's applicable rules and regulations.

8. Frontier will file tariff revisions, to the extent that it is necessary, subsequent to approval of its application and prior to providing service in those areas of Tennessee covered by this Petition.

9. Frontier's internal policies regarding changes of local and long distance carriers will be consistent with applicable Federal Communication Commission ("FCC") telemarketing and carrier change rules, and will comply with any applicable Tennessee policies, rules, and orders governing such carrier changes.

10. Frontier is aware of the telemarketing statutes and regulations found in

Sections 65-4-401 through Sections 65-4-408 of the Tennessee Code Annotated and in Chapter 1220-4-11 of the Authority's Rules and Regulations and will comply with such rules if and when it uses telemarketing in Tennessee.

E. Numbering Issues

1. Frontier will abide by all of the numbering rules established by the FCC, including sequential assignment of telephone numbers, as well as any rules established by the Authority.

2. Frontier will comply with all of the FCC regulations concerning number resource optimization in order to conserve numbering resources.

3. In requesting growth codes, Frontier will comply with applicable FCC regulations relating to utilization thresholds. While the threshold will rise in increments of 5%, current FCC regulations require that carriers achieve a 60% utilization prior to requesting growth codes.

III. Public Interest Statement

1. The Authority granted Frontier its current CCN based in part upon finding that grant of Frontier's certificate was in the public interest. At that time, Frontier sought and obtained statewide certification, but the Authority has since determined that this territory does not include the territory served by Ben Lomand and presumably other telephone cooperatives in Tennessee. However, as stated previously, Frontier's statewide CCN should be statewide and include the territory currently served by Ben Lomand for the following reasons

a. The Federal Communications Commission has determined that Section 65-4-201(d) is pre-empted by Federal law. *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 as Exhibit D).

b. The Attorney General for the State of Tennessee has issued an opinion that due to the Federal Communication Commission's preemption of Tennessee Code Annotated Section 65-4-201(d), this provision is not enforceable. Office of the Attorney General, Opinion No. 01-036, 2001 Tenn. AG Lexis 36 (Mar. 19, 2001) (Copy attached as Exhibit H).

c. The Tennessee Attorney General has also opined that T.C.A. § 65-29-102 does not provide territorial protection to telephones cooperatives such as Ben Lomand. *See* Op. Atty Gen. No. 90-83, August 27, 1990 (Copy attached as Exhibit C).

Accordingly, there is no longer any justification for the geographic limitation in Frontier's certificate.

2. T.C.A. § 65-4-123 sets forth Tennessee General Assembly's legislative intent that the "policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services **by permitting competition in all telecommunications services markets...**" (emphasis added). In addition, the relief requested is equitable given the fact that Ben Lomand, through its subsidiaries, is competing in areas served by Frontier's affiliate ILEC. Thus, it would be unfair to prevent Frontier from providing competing services in Ben Lomand's territory.

3. The grant of this Application will also further the public interest by expanding the availability of telecommunications services in throughout the State of Tennessee. In particular, the public will benefit directly through the use of the competitive local services to be offered by Frontier. The public will also benefit indirectly because the competitive presence Frontier in an expanded service area will increase the incentives for both telecommunications providers to operate more efficiently, offer more innovative services, reduce prices, and improve the quality and coverage of their services. In addition, intrastate offering of these services is in

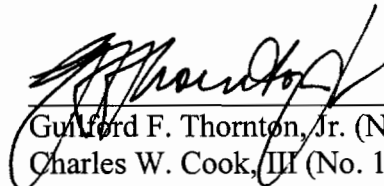
the public interest because the services will provide Tennessee customers with access to new technologies and service choices and can permit customers to achieve increased efficiencies and cost savings.

4. Grant of this Application will promote the availability of quality services and increased consumer choice for Tennessee telecommunications consumers. Competition for customers in areas served by telephones cooperatives and small incumbent LECs should result in benefits to consumers in the form of lower prices, better quality, and increased investment in broadband infrastructure. Frontier's expertise in the telecommunications industry will allow it to provide economic and efficient services, thereby affording customers with an optimal combination of price, quality, and customer service. Accordingly, Frontier anticipates that its proposed services will increase consumer choice of innovative, diversified, and reliable service offerings and further the public interest.

CONCLUSION

WHEREFORE, Frontier respectfully requests that, to the extent that its CCN does not already permit Frontier to provide services in areas served by telephone cooperatives, including Ben Lomand, the Authority amend Frontier's current CCN to allow Frontier to provide the services authorized hereunder on a statewide basis, including areas served by telephone cooperatives and small incumbent LECs.

Respectfully submitted,



Gunford F. Thornton, Jr. (No. 14508)
Charles W. Cook, III (No. 14274)
ADAMS AND REESE LLP
424 Church Street, Suite 2800
Nashville, TN 37215
Telephone: (615) 259-1456

Attorneys for Frontier Communications of America, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following by first class U.S Mail Postage prepaid:

Counsel for Cooperatives in Docket No. 04-00379

H. LaDon Baltimore
Farrar & Bates
211 Seventh Avenue, North, Suite 420
Nashville, Tennessee 37219

Melvin J. Malone
Miller & Martin
1200 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Office of the Attorney General for the State of Tennessee
PO Box 20207
Nashville, Tennessee 37202

Telephone Cooperatives Identified as Tier 1 Members of Tennessee Telecommunications Association

Ardmore Telephone Company
PO Box 549
30190 Ardmore Avenue
Ardmore, TN 38449

Ben Lomand Rural Telephone Co-Op
PO Box 670
311 North Chancery Street
McMinnville, TN 37110

Bledsoe Telephone Cooperative
PO Box 609
338 Cumberland Avenue
Pikeville, TN 37367

Concord Telephone Exchange
P.O. Box 22610
11505 Kingston Pike

Knoxville, TN 37922

Crockett Telephone Company
P.O. Box 10
224 East Main Street
Bradford, TN 38316

DTC Communications
P.O. Box 247
111 High Street
Alexandria, TN 37012

Embarq
14111 Capital Blvd.
Wake Forest, NC 27587-5900

Highland Telephone Cooperative
P.O. Box 119
7840 Morgan County Highway
Sunbright, TN 37872

Humphreys County Telephone Company
P.O. Box 552
203 Long Street
New Johnsonville, TN 3734-0552

Loretto Telephone Company
P.O. Box 130
136 South Main Street
Loretto, TN 38469

North Central Telephone Cooperative
P. O. Box 70
Highway 52 By-Pass
Lafayette, TN 37083

Peoples Telephone Company
P.O. Box 10
224 East Main Street
Bradford, TN 38316

Scott County Telephone Cooperative
P.O. Box 487
Gate City, VA 24251-0487

TDS Telecom-Knoxville
P.O. Box 22995
Knoxville, TN 37933-0995
Tennessee Telephone Company
P.O. Box 155
30502 Broad Street
Bruceton, TN 38317-0155

Tennessee Telephone Company
P.O. Box 100
5265 Murfreesboro Road
LaVergne, TN 37086-0100

Tennessee Telephone Company
P.O. Box 610
264 East Main Street
Parsons, TN 38363

Tennessee Telephone Company
P.O. Box 70387
7407 Andersonville Pike
Knoxville, TN 37938-2139

Tennessee Telephone Company
4112 N. Mt. Juliet Rd.
Mt. Juliet, TN 37122

Tennessee Telephone Company
P.O. Box 433
215 South Main Street
Waynesboro, TN 38485

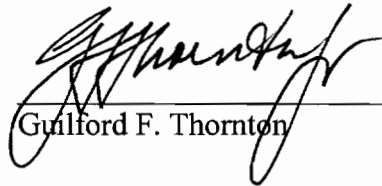
Twin Lakes Telephone Cooperative
P.O. Box 67
201 West Gore Avenue
Gainsboro, TN 38562-0067

United Telephone Company
P.O. Box 38
120 Taylor Street
Chapel Hill, TN 37034

West Kentucky Rural Telephone
P.O. Box 649
237 North 8th Street

Mayfield, KY 42066

West Tennessee Telephone Company
P.O. Box 10
224 East Main Street
Bradford, TN 38316



Guilford F. Thornton

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BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nashville, Tennessee

June 27, 1996

**IN RE: APPLICATION OF CITIZENS TELECOMMUNICATIONS
 COMPANY, D/B/A CITIZENS TELECOM FOR A CERTIFICATE
 OF CONVENIENCE AND NECESSITY**

DOCKET NO. 96-00779

ORDER

This matter is before the Tennessee Public Service Commission upon the application of Citizens Telecommunications Company, d/b/a Citizens Telecom ("Citizens") for a Certificate of Convenience and Necessity pursuant to TCA § 65-4-201 (c) as set forth in the above caption.

The matter was heard on May 15, 1996, in Nashville Tennessee, before Ralph B. Christian, II, Administrative Judge. On May 30, 1996, the Administrative Judge issued his Initial Order recommending that the application be granted.

The Public Service Commission considered this matter at a regularly scheduled Commission Conference held on June 25, 1996. It was concluded after careful consideration of the entire record, including the Administrative Judge's Initial Order and all applicable laws and statutes and particularly the requirements of Chapter 408 of the Public Acts of 1995, that the Administrative Judge's Initial Order should be approved and the authority granted as requested. The Commission further ratifies and adopts the findings and conclusions of the Administrative Judge as its own.

IT IS THEREFORE ORDERED:

1. That the Administrative Judge's Initial Order, dated May 30, 1996, in this docket is hereby ratified, adopted and incorporated by reference in this Order as fully as though copied verbatim herein, including the findings and conclusions of the Administrative Judge which the Commission adopts as its own;

2. That the application of Citizens Telecommunications Company d/b/a Citizens Telecom for a Certificate of Convenience and Necessity as a Competing Telecommunications Service Provider pursuant to Section 7 of Chapter 408 of the Public Acts of 1995 is hereby granted;

3. That Citizens is authorized to offer all of the services that may be provided by a Competing Telecommunications Service Provider, as that term is defined in Section 3 of Chapter 408, TCA §65-4-101 (e); those services include, but are not limited to toll, local exchange, access, private line, paging and enhanced services, Centrex services, measured business lines, voice mail, ISDN, and vertical factors;

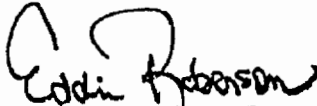
4. That Citizens abide by the rules and regulations of the Commission;

5. That Citizens may commence service under its certificate once it has filed proper tariffs for service to be offered and such other information as the Public Service Commission may require;


6. That any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this order; and

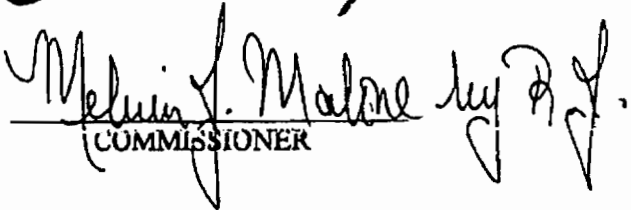
7. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review with the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

ATTEST:


Executive Director


CHAIRMAN


COMMISSIONER


COMMISSIONER

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 24, 2004

IN RE:

**PETITION FOR APPROVAL OF THE
INTERCONNECTION AGREEMENT
BETWEEN BEN LOMAND TELEPHONE
COOPERATIVE, INC. AND FRONTIER
COMMUNICATIONS OF AMERICA, INC.**

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**DOCKET NO.
04-00233**

ORDER APPROVING THE INTERCONNECTION AGREEMENT

This matter came before Chairman Pat Miller, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on October 11, 2004, to consider, pursuant to 47 U.S.C. § 252, the Petition for approval of the interconnection agreement negotiated between Ben Lomand Telephone Cooperative, Inc. and Frontier Communications of America, Inc., filed on August 4, 2004.

