**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**July 9, 2008**

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| **IN RE:** | ) | |
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| **PETITION OF FRONTIER COMMUNICATIONS OF AMERICA INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY** | ) | **DOCKET NO. 07-00155** |
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**ORDER**

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This matter came before Chairman Eddie Roberson, Director Tre Hargett, and Director Ron Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference on May 5, 2008 for consideration of the *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity ("Petition")* filed on June 20, 2007 which requested an amendment to its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand")."[1]

**BACKGROUND**

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

[1] *Petition,* p. 1 (June 20, 2007).

and conclusions in the Administrative Judge's Initial Order entered on May 30, 1996.[2] The *Initial Order* stated that the application of Citizens sought a CCN to offer "a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company" on a statewide basis. Specifically, the *Initial Order* reflected that Citizens agreed to adhere to TPSC policies, rules and orders and stated that "the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. § 65-4-201(d)."[3]

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

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* ("*Petition for Declaratory Ruling*") in Docket No. 04-00379. In its *Petition for Declaratory Ruling,* Frontier identified itself as a competing local exchange carrier ("CLEC") and contended that it had statewide authority from the TRA to provide telecommunications services based on the Order entered in TPSC Docket No. 96-00779. Additionally, Frontier and Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand") petitioned for and obtained TRA approval of an Interconnection Agreement dated August 2, 2004. Through its *Petition for Declaratory Ruling* and its Interconnection Agreement with Ben Lomand, Frontier sought to compete in territory served by Ben Lomand. Ben Lomand

[2] *Initial Order, Application of Citizens Telecommunications Company, d/b/a Citizens Telecom for a Certificate of Public Convenience and Necessity as Competing Telecommunications Service Provider,* TPSC Docket No. 96-00779, p. 1 (May 30, 1996) ("*Initial Order*").
[3] *Id.* at 3.

responded to the *Petition for Declaratory Ruling* stating that Frontier did not have authority to compete in Ben Lomand's service territory and moving to dismiss the action.

At a regularly scheduled Authority Conference on November 7, 2005, the panel in Docket No. 04-00379 unanimously determined that Frontier does not have statewide authority under its current CCN to permit it to serve customers in Ben Lomand's territory. The panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide a competing service only as allowable by state law at the time. The 1996 TPSC Order did not extend Citizens' authority statewide to enter into territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives. The panel unanimously voted to dismiss the *Petition for Declaratory Ruling* of Frontier on the procedural ground that Frontier was asserting a claim for relief which could not be granted pursuant to the status of Frontier's current CCN.[4] The Authority's dismissal of the declaratory petition did not address the merits of the statutory restriction pertaining to competition within the territory of cooperative telephone service providers.

On December 14, 2005, Frontier filed its *Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling* ("*Petition for Preemption*") with the Federal Communications Commission ("FCC").[5] The *Petition for Preemption* seeks an Order from the FCC that would overrule the November 7, 2005 decision of the Authority in TRA Docket No. 04-00379, preempt Tenn. Code Ann. § 65-29-102, and rule that Frontier may compete in the service territory of Ben Lomand. In its *Petition for Preemption*, which was filed with the FCC before the issuance of the Order of the Authority in Docket No. 04-00379, Frontier

[4] The *Order Denying Petition of Frontier Communications, Inc.*, reflecting the decision of the Authority in Docket No. 04-00379, was issued on March 8, 2006.

[5] *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling,* FCC WC Docket No. 06-6 (December 14, 2005).

asserts that Ben Lomand's motion to dismiss in that docket was granted by the TRA "on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives."[6]

On February 21, 2006, during the comment period for FCC WC Docket 06-6, the TRA filed its *Opposition of the Tennessee Regulatory Authority to Frontier's Petition for Preemption and Declaratory Ruling ("Opposition to Petition for Preemption")* with the FCC, effectively intervening in that action. In its *Opposition to Petition for Preemption,* the Authority stated,

> Frontier is not entitled to compete with Ben Lomand because Frontier does not possess statewide authority under its [CCN] and has not sought approval of an amendment to its CCN from the TRA for a grant of such authority. The *Petition for Preemption* of Frontier should be summarily dismissed on the ground that it is not ripe for consideration because Frontier has not exhausted its remedies at the TRA.[7]

To date, the FCC has not rendered a decision on Frontier's *Petition for Preemption.*

**TRAVEL OF THIS CASE**

On June 20, 2007, Frontier filed its *Petition* requesting amendment to its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by [Ben Lomand]."[8] On July 9, 2007, the panel voted unanimously to convene a contested case proceeding and to appoint General Counsel or his designee as Hearing Officer for the purpose of preparing this matter for hearing. On July 11, 2007, Ben Lomand filed its *Petition to Intervene* pursuant to Tenn. Code Ann. §4-5-310.

On November 20, 2007, the Hearing Officer issued a *Notice of Status Conference.* The notice provided that any party desiring to participate in this proceeding should file a petition to intervene not later than November 30, 2007, and that petitions to intervene filed by that date

[6] *Petition for Preemption*, p. 3 (December 14, 2005).
[7] *Opposition to Petition for Preemption,* p. 1 (February 21, 2007).
[8] *Petition,* p. 1 (June 20, 2007).

would be considered at the status conference on December 5, 2007. The notice also stated that the establishment of a procedural schedule and any other pre-hearing issues would be matters for discussion during the status conference.

On November 29, 2007, the Authority received petitions for leave to intervene from the following interested parties: Highland Telephone Cooperative, Inc. ("Highland"), Bledsoe Telephone Cooperative Corporation, Inc. ("Bledsoe"), West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky"), DTC Communications ("DTC"), North Central Telephone Cooperative, Inc. ("North Central"), and Twin Lakes Telephone Cooperative Corporation ("Twin Lakes") (collectively, the "Intervening Cooperatives"). On December 3, 2007, the Intervening Cooperatives filed their *Motion to Hold Case in Abeyance ("Abeyance Motion").* On December 5, 2007, Frontier filed its *Response in Opposition to the Motion to Hold Case in Abeyance Filed by the Intervenors.*

At the Status Conference convened on December 5, 2007, all parties presented oral argument concerning the merits of the *Abeyance Motion,* after which the Hearing Officer took the matter under advisement. Additionally, the parties agreed that a procedural timeline for resolution of this docket is dependent upon the outcome of the Abeyance *Motion* and suggested that the parties submit an agreed proposed procedural schedule not later than seven days following issuance of the Hearing Officer's Order pertaining to the *Abeyance Motion,* if necessary.

On December 6, 2007, the Hearing Officer issued an *Order Granting Petitions to Intervene, Setting Deadline for Receipt of Proposed Procedural Schedule and Addressing Other Preliminary Matters* memorializing decisions made by the Hearing Officer at the Status Conference. Additionally therein, the Hearing Officer stated that a separate order rendering a

decision on the *Abeyance Motion* would be later issued.

On December 20, 2007, the Hearing Officer issued an *Order Declining to Hold Case in Abeyance Subject to Condition Precedent.* In the Order, the Hearing Officer denied the *Abeyance Motion* and advised the parties that the docket would not proceed until a notice of the filing of the *Petition* and Frontier's request that the Authority proceed on its *Petition* was filed with the FCC in FCC Docket WC-06-6. The Hearing Officer further ruled that upon the filing of a copy of such a notice with the TRA, the parties shall submit an agreed procedural schedule proposing a timeline for moving the docket forward to a resolution on the merits.

On January 14, 2008, a copy of a letter notifying the FCC of Frontier's *Petition* and its request to the TRA to proceed with action on the *Petition* was received by the Authority. On February 22, 2008, a *Petition of Comcast Phone of Tennessee, LLC ("Comcast Phone") for Leave to Intervene* was filed with the Authority. On March 5, 2008, the Hearing Officer received an electronic communication from the parties advising of their agreement regarding a proposed procedural schedule and a request that the docket proceed to resolution before the Authority. Comcast's petition to intervene was granted by Order of the Hearing Officer issued on March 6, 2008. On March 7, 2008, the Hearing Officer issued the *Order Setting Procedural Schedule* in which it was noted that the parties had advised the Hearing Officer that there were no material facts in dispute and that the issues presented in the docket were purely legal in nature. On March 26, 2008, the Intervening Cooperatives filed their notice of withdrawal. On March 27, 2008 initial briefs were filed by Frontier, Ben Lomand, and Comcast. Frontier and Ben Lomand each filed a reply brief on April 10, 2008. Comcast informed the TRA of its election not to file a reply brief on April 10, 2008.