Based upon a review of the agreement, the record in this matter, and the standards for review set forth in 47 U.S.C. § 252, the Directors unanimously granted the Petition and made the following findings and conclusions:

- 1) The Authority has jurisdiction over public utilities pursuant to Tenn. Code Ann. § 65-4-104.
- 2) The agreement is in the public interest as it provides consumers with alternative sources of telecommunications services within the service area of Ben Lomand Telephone Cooperative, Inc.
- 3) The agreement is not discriminatory to telecommunications service providers that are not parties thereto.

4) 47 U.S.C. § 252(e)(2)(A) provides that a state commission may reject a negotiated agreement only if it “discriminates against a telecommunications carrier not a party to the agreement” or if the implementation of the agreement “is not consistent with the public interest, convenience or necessity” Unlike arbitrated agreements, a state commission may not reject a negotiated agreement on the grounds that the agreement fails to meet the requirements of 47 U.S.C. §§ 251 or 252(d) ¹ Thus, although the Authority finds that neither ground for rejection of a negotiated agreement exists, this finding should not be construed to mean that the agreement is consistent with §§ 251 or 252(d) or, for that matter, previous Authority decisions.

5) No person or entity has sought to intervene in this docket.

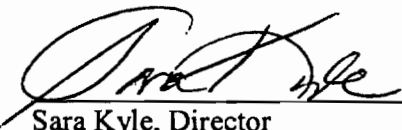
6) The agreement is reviewable by the Authority pursuant to 47 U.S.C. § 252 and Tenn. Code Ann. § 65-4-104.

IT IS THEREFORE ORDERED THAT:

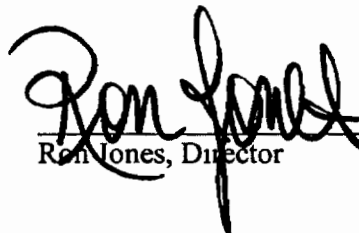
The Petition is granted, and the interconnection agreement negotiated between Ben Lomand Telephone Cooperative, Inc. and Frontier Communications of America, Inc. is approved and is subject to the review of the Authority as provided herein.



Pat Miller, Chairman



Sara Kyle, Director



Ron Jones, Director

¹ See 47 U.S.C. § 252(e)(2)(B)

*1 Office of the Attorney General
State of Tennessee

Opinion No 90-83

August 27, 1990

MUNICIPAL CORPORATIONS Municipal Powers

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by T C A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4-104, -107, -201 et seq, -207, § § 65-29-101 et seq, -102, -130.

PUBLIC SERVICE COMMISSION

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C A § 65-4-107; a telephone cooperative is prohibited by R C.A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4-104, -107, -201 et seq, -207, § § 65-29-101 et seq, -102, -130

PUBLIC UTILITIES AND CARRIERS: Regulation of Public Utilities.

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by T.C A § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C A § 65-29-130 to establish a telephone

Tenn Op. Atty Gen No 90-83, 1990 WL 513064 (Tenn.A G)
(Cite as: 1990 WL 513064 (Tenn.A.G.))

cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service. T.C.A. § 1-3-103, §§ 65-4-104, -107, -201 et seq, -207, §§ 65-29-101 et seq, -102, -130.

*2 TELEPHONE

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107, a telephone cooperative is prohibited by T.C.A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available"; the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T.C.A. § 1-3-103, §§ 65-4-104, -107, -201 et seq, -207, §§ 65-29-101 et seq, -102, -130.

Authority of Municipality to Permit a Competing Telephone Company or Cooperative Within its Jurisdiction

The Honorable Jerry W Cooper
State Senator
Room 307, War Memorial Building
Nashville, Tennessee 37243-0214

QUESTIONS

- (1) Whether a municipality may permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company?
- (2) Whether a telephone cooperative organized under T.C.A. § 65-29-101 et seq can conduct business in a municipality which already possesses existing telephone service administered by a telephone company?

OPINIONS

- (1) No, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107.
- (2) A telephone cooperative is prohibited by T.C.A. § 65-29-102 from providing service in an area where "reasonably adequate telephone service is available". The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service.

ANALYSIS

The establishment, regulation and control of public utilities, including telephone companies, is governed by Chapter 4 of Title 65 of the Tennessee Code. Chapter 4 is divided into three specific parts, with part 1 detailing the general provisions of Chapter 4, part 2 addressing the certificate of public convenience and necessity required of each public utility, and part 3 detailing both the Commission's powers to inspect and control public utilities as well as the supervision fee required to be paid by public utilities

*3 T C A. § 65-4-104, contained in part 1 of Chapter 4, grants the Tennessee Public Service Commission general supervision and regulation of, and jurisdiction and control over, all public utilities, and also over their property, property rights, facilities and franchises T C A § 65-4-107, also in part 1, specifically provides that no privilege or franchise granted to any public utility by the State of Tennessee or by any political subdivision thereof shall be valid until approved by the Public Service Commission, with such approval to be given after a hearing and a determination by the Commission that such privilege or franchise "is necessary and proper for the public convenience and properly conserves the public interest."

Part 2 of Chapter 4, codified at T.C.A. § 65-4-201 et seq , provides that 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 Tennessee Public Service Commission, 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 T.C.A. § 65-4-207 however provides that the "provisions of this part shall not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county " (Emphasis added)

The initial question raised in this opinion request focuses on these provisions, and specifically whether T C A. § 65-4-207 grants a municipality the authority to permit a competing telephone company to come into the municipality when the Public Service Commission has not approved the competing telephone company's entry into the territory of the municipality. The Tennessee Supreme Court in 1933 definitively answered this question in the negative in the case of Holston River Electric Co. v Hydro Electric Corp , 166 Tenn 662, 64 S W 2d 509 (1933)

In that case, the town of Rogersville had issued in 1932 a franchise to the Hydro Electric Corporation, authorizing it to distribute and sell electric power within Rogersville, without the approval of the Railroad and Public Utilities Commission, the predecessor to the Public Service Commission. At the time this municipal franchise was granted to the Hydro Electric Corporation, Holston River Electric Company was exercising a similar franchise granted to it by Rogersville in 1926 for a term of 25 years. Holston River Electric Company commenced litigation seeking an injunction restraining the Hydro Electric Corporation from operating under its franchise unless it was approved by the Public Utilities Commission, as required by section 5453 of the Tennessee Code, presently codified at T.C.A. § 65-4-107

Hydro Electric Corporation contended that the approval of the Public Utilities Commission was not necessary, since section 5508 of Code, presently codified as T C A § 65-4-207, allowed a municipality by resolution or ordinance to declare that a public necessity required a competing company in the municipality. The Court found that a municipality could not by itself authorize such a competing telephone company, even under present § 65-4-207, reasoning as follows:

*4 Section 5453 of the Code, in article 1 of chapter 23 [presently codified as T C A § 65-4-107], deals specifically with franchises granted to public utilities by the state or its subdivisions, and expressly makes the approval of the Railroad and Public Utilities Commission [now the Public Service Commission] a condition precedent to the validity of any such franchise. This provision embodies a most important matter of public policy, which we cannot presume the Legislature would either adopt or discard without plainly and deliberately expressing its intention.

Sections 5502-5508, comprising article 2 of the same chapter of the Code [presently codified at T C A § 65-4-201 et seq], do not deal with franchises, but directly refer to and purport to regulate physical operations of public utilities. Since no such operations may be undertaken by a company not in possession of a franchise, whenever one is required, by law, it would seem that the regulations and control prescribed by these sections were intended to apply to and affect a utility, already holding any required franchise with the commission's approval, which might be about to engage in some specific operation in competition with another similar company. The certificate of public convenience and necessity required by these sections is clearly in addition to and not a substitute for the commission's approval of the franchise, required by section 5453 [T.C A § 65-4-107].

Giving effect to the rule of construction prescribed in section 13 of the Code [FN1] as well as to the general rule that the various sections of the Code must be reconciled if their language reasonably permits it (Dagley v State, 144 Tenn., 501, 507, 508, 234 S W , 333), we are of opinion and so hold that the Code sections 5502-5508 were not intended to and do not repeal the provision of section 5453 which requires the approval of the Railroad and Public Utilities Commission as a condition to the validity of all franchises included in that section. Holston River Electric Co v Hydro Electric Corporation, 166 Tenn 662, 667-668, 64 S W 2d 509 (1933). See also Briley v Cumberland Water Co., 215 Tenn 718, 727-728, 389 S W.2d 278 (1964) (Supreme Court stating that a municipality could not grant a valid franchise to a utility without the approval of the Public Service Commission, given after a hearing in which the Commission determines the franchise is necessary and proper for the public convenience and properly conserves the public interest).

Thus it appears that even though a municipality under T.C A. § 65-4-207 may authorize a telephone company and dispense with the necessity of obtaining a certificate of convenience and necessity under § § 65-4-201 to -206, the approval of the Public Service Commission is still necessary pursuant to T C A § 65-4-107 before the telephone company may operate.

Secondly, a municipality can only allow a telephone cooperative organized under T C A § 65-29-101 et seq. (the Telephone Cooperative Act) to conduct business in the municipality if it is determined under T C A. § 65-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative.

[FN2] In any event, the ultimate question of whether a telephone cooperative could enter the territory of such a municipality is one for the Public Service Commission, since T.C.A. § 65-29-103 grants the Commission jurisdiction to resolve any territorial disputes between a telephone cooperative and any other entity rendering telephone service

*5 Charles W Burson

Attorney General and Reporter

John Knox Walkup

Solicitor General

William E Young

Assistant Attorney General

[FN1] Section 13, now codified at T C A § 1-3-103, declares, "[i]f provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article "

[FN2] Even in those circumstances, the terms of the franchise granted to the existing company would be relevant in determining its rights versus those of a competing cooperative.

Tenn Op Atty. Gen No 90-83, 1990 WL 513064 (Tenn.A G)

END OF DOCUMENT

H

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

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
CC Docket No. 98-92

FCC 99-100

Adopted: May 14, 1999

Released: May 27, 1999

*11064 By the Commission:

1. On May 29, 1998, AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (Hyperion) filed the above-captioned petition (Petition) asking the Commission to: (i) preempt Tenn. Code Ann. § 65-4-201(d), and (ii) preempt the enforcement of the April 9, 1998, order of the Tennessee Regulatory Authority (Authority or Tennessee Authority) denying Hyperion a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company (Denial Order). [FN1] Hyperion also asks the Commission to direct the Tennessee Authority to grant Hyperion's application for a CPCN. [FN2] Hyperion asserts that the Tennessee Authority's Denial Order and Tenn. Code Ann. § 65-4-201(d) violate section 253(a) of the Communications Act of 1934, as amended, [FN3] *11065 fall outside the scope of authority reserved to the states by section 253(b) of the Act, [FN4] and thus satisfy the requirements for preemption by the Commission pursuant to section 253(d) of the Act. [FN5]

2. For the reasons described below, we grant Hyperion's Petition in part and deny it in part. Specifically, we preempt the enforcement of the Tennessee Authority's Denial Order and Tenn. Code Ann. § 65-4-201(d), [FN6] but we decline to direct the Tennessee Authority to grant Hyperion's CPCN application. We expect, however, that upon a request from Hyperion, the Authority will expeditiously reconsider Hyperion's CPCN application in a manner consistent with the Communications Act and with this Memorandum Opinion and Order.

II. BACKGROUND

3. Hyperion is a facilities-based competitive local exchange carrier operating in twelve states. [FN7] Hyperion has constructed a fiber-based network in the Nashville, Tennessee area, and is in the process of extending that network into outlying areas of Tennessee, including areas currently served by the Tennessee Telephone Company (Tennessee Telephone). [FN8] Tennessee Telephone serves fewer than 100,000 residential and business customers in Tennessee. [FN9]

4. On August 24, 1995, the Tennessee Public Service Commission (TPSC, the

predecessor to the Tennessee Authority) found that Hyperion possessed the requisite technical, managerial, and financial qualifications to render local exchange services, and granted *11066 Hyperion a CPCN to provide such services in Tennessee. [FN10] The following March, however, the TPSC issued an order limiting Hyperion's certificate to only those areas of Tennessee that are served by companies having 100,000 access lines or more within the state. [FN11] The TPSC explained that, under Tennessee law, incumbent LECs serving fewer than 100,000 access lines were protected from competition "until the incumbent LEC either '... voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider' or the incumbent LEC ... 'applies for a certificate to provide telecommunications services in an area outside its service area.'" [FN12]

5. Hyperion, believing the restriction to be inconsistent with the 1996 Act, petitioned the Tennessee Authority on January 2, 1998, for permission to extend its service into the areas served by Tennessee Telephone. On April 9, 1998, the Authority denied Hyperion's application. The Authority based its denial on Tenn. Code Ann. § 65-4-201, which in relevant part provides:

(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 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 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 the June 6, 1995. [FN13]

*11067 6. The transcript of the Tennessee Authority's March 10, 1998, hearing denying Hyperion's application reveals that disagreement arose within the Authority on the effect of Tenn. Code Ann. § 65-4-201(d) on Hyperion's petition. [FN14] The incumbent LEC into whose service territory Hyperion wished to expand, Tennessee Telephone, served fewer than 100,000 access lines in Tennessee, so it clearly fell within the class protected from competition by Tenn. Code Ann. § 65-4-201(d). During the hearing, however, the Authority's Chairman argued that subsection (d) was inconsistent with the 1996 Act's purpose and the plain meaning of section 253(a), which preempts state legal requirements that prohibit the provision of telecommunications service. [FN15] The Authority's two other Directors argued that subsection (d) lay within the regulatory authority reserved to the states in section 253(b), which excludes from preemption state or local requirements necessary to protect universal service and certain other public interest goals, if such requirements are competitively neutral and consistent with the Act's universal service provisions. [FN16] In its Denial Order, the Authority concluded that Tenn. Code Ann. § 65-4-201(d) does satisfy the requirements of section 253(b), and that

therefore section 253(b) operates as a limitation on Hyperion's challenge under 253(a). [FN17] Hyperion contends that Tenn. Code Ann. § 65-4-201(d) is inconsistent with section 253 and with Commission precedent, and on that basis petitions us to preempt Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's Denial Order. [FN18]

7. In assessing whether to preempt enforcement of the Denial Order and Tenn. Code Ann. § 65-4-201(d) pursuant to section 253, we first determine whether those legal requirements are proscribed by section 253(a), which states:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the *11068 ability of any entity to provide any interstate or intrastate telecommunications service. [FN19]

8. If we find that the Denial Order and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a) considered in isolation, we must then determine whether, nonetheless, they fall within the reservation of state authority set forth in section 253(b), which provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. [FN20]

9. If the Denial Order and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a), and do not fall within the scope of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d), which provides:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. [FN21]

10. Hyperion maintains that because it has met the technical, managerial, and financial qualifications to provide service, only Tenn. Code Ann. § 65-4-201(d)'s protection of incumbent LECs serving fewer than 100,000 lines, and the Denial Order enforcement of that statutory provision, prevented Hyperion from providing local exchange service in Tennessee Telephone's service areas [FN22] Hyperion further maintains that these legal requirements fall squarely within section 253(a)'s proscription of state legal requirements that prohibit the ability of any entity to provide any telecommunications service. [FN23] According to *11069 Hyperion, Tenn. Code Ann. § 65-4-201(d) and the Denial Order are virtually identical to two previous state requirements which ran afoul of section 253(a), and which the Commission preempted in the Texas Preemption Order and Silver Star Preemption Order decisions. [FN24]

11. Neither the Tennessee Authority nor TDS Telecommunications Corporation (TDS) argues that the Denial Order or Tenn. Code Ann. § 65-4-201(d) can survive section 253(a) considered in isolation, but they insist that the statutory provision and the Denial Order fall within the reservation of state authority provided in 253(b) [FN25] Specifically, the Tennessee Authority argues that Tenn. Code Ann. § 65-4-

201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals, [FN26] and because the provision applies in a competitively neutral manner to all non-incumbent LECs. [FN27] The Authority explains that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because the restriction on entry into the service areas of small LECs applies to all providers within the state, and thus they argue that no provider is given a competitive advantage over any other. [FN28] TDS likewise maintains that the Authority's denial of Hyperion's application is a proper exercise of state authority under 253(b) because it is consistent with the universal service provisions of the 1996 Act, [FN29] is necessary to protect consumer interests, [FN30] and is competitively neutral. [FN31] TDS contends that potential competing LECs are not subject to the same terms and conditions as incumbent LECs, and that the Tennessee Authority may therefore treat them differently and still maintain competitive neutrality. [FN32] Hyperion and its supporters disagree, and argue that section 253(b) does not exempt Tenn. Code Ann. § 65-4-201(d) and the Denial Order from preemption, because the *11070 code and the Denial Order favor the incumbent LEC over new entrants, and are therefore not "competitively neutral" under section 253(b). [FN33]

III. Discussion

12. We conclude that, in denying Hyperion the right to provide competing local exchange service in the area served by Tennessee Telephone, Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's Denial Order violate section 253(a). We further conclude that, because these state and local legal requirements shield the incumbent LEC from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b). Finally, we conclude that, because the requirements violate section 253(a), and do not fall within the boundaries of section 253(b), we must preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) and the Denial Order, as directed by section 253(d)

13. The case before us is similar to two cases the Commission has previously decided. In the Silver Star Preemption Order, the Commission preempted the enforcement of a provision of the Wyoming Telecommunications Act of 1995 [FN34] that empowered incumbent LECs serving 30,000 or fewer access lines in Wyoming to preclude anyone from providing competing local exchange service in their territories until at least January 1, 2005. [FN35] The Commission also preempted the enforcement of an order of the Wyoming Public Service Commission denying, on the basis of that provision, the application of Silver Star Telephone Company to provide competing local service in a neighboring incumbent's local exchange area. [FN36] In ordering the preemption, the Commission determined that the rural incumbent protection provision and the Wyoming Commission's Denial Order fell within the proscription of entry barriers set forth in section 253(a) because they enabled certain incumbent LECs to bar other entities from providing competing local service. [FN37] The Commission found that the rural incumbent protection provision's lack of competitive neutrality placed the Wyoming legal requirements outside the authority reserved to the States by section 253(b). [FN38]

*11071 14. Similarly, in the Texas Preemption Order, [FN39] the Commission preempted a section of the Texas Public Utility Act of 1995 that prohibited the

Public Utilities Commission of Texas from permitting certain competitive LECs to offer service in exchange areas of incumbent LECs serving fewer than 31,000 access lines. [FN40] The Commission found that the moratorium on competition violated the terms of section 253(a) of the Act. [FN41] The Commission also found that the Texas provision did not fall within the exempted state regulation described in section 253(b), because the prohibition was neither competitively neutral nor necessary to achieve any of the policy goals enumerated in section 253(b). [FN42]

15. Our decision here to preempt is consistent with these precedents and comports with the analysis set forth therein. Tennessee's restriction of competition in service areas with fewer than 100,000 access lines is essentially the same as the attempt of both Wyoming and Texas to shield small, rural LECs from competition, and cannot be squared with section 253(a)'s ban on state or local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN43] Also, as in both the Silver Star and Texas Preemption Orders, we find that the lack of competitive neutrality renders the Tenn. Code Ann. § 65-4-201(d) and the Denial Order ineligible for the protection of section 253(b).

16. We reject the Tennessee Authority's contention that "competitive neutrality" can be interpreted under section 253(b) to mean only that non-incumbents must be treated alike while incumbents may be favored. [FN44] As we explained in our Silver Star Reconsideration, a state legal requirement would not as a general matter be "competitively neutral" if it favors incumbent LECs over new entrants (or vice-versa). [FN45] Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to all carriers in that market. The plain meaning of section 253(b) and the predominant pro-competitive policy of the 1996 Act undermine the Authority's argument. Indeed, in various similar contexts the Commission has consistently construed the term "competitively neutral" as requiring competitive neutrality among the entire universe of participants and potential participants in a market. [FN46] We reaffirm our holding in the Silver Star Reconsideration that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, inter alia, the requirement is competitively neutral with respect to, and as between, all of the participants and potential participants in the market at issue.

17. TDS elaborates on the Authority's argument by contending that competing LECs do not operate under the same terms and conditions as incumbent LECs, and that this disparity in their regulatory obligations permits the Tennessee Authority to treat them differently and still maintain competitive neutrality. [FN47] TDS thus argues that the principle of "competitive neutrality" does not preclude carriers in dissimilar situations from being treated somewhat differently. Providing for "somewhat" different treatment, however, is an entirely distinct proposition from barring competitive entry altogether. [FN48] At the very least, "competitive neutrality" for purposes of 253(b) does not countenance absolute exclusion, and we need not and therefore do not reach the question of the extent to which state commissions may treat competing LECs differently from incumbent LECs in certain instances. We find here that because Tenn. Code Ann. § 65-4-201(d) favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral.

18. That Tenn. Code Ann. § 65-4-201(d) and the Denial Order are not competitively neutral suffices of itself to disqualify these requirements from the 253(b) *11073 exception. [FN49] Therefore, we need not reach the question of whether Tenn. Code Ann. § 65-4-201(d) and the Denial Order are "necessary," or "consistent with section 254" within the meaning of section 253(b). We note, however, that, for the reasons we gave in response to similar arguments that were raised in our Silver Star Preemption Order decision, we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service [FN50] Moreover, by requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never "necessary" to preserve and advance universal service within the meaning of section 253(b). [FN51]

19. TDS introduces three arguments by which it attempts to distinguish the case before us from other cases we have decided under section 253. First, TDS points out that the Tennessee legislature provided for Tenn Code Ann. § 65- 4-201(d) to be examined every two years to reevaluate the "transitional distinction" in treating applications to serve areas served by incumbent LECs with fewer than 100,000 access lines, and contrasts Tennessee's biennial review with the Wyoming statute at issue in the Silver Star Preemption Order, which gave rural incumbent LECs a veto provision that would apply until 2005. [FN52] This is a distinction without a difference for purposes of our analysis because, as we held in the Silver Star Preemption Order, even a temporary ban on competition can be an absolute prohibition, and section 253 does not exempt from its reach State-created barriers to entry that may expire at some later date. [FN53]

*11074 20. Second, TDS argues that "unanticipated confusion and controversy surrounding the universal service plan" justifies the Tennessee Authority's delay of competitive entry into rural areas [FN54] As the Commission has previously stated, we reject the assumption that competition and universal service are at cross purposes, and that in rural areas the former must be curtailed to promote the latter. [FN55] Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers. [FN56] We continue to believe that Congress intended new competitors to bring the benefits of competition to rural as well as populous markets. [FN57]

21 Third, TDS contends that even if the Commission is correct in preempting enforcement of the Authority's Denial Order, the Commission should not preempt Tenn Code Ann. § 65-4-201(d) itself. [FN58] TDS argues that although the Authority has applied the statute to preclude competition in this case, the statute permits the Authority to allow competition in *11075 other circumstances. [FN59] TDS suggests that Tenn. Code Ann. § 65-4-201(d) might therefore be applied in way that would not offend section 253, [FN60] and therefore should be left standing, in obedience to 253(d)'s instruction to the Commission to preempt only "to the extent necessary to correct such violation or inconsistency " [FN61]

22. We are mindful of the limits that section 253 (d) places on our preemption authority. Further, the construction of a state statute by a state commission informs our determination of whether the statute is subject to preemption under section 253. [FN62] In this case, however, TDS's construction of Tenn. Code Ann. §

65-4-201(d) conflicts with that of the Tennessee Authority, which we regard as dispositive. [FN63] According to the Authority, Tenn. Code Ann. § 65-4-201(d) does require the Tennessee Authority to deny any and all CPCN applications within its scope. [FN64] For this reason we reject TDS's argument that Tenn. Code Ann. § 65-4-201(d) may stand even if the Authority's Denial Order must fall. We decline, however, to grant Hyperion's request that we direct the Tennessee Authority to grant Hyperion's application for a CPCN because we do not believe such a step is necessary at this time. [FN65] Based on our explanation regarding the force and effect of section 253 in this case, we expect that the Authority will respond to any request by Hyperion to reconsider Hyperion's application for a concurrent CPCN consistent with the Communications Act and this decision. [FN66]

23. Hyperion brings to our attention that states other than Tennessee have legal requirements that appear to be similar to Tennessee's Section 65-4-201(d), and maintains that these requirements may also restrict competition in the way we have found unlawful here and in the Silver Star and Texas Preemption Orders. [FN67] Hyperion urges us to clarify generally the *11076 scope of section 253 as it might apply in such cases. [FN68] While the requirements of other states are not before us at this time, we would expect to apply a similar analysis to other state statutes. Thus, we encourage these and any other states, as well as their respective regulatory agencies, to review any similar statutes and regulations, and to repeal or otherwise nullify any that in their judgement violate section 253 as applied by this Commission

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption and Declaratory Ruling filed by AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. on May 29, 1998, IS GRANTED to the extent discussed herein, and in all other respects IS DENIED.

25. IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the enforcement of Tenn. Stat. Ann. § 65-4-201(d) and the Denial Order are preempted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P.; Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr.

1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172
(Cite as: 14 FCC Rcd. 11064)

9, 1998) (Denial Order).

FN2. Petition at 23.

FN3. 47 U.S.C. § 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. All citations to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

FN4. 47 U.S.C. § 253(b).

FN5. 47 U.S.C. § 253(d). The Commission placed Hyperion's Petition on public notice on June 12, 1998. Pleading Cycle Established for Comments on Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, Public Notice, CC Docket No. 98-92, DA 987-1115 (rel. June 12, 1998). The Association for Local Telecommunications Services (ALTS), KMC Telecom Inc. (KMC), MCI Telecommunications Corporation (MCI), TDS Telecommunications Corporation (TDS), the Tennessee Authority, and WorldCom, Inc. (WorldCom) filed comments, and Hyperion, MCI, and TDS filed replies.

FN6. Tenn. Code Ann. § 65-4-201(d).

FN7. Petition at 2.

FN8. Id.

FN9. Tennessee Telephone Company serves approximately 45,121 residential and 11,665 business customers in Tennessee. AVR of Tennessee, L.P., d/b/a Hyperion Telecommunications of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Extend its territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Application, Petition Exhibit D at 3.

FN10. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Services Within Davidson, Williamson, Maury, Rutherford, Wilson, and Sumner Counties, Tennessee, Docket No. 94- 00661, (TPSC Aug. 24, 1995), Petition Exhibit B.

FN11. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Point-to-Point and Telecommunications Access Service Within the State of Tennessee, Order, Docket No.

94-00661 (TPSC Mar. 8, 1996), Petition Exhibit C, (TPSC Restriction Order).

FN12. TPSC Restriction Order at 5

FN13. Tenn. Code Ann. § 65-4-201; Petition at 4.

FN14 Transcript of the Tennessee Regulatory Authority's March 10, 1998, Hearing Denying Hyperion's Application, Petition Exhibit E (Hearing).

FN15. "I personally believe that the Tennessee Regulatory Authority has a duty to uphold both the vision and the substance of the Federal Communications Act of 1996. This Act provides the framework from which competition in the telecommunications industry can develop Section 253(a) of the Act specifically addresses the prohibition of any State regulation or statute that prohibits the ability of any entity to provide any interstate or intrastate telecommunication service. As I see it, we have a conflict between the federal law and one of our State statutes, and the federal law must prevail." Chairman Greer, Hearing at 7.

FN16. "To be sure, there exists a host of arguments [that] Section 65-4- 201(d) is not competitively neutral as this phrase is defined by the FCC. Nonetheless, given the legislature's rationale for enacting section 65-4- 201(d), the language of section 253(b) as a whole, section 65-4-201(d)'s pronouncement that any such protected interest forfeits its protection if it seeks to compete outside the area, and the requirement that the general assembly review this statute every two years, this statute may be held competitively neutral.... I am persuaded that at a minimum the State of Tennessee should have the opportunity, should it so choose, to argue before the FCC that its statute is, notwithstanding the FCC's prior rulings, competitively neutral." Director Malone, Hearing at 11-12.

FN17 Denial Order at 11.

FN18. Petition at 8.

FN19. 47 U.S.C. § 253(a).

FN20. 47 U.S.C. § 253(b).

FN21. 47 U.S.C. § 253(d).

FN22. Petition at 6. Although Tenn. Code Ann. § 65-4-201(d) does permit competition in areas served by incumbent LECs with fewer than 100,000 access lines when the incumbent LEC enters into an interconnection agreement with the competitor

or itself applies for CPCN outside its service area, neither exception applies to this case.

FN23. Petition at 8.

FN24 Petition at 15-18; The Public Utility Commission of Texas, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3511, ¶ ¶ 106-07 (1997) (Texas Preemption Order); Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-57, ¶ ¶ 38-39 (1997) (Silver Star Preemption Order). ALTS, KMC, MCI, and WorldCom agree with Hyperion that the Tennessee statute is in direct conflict with Section 253(a). ALTS Comments at 2; KMC Comments at 2; MCI at Comments at 1, WorldCom Comments at 1-2; AVR Reply at 3; MCI Reply at 1-2.

FN25. Tennessee Authority Comments at 3-6; TDS Comments at 5-15. TDS owns four subsidiaries in Tennessee, one of which is the Tennessee Telephone Company. TDS Comments at 1.

FN26. Tennessee Authority Comments at 3-5.

FN27. Tennessee Authority Comments at 6.

FN28. Id.

FN29. TDS Comments at 6-7.

FN30. TDS Comments at 5-7; TDS Reply at 2-3

FN31 TDS Comments at 8-10; TDS Reply at 3-4.

FN32. Id.

FN33 Petition at 10-11; ALTS Comments at 4; KMC Comments at 3-4; MCI at Comments at 3-5; Hyperion Reply at 3; MCI Reply at 2.

FN34. WYO. STAT. ANN. § § 37-15-101, et seq.

FN35. WYO. STAT. ANN. § 37-15-201(c)

FN36. Application of Silver Star Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification, Docket No. 70006-TA-96-24 (Wyoming Commission Dec. 4, 1996)

FN37. Silver Star Preemption Order, 12 FCC Rcd at 15656-57, ¶ ¶ 38-39.

FN38. Silver Star Preemption Order, 12 FCC Rcd at 15657-59, ¶ ¶ 41-44

FN39. Texas Preemption Order, 13 FCC Rcd 3460 (1997).

FN40. Texas Public Utility Act of 1995 § 3.2531(h).

FN41. Texas Preemption Order, 13 FCC Rcd at 3511, ¶ 106.

FN42. Texas Preemption Order, 13 FCC Rcd at 3511, ¶ 107.

FN43. 47 U.S.C. § 253(a) (emphasis added).

FN44. Tennessee Authority Comments at 6.

FN45. Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCBPol 97-1, FCC 98-205, ¶ ¶ 9-10 (rel. Aug. 24, 1998) (Silver Star Reconsideration). See also New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19721-22, ¶ 20 (1996) (holding that legal requirement at issue was not competitively neutral under section 253(b) because "the prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers)"); Recon. denied, Memorandum Opinion and Order, FCC 97-143 (rel. April 18, 1997)

FN46. See, e.g., Telephone Number Portability, Third Report and Order, FCC 98-82, CC Docket No. 95-116, ¶ 53 (rel. May 12, 1998) (a competitively neutral cost recovery mechanism "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return"), Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶ 24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications provider over another or one class of providers over another class"); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996) ("If in

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practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

FN47. TDS Comments at 8-10, TDS Reply at 3-4.

FN48. We agree that in order to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance. As the Commission has previously explained: "'non-discriminatory and competitively neutral' treatment does not necessarily mean 'equal' treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities 'equally.'" Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20310 at ¶ 195 (1996). See Separations NPRM, 12 FCC Rcd at 22132, ¶ 24 ("Competitive neutrality ... would not, however, preclude carriers in dissimilar situations from being treated differently").

FN49. Silver Star Preemption Order, 12 FCC Rcd at 15660, ¶ 45. Accord Texas Preemption Order, 13 FCC Rcd at 3480, ¶ 41; Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082, 13101, ¶ 35.

FN50 Specifically, we noted that section 251(f) of the Act affords rural and small LECs certain avenues of relief from the interconnection duties set forth in sections 251(b) and (c), and that sections 253(f) and 214(e)(2) also provide states special latitude in regulating emerging competition in markets served by rural telephone companies. Section 253(f) permits a state to require a telecommunications carrier to meet certain universal service requirements as a condition for obtaining permission to compete with a rural telephone company. Section 214(e)(2) permits a state, with respect to an area served by a rural telephone company, to decline to designate more than one common carrier as an "eligible telecommunications carrier" for purposes of receiving universal service support. These accommodations to the needs of rural telephone companies indicate that Congress recognized that the special circumstances of rural and small LECs warrant special regulatory treatment. In choosing less competitively restrictive means of protecting rural and small LECs, however, Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition. Silver Star Preemption Order, 12 FCC Rcd at 15658-59, ¶ ¶ 43-44.

FN51 Silver Star Reconsideration, FCC 98-205, ¶ 19

FN52. TDS at Comments 12 (contrasting Tenn. Code Ann. § 65-5-211 with Wyo. Stat. § § 37-15-101 et seq).

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FN53. Silver Star Preemption Order, 12 FCC Rcd at 15657, ¶ 39. We note that the 1996 Act contains numerous deadlines requiring the Commission and State commissions to complete with dispatch various tasks implementing the 1996 Act. See, e.g., 47 U.S.C. § § 251(d)(1), 251(f)(1)(B); 252(e)(4); 254(a), 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight that Tennessee's statutory delay of competition conflicts with Congressional intent.

FN54. TDS Comments at 14; TDS Reply at 2-3.

FN55. Accord Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8800, ¶ 47 (1997) ("competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another"). See generally Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, 267 ¶ 345 (1996) ("We recommend that any competitive bidding system be competitively neutral and not favor either the incumbent or new entrants").

FN56. Silver Star Preemption Order, 12 FCC Rcd at 15656, ¶ 38.

FN57. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16118, ¶ 1262 (1996) ("We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service.") What the Commission said in the Universal Service Order regarding the "false choice" between competition and universal service also bears reiteration:

Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.

Universal Service Order, 12 FCC Rcd at 8802-03, ¶ 50

FN58. TDS at Comments at 15-18.

FN59. TDS Comments at 15, 17

FN60. TDS states that § 65-4-201(d) allows the Tennessee Authority to obtain

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useful information through closer scrutiny of applications to serve rural areas.
TDS Comments at 18.

FN61. TDS Comments at 15.

FN62. See Texas Preemption Order, 13 FCC Rcd at 3464-3466, ¶ 7-11

FN63. Id. See also, e.g., Ginsburg v. New York, 390 U.S. 629, 643-44 (1968).

FN64. TPSC Restriction Order at 4 ("Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider"), see also Denial Order at 8.

FN65. Petition at 23.

FN66. Given our disposition of the Petition on the bases discussed in the text, we need not and do not address the merits of other arguments raised by the parties.

FN67. Hyperion Petition at 21; See Letter from Kecia Boney, MCI Telecommunications Corp., to Magalie R. Salas, Secretary, FCC, Jan. 6, 1999. See also Louisiana, In re Regulations for Competition in the Local Telecommunications Market, General Order, app. B, sec. 201 (LPSC, rel. Apr. 1, 1997) ("TSPs are permitted to provide telecommunications services in all historically designated ILEC services areas . . . with the exception of service areas served by ILECs with 100,000 access lines or less statewide."); New Mexico, N.M. STAT. ANN. § 63-9A-6 D (1997) ("[A]ny telecommunications company with less than one hundred thousand access lines . . . shall have the exclusive right to provide local exchange service within its certificate service territory"); North Carolina, N.C. GEN. STAT. § 62-110 f(2) (1997) ("[The Commission shall not be authorized to issue a certificate] applicable to franchised areas . . . served by local exchange companies with 200,000 access lines or less . . . "); Utah, UTAH CODE ANN. § 54-8b- 2.1(2)(c) (1953) ("An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the Commission to exclude from an application [filed by a competing LEC] any local exchange with fewer than 5,000 access lines . . . "); and Oregon, OR. REV. STAT. § 759 020 (1989), Admin. Rules Chapter 860, Div. 32, 860-32-005(8)(a) (providing for certification of competing LECs if the ILEC "consents or does not protest").

FN68. Hyperion Petition at 21.

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H

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

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 AREAS
CC Docket No. 98-92

FCC 01-3

Adopted: January 3, 2001

Released: January 8, 2001

*1247 By the Commission:

I. INTRODUCTION

1. On June 28, 1999, the **Tennessee** Regulatory Authority (**Tennessee** Authority) and TDS Telecommunications Corporation (TDS Telecom) filed petitions for reconsideration of the **Hyperion** Preemption Order. [FN1] In that Order, the Commission granted in part a petition for preemption filed by AVR, L.P. d/b/a **Hyperion of Tennessee**, L.P. (**Hyperion**) in May 1998. In this order we deny those petitions for reconsideration along with a related motion filed by the **Tennessee** Authority for a stay of enforcement of the **Hyperion** Preemption Order.

*1248 II DISCUSSION

2. **Hyperion** originally sought preemption of **Tennessee** Code section 65-4-201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in **Tennessee** that serve fewer than 100,000 access lines. In addition, **Hyperion** asked that this Commission preempt enforcement of an April 1998 order of the **Tennessee** Authority to the extent that it denied **Hyperion's** application to provide service in the service area of the **Tennessee** Telephone Company. [FN2] The **Tennessee** Authority and TDS Telecom now seek reconsideration of the Commission's determination that the **Tennessee** Authority's Denial Order and **Tennessee** Code section 65-4-201(d) do not fall within the protection of section 253(b) of the Communications Act of 1934, as amended. [FN3] In addition, on July 9, 1999, the **Tennessee** Authority filed a motion for stay of enforcement of our **Hyperion** Preemption Order until appropriate universal service mechanisms are implemented by the Commission and the **Tennessee** Regulatory Authority. [FN4] **Hyperion** filed an opposition to the **Tennessee** Regulatory Authority's motion for stay of enforcement, dated July 20, 1999, arguing that the **Tennessee** Regulatory Authority failed to establish any of the four conditions necessary to justify a stay of the Commission's Order. [FN5]

3. We deny TDS's and the **Tennessee** Authority's petitions for the following reasons. TDS's petition essentially repeats the same arguments it relied upon in

the comments and reply comments it filed in opposition to the **Hyperion** preemption petition. First, TDS argues that, because the incumbent LEC is regulated differently from competitive LECs, the "competitive neutrality" requirement under section 253(b) of the Communications Act is satisfied even if the *1249 incumbent has special protections as long as all competitive carriers are treated alike. [FN6] In a related argument, TDS argues that competitive imbalances will result from preemption of the statute. [FN7] The Commission rejected these arguments in the **Hyperion** Preemption Order.

4. TDS also argues that, because the **Hyperion** Preemption Order did not allow the **Tennessee** Authority to implement section 65-4-201(d) "to the extent permissible by law," the Commission's blanket preemption of section 65-4-201(d) was needlessly broad. [FN8] The Commission previously considered and rejected this argument, concluding that the **Tennessee** Authority's own interpretation of **Tennessee Code section 65-4-201(d)**, which the Commission regards as dispositive, made section 65-4-201(d) inconsistent with federal law in every circumstance. [FN9] TDS has failed to identify any redeemable portion of the preempted law [FN10] Accordingly, we conclude that the Commission's preemption was in fact limited to the extent necessary to correct the violation of federal law in accordance with section 253(d) of the Communications Act. TDS's petition fails to raise new arguments or facts that would warrant reconsideration of that order

5. The **Tennessee** Authority also repeats in its petition for reconsideration the arguments it made regarding the **Hyperion** preemption petition. Those arguments include: (1) that preemption of **Tennessee Code section 65-4-201(d)** is not competitively neutral to **Tennessee** rural incumbent carriers because these carriers have obligations under state and federal laws that are not imposed on new entrants, [FN11] (2) that **Tennessee Code section 65-4-201(d)** is necessary to *1250 preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers within the state of **Tennessee**; [FN12] and (3) that the Commission did not fully consider the unity of purpose behind the 1996 Act and **Tennessee Code section 65-4-201(d)** [FN13] That both the 1996 Act and section 65-4-201(d) address similar concerns about the effect of competitive entry on rural incumbent carriers does not insulate the **Tennessee** statute from section 253 preemption. Instead, Congress appears to have entirely occupied the field of regulating rural competitive entry when it addressed the issue comprehensively in sections 251(f) and 153(37). [FN14] Just as TDS Telecom and the **Tennessee** Authority raise no new arguments or facts that warrant reconsideration of the **Hyperion** Preemption Order, the **Tennessee** Authority raises no new arguments or facts that warrant a stay of enforcement. [FN15]

6. Accordingly, IT IS ORDERED, pursuant to section 1.106 of the Commission's rules, 47 C F.R. § 1.106, that the petition for reconsideration filed by TDS Telecommunications Corporation and the petition for reconsideration filed by the **Tennessee** Regulatory Authority, both dated June 28, 1999, ARE DENIED.

7. IT IS FURTHER ORDERED, that the **Tennessee** Regulatory Authority's motion for stay of enforcement, filed on July 9, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. 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 Areas, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999) (**Hyperion** Preemption Order).

FN2. In Re: AVR of **Tennessee**, L.P. d/b/a **Hyperion** of **Tennessee**, L.P., Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by **Tennessee** Telephone Company, Order Denying **Hyperion's** Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by **Tennessee** Telephone Company, Docket No. 98-0001 (**Tennessee** Authority Apr. 9, 1998) (Denial Order). The **Tennessee** Telephone Company is a wholly-owned subsidiary of TDS Telecom.

FN3. 47 U.S.C. § 253(b). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. All citations to the 1996 Act in this order are to the 1996 Act as codified in Title 47 of the United States Code. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal 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). Section 253(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C. § 253(b).

FN4. **Tennessee** Regulatory Authority Motion for Stay at 1.

FN5. The Commission applies a four-part test in consideration of motions for stay. See Virginia Petroleum Jobbers Ass'n, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). To justify a stay, the **Tennessee** Regulatory Authority must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the absence of any substantial harm to other interested parties if the stay is granted, and (4) that public interest favors the stay.

FN6. TDS Petition for Reconsideration at 5-6, 10 TDS made this argument in its comments at 5-7 and its reply comments at 2 The Commission rejected the argument in the **Hyperion** Preemption Order, 14 FCC Rcd at 11071-72, ¶ ¶ 15-16

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(Cite as: 16 F.C.C.R. 1247)

FN7. TDS Petition for Reconsideration at 6-8. TDS made this argument in its comments at 8-11 and its reply comments at 3-4. The Commission rejected the argument in the Hyperion Preemption Order, 14 FCC Rcd at 11072, ¶ 17.

FN8. TDS Petition for Reconsideration at 12. TDS appears to be referring to section 253(d) of the Communications Act instead of section 253(b). TDS made this argument in its comments at 15-18.

FN9. Hyperion Preemption Order, 14 FCC Rcd 11075, ¶ 22.

FN10. We note that the scope of section 65-4-201(d) is extremely limited and that its preemption does not impinge on any of the ~~Tennessee~~ Authority's general safeguards. Tenn. Code. Ann. 65-4-201(d) states, in its entirety, "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 the June 6, 1995."

FN11. ~~Tennessee~~ Authority Petition for Reconsideration at 4 - 7. The ~~Tennessee~~ Authority made this same argument in its comments regarding the Hyperion Preemption Petition. Comments in Response to Hyperion Petition for Preemption, filed July 13, 1998, at 6, ¶ 8. The Commission previously considered and rejected this argument in the Hyperion Preemption Order, stating that "[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to the market as a whole, including the incumbent LEC." Hyperion Preemption Order, 14 FCC Rcd at 11071-72, ¶ 16, citing Silver Star Reconsideration Order, 13 FCC Rcd 16359 (1998). The United States Court of Appeal for the Tenth Circuit recently affirmed the Commission's Silver Star Reconsideration Order in RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th Cir. 2000).

FN12. ~~Tennessee~~ Authority Petition for Reconsideration at 8-11. The Commission rejected this argument at Hyperion Preemption Order, 14 FCC Rcd at 11074, ¶¶ 18, 20.

FN13. ~~Tennessee~~ Authority Petition for Reconsideration at 11-13; Hyperion Preemption Order, 14 FCC Rcd at 11074, ¶¶ 18, 20.

FN14. See 47 U.S.C. § 153(37); 47 U.S.C. § 251(f). See also 47 U.S.C. § 253(f).

FN15. The ~~Tennessee~~ Authority recognizes that a party seeking a stay must demonstrate, among other criteria, that it is likely to prevail on the merits.

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(Cite as: 16 F.C.C.R. 1247)

Tennessee Authority Motion at 1. Therefore, in as much as we decide against the **Tennessee** Authority on the merits, the **Tennessee** Authority's motion for a stay of enforcement is denied.

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Office of the Secretary of State

RECEIVED
1984 APR 18 PM 9:40

I, WILLIAM T. QUILLEN, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY "CITIZENS TELECOMMUNICATIONS COMPANY" IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE EIGHTH DAY OF APRIL, A.D. 1984.

*William T. Quillen*

William T. Quillen, Secretary of State

2342821 8300

AUTHENTICATION: 7082461

944059230

DATE: 04-08-84

Secretary of State

Corporations Section

James K. Polk Building, Suite 1800

Nashville, Tennessee 37243-0306

DATE: 04/18/94

REQUEST NUMBER: 2836-1190

TELEPHONE CONTACT: (615) 741-0537

FILE DATE/TIME: 04/18/94 0946

EFFECTIVE DATE/TIME: 04/18/94 0946

CONTROL NUMBER: 0278200

TO:
PRENTICE HALL
ATTN JOEY KELLEY
500 CENTRAL AVE
ALBANY, NY 12206

RE:
CITIZENS TELECOMMUNICATIONS COMPANY
APPLICATION FOR CERTIFICATE OF
AUTHORITY - FOR PROFIT

WELCOME TO THE STATE OF TENNESSEE. THE ATTACHED CERTIFICATE OF
AUTHORITY HAS BEEN FILED WITH AN EFFECTIVE DATE AS INDICATED ABOVE.

A CORPORATION ANNUAL REPORT MUST BE FILED WITH THE SECRETARY OF STATE
ON OR BEFORE THE FIRST DATE OF THE FOURTH MONTH FOLLOWING THE CLOSE OF THE
CORPORATION'S FISCAL YEAR. PLEASE PROVIDE THIS OFFICE WITH WRITTEN
NOTIFICATION OF THE CORPORATION'S FISCAL YEAR. THIS OFFICE WILL MAIL THE
REPORT DURING THE LAST MONTH OF SAID FISCAL YEAR TO THE CORPORATION AT THE
ADDRESS OF ITS PRINCIPAL OFFICE OR TO A MAILING ADDRESS PROVIDED TO THIS
OFFICE IN WRITING. FAILURE TO FILE THIS REPORT OR TO MAINTAIN A REGISTERED
AGENT AND OFFICE WILL SUBJECT THE CORPORATION TO ADMINISTRATIVE REVOCATION
OF ITS CERTIFICATE OF AUTHORITY.

WHEN CORRESPONDING WITH THIS OFFICE OR SUBMITTING DOCUMENTS FOR
FILING, PLEASE REFER TO THE CORPORATION CONTROL NUMBER GIVEN ABOVE.

FOR: APPLICATION FOR CERTIFICATE OF
AUTHORITY - FOR PROFIT

ON DATE: 04/18/94

FROM:
PRENTICE HALL LEGAL & FIN (ALBANY, NY)
500 CENTRAL AVENUE

ALBANY, NY 12206-0000

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Riley C. Darnell

RILEY C. DARNELL
SECRETARY OF STATE

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SECRETARY OF STATE

**APPLICATION FOR CERTIFICATE OF AUTHORITY FOR
CITIZENS TELECOMMUNICATIONS COMPANY**

To the Secretary of State of the State of Tennessee:

Pursuant to the provisions of Section 48-25-103 of the Tennessee Business Corporation Act, the undersigned corporation hereby applies for a certificate of authority to transact business in the State of Tennessee, and for that purpose sets forth:

1. The name of the corporation is:

CITIZENS TELECOMMUNICATIONS COMPANY

If different, the name under which the certificate of authority is to be obtained is:
n/a

2. The state or country under whose law it is incorporated is: Delaware
3. The date of its incorporation is: July 1, 1993 and the period of its duration, if other than perpetual is:
4. The complete street address (including zip code) of its principal office is: Administrative Offices, High Ridge Park, Stamford, CT 06095.
5. The complete street address (including the county and the zip code) of its registered office in this state is: c/o The Prentice-Hall Corporation 500 Tallan Building, Two Union Square, Chattanooga, Tennessee 37402-2571, Hamilton County.

The name of its registered agent at that office is:

The Prentice-Hall Corporation System, Inc.

6. The names and complete business addresses (including zip code) of its current officers are:

L. Tow Chairman, C.E.O., C.F.O. High Ridge Park Stamford, CT 06095	D. A. Ferguson President, C.O.O. High Ridge Park Stamford, CT 06095	D. K. Robertson Vice President High Ridge Park Stamford, CT 06095
R. L. O'Brien Vice President High Ridge Park Stamford, CT 06095	J. M. Love Vice President High Ridge Park Stamford, CT 06095	Charles J. Weiss Secretary High Ridge Park Stamford, CT 06095

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STATE SECRETARY'S OFFICE
1994 APR 18 AM 9:46

7. The names and complete business addresses (including zip code) of its current board of directors are:

Norman I. Botwinik
High Ridge Park
Stamford, CT 06095

Aaron I. Fleischman Stanley Harfenist
High Ridge Park High Ridge Park
Stamford, CT 06095 Stamford, CT 06095

Andrew N. Heine
High Ridge Park
Stamford, CT 06095

Elwood A. Rickless John L. Schroeder
High Ridge Park High Ridge Park
Stamford, CT 06095 Stamford, CT 06095

Robert D. Siff
High Ridge Park
Stamford, CT 06095

Robert A. Stanger Edwin Tornberg
High Ridge Park High Ridge Park
Stamford, CT 06095 Stamford, CT 06095

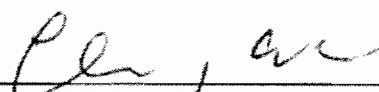
Claire Tow
High Ridge Park
Stamford, CT 06095

Leonard Tow
High Ridge Park
Stamford, CT 06095

8. The corporation is a corporation for profit.
9. If the document is not to be effective upon filing by the Secretary of State, the delayed effective date/time is: n/a
(effective date may not be later than the 90th day after this document is filed)

CITIZENS TELECOMMUNICATIONS COMPANY

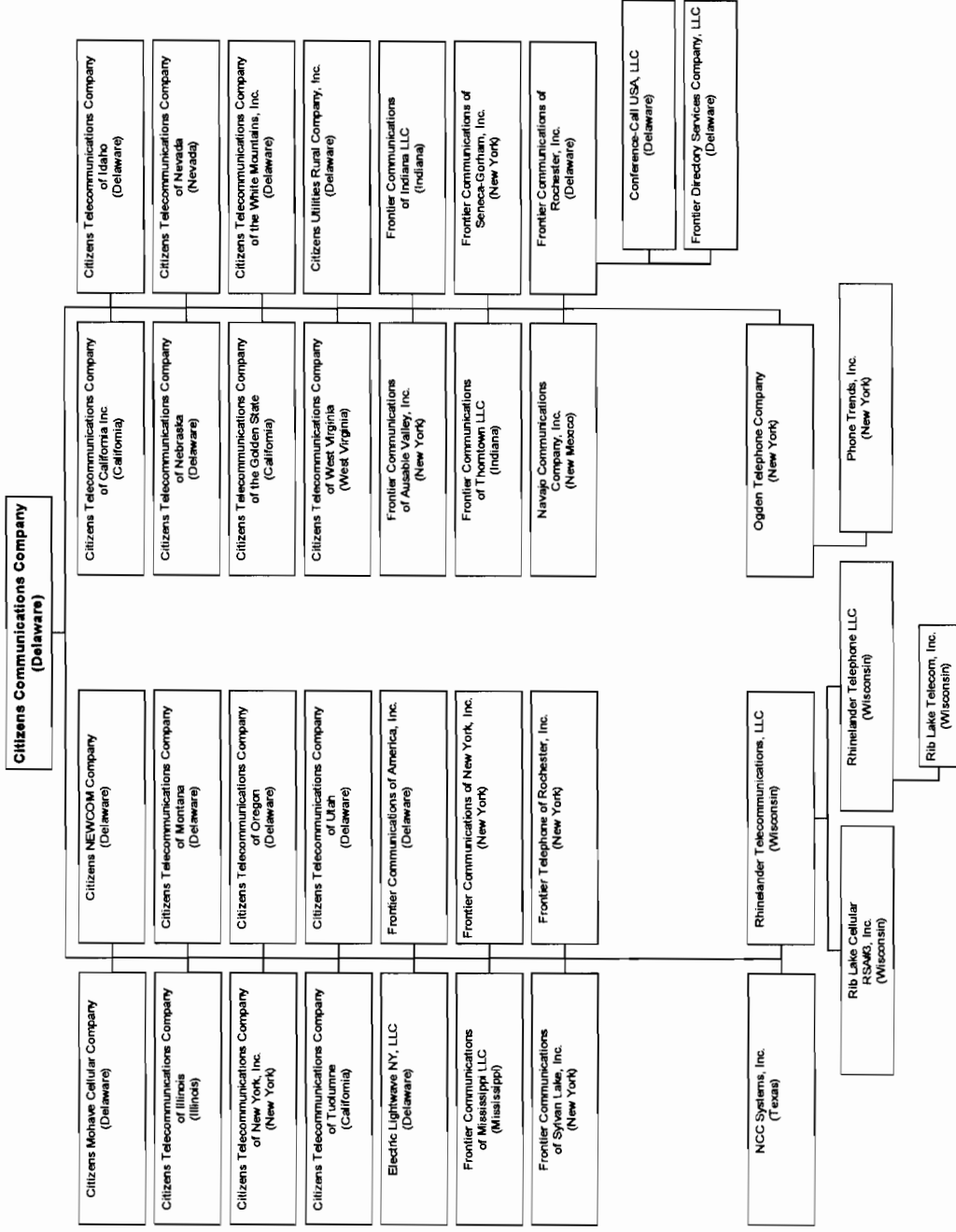
Date: April 12, 1994



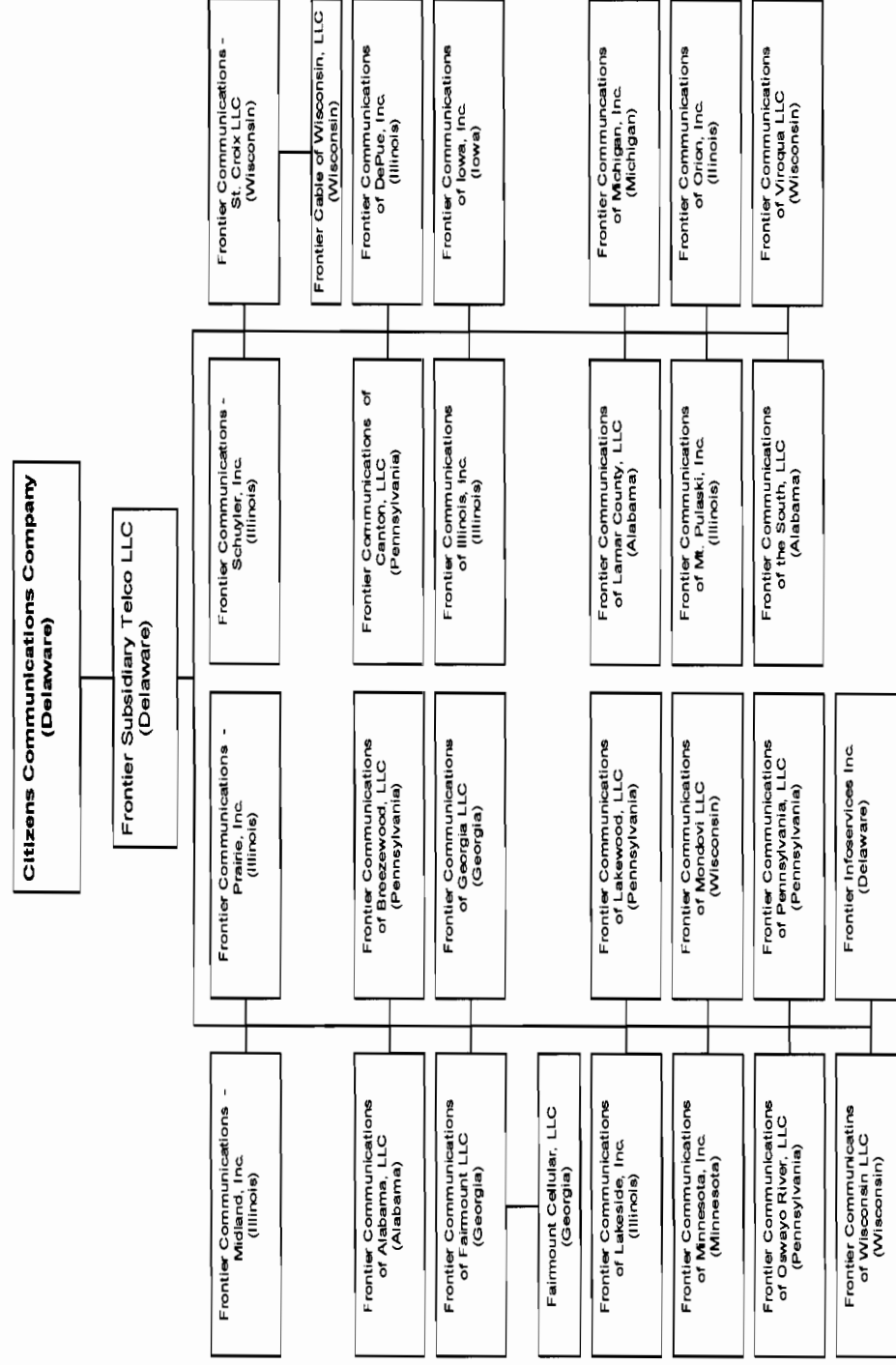
Charles J. Weiss, Secretary

C3047-054189

Citizens Communications Company Communications Sector Subsidiaries



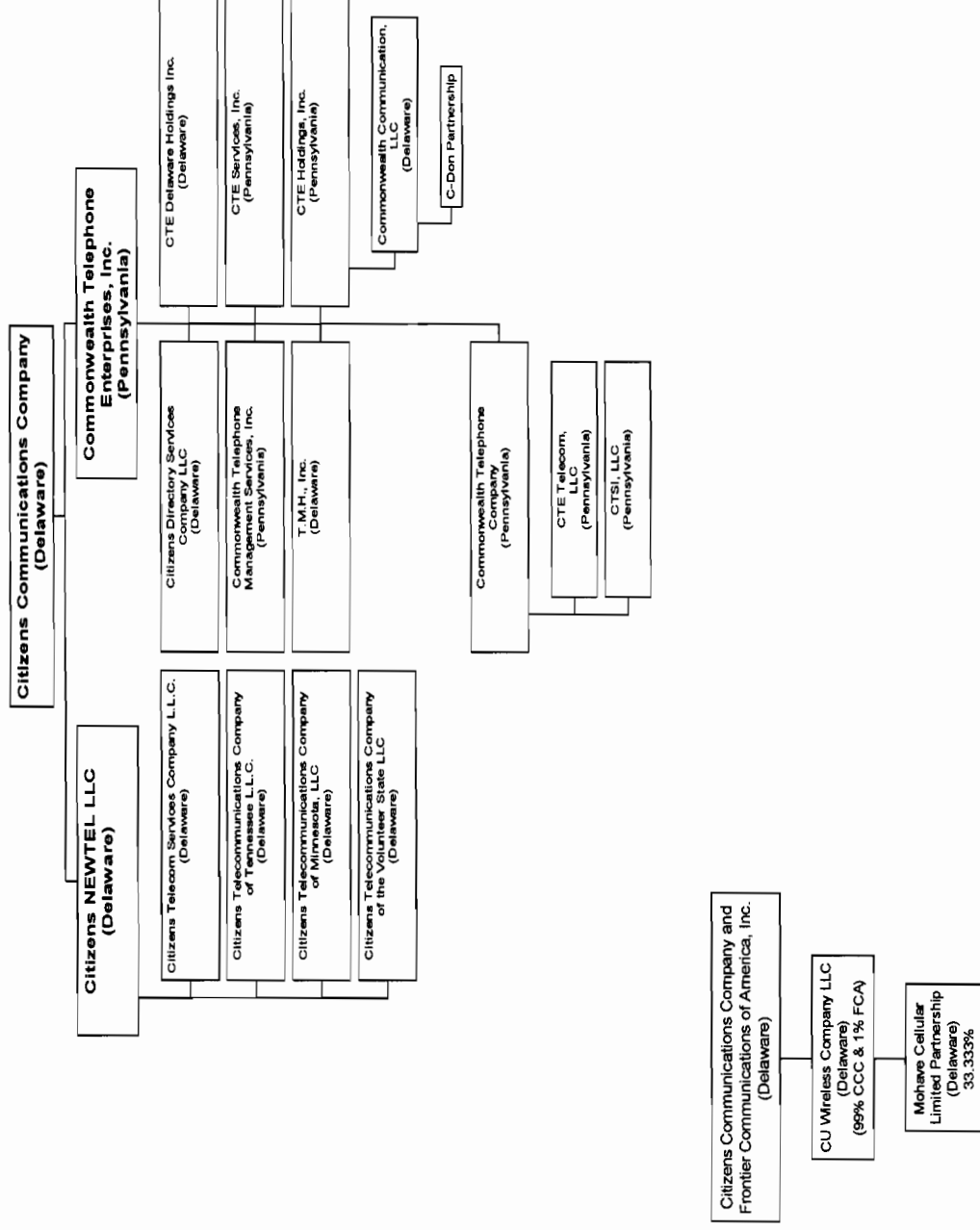
Citizens Communications Company Communications Sector Subsidiaries



3/8/2007

Citizens Communications Company

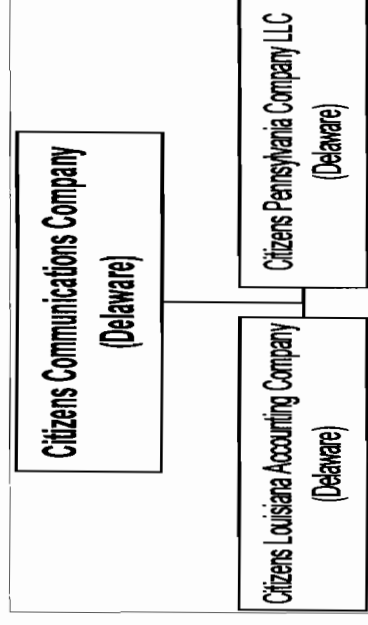
Communications Sector Subsidiaries



3/8/2007

Citizens Communications Company

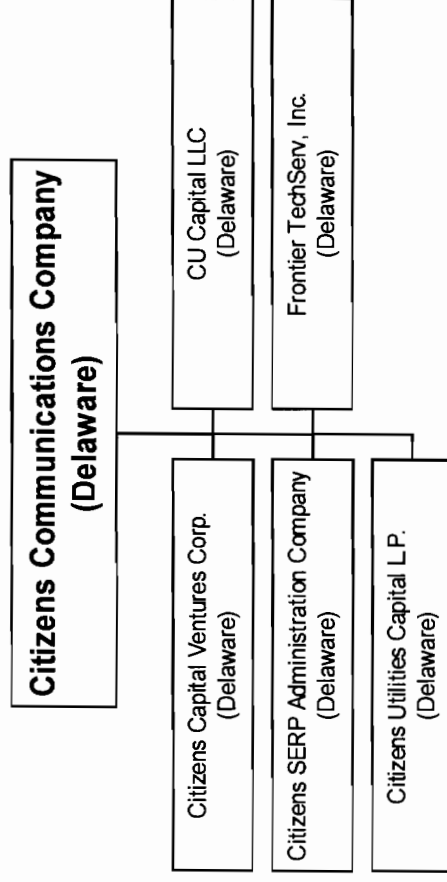
Public Service Subsidiaries



3/8/2007

Citizens Communications Company

Management Entities and Limited Partnerships



STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

March 19, 2001

Opinion No. 01-036

Preemption of Tenn. Code Ann. § 65-4-201(c) and/or (d) by 47 U.S.C. § 253

QUESTION

Are the provisions of Tenn. Code Ann. § 65-4-201(c) and (d) lawful and enforceable in view of 47 U.S.C. § 253?

OPINION

It is the opinion of this Office that the provisions of Tenn. Code Ann. § 65-4-201(c) are lawful and enforceable. The Federal Communications Commission has preempted enforcement of the provisions of Tenn. Code Ann. § 65-4-201(d) pursuant to the authority granted to it under 47 U.S.C. § 253(d). Accordingly, Tenn. Code Ann. § 65-4-201(d) is not enforceable.

ANALYSIS

You have requested this Office to analyze whether the provisions of 47 U.S.C. § 253, enacted as part of the Telecommunications Act of 1996, preempt the provisions of Tenn. Code Ann. § 65-4-201(c) & (d), enacted as part of Chapter 408 of the Tennessee Public Acts of 1995. Both of these acts embody similar goals of fostering competition among telecommunications providers and loosening the previous regulatory regime.

The Tennessee courts have already decided that 47 U.S.C. § 253 does not implicitly preempt Tenn. Code Ann. § 65-4-201. *See BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997)(application for permission to appeal denied June 15, 1998). Congress, however, has expressly granted the Federal Communications Commission (the "FCC") the power, under 47 U.S.C. § 253(d), to preempt the provisions of any state telecommunications act, such as Tenn. Code Ann. § 65-4-201, if the state act violates 47 U.S.C. §§ 253(a) or (b). The exercise by the FCC of its power to preempt portions of state telecommunications acts under 47 U.S.C. § 253(d) has been expressly approved by the Court of Appeals for the Tenth Circuit. *See RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

The FCC has exercised its authority under 47 U.S.C. § 253(d) to preempt enforcement of Tenn. Code Ann. § 65-4-201(d).¹ The FCC preempted this portion of the Tennessee act in a memorandum opinion and order adopted May 14, 1999, in *In re AVR, L.P. d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999) (the "Hyperion Preemption Order"). On January 3, 2001, the FCC affirmed this order in response to a petition for stay and rehearing by the Tennessee Regulatory Authority (the "TRA"). After consultation with this Office, the TRA determined that it will not challenge the Hyperion Preemption Order through an appeal to the Sixth Circuit Court of Appeals. Therefore, Tenn. Code Ann. § 65-4-201(d) has been authoritatively preempted by the FCC and is unenforceable. Because the FCC has not preempted enforcement of Tenn. Code Ann. § 65-4-201(c), this portion of the Tennessee act is valid and enforceable.²

CONCURRENT FEDERAL AND STATE JURISDICTION.

The decision that the Telecommunications Act of 1996 does not implicitly preempt the provisions of Chapter 408 of the Tennessee Public Acts of 1995, codified, in part, in Tenn. Code Ann. § 65-4-201, was announced by the Court of Appeals, Middle Section, in *BellSouth v. Greer*, *id.* at 669-72. We find the analysis of the court in this decision compelling and persuasive and have found no authority that limits or alters this decision since it was rendered. Absent a showing of actual conflict between the federal and state law, the state and federal governments exercise concurrent jurisdiction over the regulation of telecommunications. Moreover, the federal and Tennessee acts are similar in their goals of furthering competition in the telecommunications field.

The structure of 47 U.S.C. § 253 expressly permits state regulation of telecommunications and provides a means for resolution of any conflict between state law and the federal act. 47 U.S.C. § 253(b) states:

¹ Tenn. Code Ann. § 65-4-201(d) provides:

(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.

² Tenn Code Ann. § 65-4-201(c) provides:

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

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

(b) Nothing in this section shall affect the ability of a State to impose, *on a competitively neutral basis* and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunication services, and safeguard the rights of consumers. [emphasis added]

These provisions of § 253(b) clearly contemplate that state laws, such as Tenn. Code Ann. § 65-4-201, shall co-exist with the Telecommunications Act of 1996 and operate to regulate telecommunications in a manner not inconsistent with federal law.

FCC POWER TO PREEMPT PROVISIONS OF STATE TELECOMMUNICATIONS ACTS.

If any provisions of state law are inconsistent with or violate subsections (a) or (b) of 47 U.S.C. § 253, § 253(d) expressly authorizes the FCC to preempt the enforcement of such provisions of state law. 47 U.S.C. § 253(d) states:

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Tenn. Code Ann. § 65-4-201(d) was challenged in this regard because it protects from competition incumbent telephone carriers with fewer than 100,000 total access lines in the state, unless such a carrier voluntarily enters into competition outside its service area. On May 14, 1999, the FCC adopted its order. The FCC determined that because §201(d) "favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and therefore is not competitively neutral." Hyperion Preemption Order, at 9. As a result, the FCC found that Tenn. Code Ann. § 65-4-201(d) is in conflict with 47 U.S.C. § 253(a) and does not qualify for the exemption provided in 47 U.S.C. § 253(b) and, accordingly, ordered that enforcement of Tenn. Code Ann. § 65-4-201(d) is preempted. In response to a petition by the TRA for reconsideration and stay of the Hyperion Preemption Order, the FCC affirmed its Order on January 3, 2001.

The Hyperion Preemption Order is consistent with two other orders by the FCC that preempt provisions of state telecommunications acts in Texas and Wyoming that are similar to Tenn. Code Ann. § 65-4-201(d). See *Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (the "Texas Preemption Order"); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (the "Wyoming Preemption Order"). Both the Texas Preemption Order and the Wyoming Preemption Order were decided on similar grounds as the Hyperion Preemption Order. All three orders hold that state

statutory provisions that prohibit competition in rural areas are not "competitively neutral" and therefore conflict with the provisions of 47 U.S.C. § 253(a) and (b).

The Wyoming public service commission filed a challenge to the Wyoming Preemption Order in the Court of Appeals for the Tenth Circuit on the grounds that the controversy before the FCC had become moot prior to the rendering of the order. On January 13, 2000, the Court denied the challenge to the Wyoming Preemption Order. *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000). While the Tenth Circuit's decision in this case is not controlling legal precedent in the Sixth Circuit, this decision does address the preemption by the FCC of telecommunications act provisions in Wyoming that are quite similar to Tenn. Code Ann. § 65-4-201(d). The court stated that it must defer to the FCC's interpretation of the term "competitively neutral" because the term is ambiguous and nowhere defined in the United States Code:

When the statute is silent or ambiguous, however, deference is due to the agency's interpretation, so long as it is reasonable and not otherwise arbitrary, capricious or contrary to the statute. Since the FCC's order in this case involved the interpretation of the ambiguous phrase "competitively neutral", we review with deference.

Id. at 1268 (citations omitted). The Tenth Circuit expressly upheld the FCC's finding that the Wyoming law was not "competitively neutral" and, therefore, was not permissible under 47 U.S.C. § 253(b) and, accordingly, could be lawfully preempted by the FCC under 47 U.S.C. § 253(d).

After consultation with this Office, the TRA decided not to file an appeal from the Hyperion Preemption Order with the Court of Appeals for the Sixth Circuit. Because the order is now final, the FCC's preemption of Tenn. Code Ann. § 67-4-201(d) is authoritative and binding.

In conclusion, this Office finds that the FCC has expressly preempted enforcement of Tenn. Code Ann. § 65-4-201(d) pursuant to authority granted thereto under 47 U.S.C. § 253(d). Accordingly, this Office is of the opinion that Tenn. Code Ann. § 65-4-201(d) is no longer valid or enforceable. In addition, this Office finds that, because Tenn. Code Ann. § 67-4-201(c) has not been preempted by the FCC and is not in conflict with federal law, Tenn. Code Ann. § 67-4-201(c) is valid and enforceable.

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Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WINSTON B. SITTON
Assistant Attorney General

Requested by:

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State Senator
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