On April 21, 2008, the panel heard oral argument of the parties concerning the following legal questions:

1) Whether the TRA has jurisdiction in this matter; and,

2) Whether the TRA may permit Frontier to amend its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone."[9]

The parties were advised that the panel would deliberate these issues at the regularly scheduled Authority Conference on May 5, 2008 and, if needed, following the decision of the panel on the threshold issues, hold a public hearing pursuant to Tenn. Code Ann. § 65-4-201. On April 28, 2008, Frontier filed its pre-filed Direct Testimony in support of its managerial, financial, and technical qualifications to provide service.

**DISCUSSION & ANALYSIS**

***Question 1 - Jurisdiction***

Under Tenn. Code Ann. § 65-4-101(6)(E), telephone cooperatives are excluded from the definition of public utilities and therefore are not subject to general regulation by the TRA except as specifically provided in Tennessee statutes. In 1961, the General Assembly determined that the TRA shall have jurisdiction over a telephone cooperative in three specific instances as follows:

> T.C.A. § 65-29-130. Jurisdiction
>
> (a) Cooperatives and foreign corporations engaged in rendering telephone service in this state pursuant to this chapter fall within the jurisdiction of the Tennessee regulatory authority for the sole and specific purposes as set out below:
>
> (1) The establishment of territorial boundaries;
>
> (2) The hearing and determining of disputes arising between one (1) telephone cooperative and other telephone cooperatives, and between telephone cooperatives and any other type of person, corporation, association, or

[9] *Petition,* p. 1.

partnership rendering telephone service, relative to and concerning territorial disputes; and

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

Tenn. Code Ann § 65-4-201 outlines the requirements which must be met by any telecommunications service provider seeking approval of a CCN for the purpose of offering services within the state and the role of the TRA when reviewing any such petition. Under Tenn. Code Ann. § 65-4-201, the TRA has jurisdiction over a petition by a telecommunications service provider requesting a CCN or an amendment thereto, statewide or otherwise. The TRA has previously determined that "the authority of the TRA to review and approve requests for CCNs and the possibility that such approval may conflict with cooperatives' territory does not necessarily remove the matter from TRA jurisdiction."[10]

Finally, Tenn. Code Ann. § 65-5-110 (a) states "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408 [the Tennessee Telecommunications Act]."

***Question 2 – Amendment of CCN to provide telecommunications service in areas served by telephone cooperatives***

**A. The *Telephone Cooperative Act ("Cooperative Act")*, Tenn. Code Ann. § 65-29-101, et seq.**

In 1961, the General Assembly, through the *Cooperative Act,* provided entities organized under chapter 29 (i.e. telephone cooperatives) with special benefits and responsibilities, unique incentives, and specific corporate powers so as to enable telephone cooperatives to provide the type of service which might otherwise be considered economically unfeasible. The General

[10] *Order Denying Petition of Frontier Communications, Inc.,* Docket No. 04-00379, p. 9 (March 8, 2006).

Assembly enacted the *Cooperative Act* to encourage the provision of telephone service in rural areas, but did not do so without any limitation. Tenn. Code Ann. § 65-29-102 provides:

> T.C.A. § 65-29-102. Purpose
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> Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; *provided, that there shall be no duplication of service where reasonably adequate telephone service is available.* Corporations organized under this chapter and corporations which become subject to this chapter in the manner provided in this chapter are referred to in this chapter as "cooperatives," and shall be deemed to be not-for-profit corporations. (Emphasis added).

As an initial matter, the parties dispute the plain language of the statute and each offers a contrasting interpretation. Frontier asserts that the *Cooperative Act* prohibits a telephone cooperative from providing service in an area where reasonably adequate service is available, as construed by the Tennessee Attorney General, but does not nor was it intended to bestow territorial protection upon telephone cooperatives.[11] Ben Lomand contends that the *Cooperative Act* "prohibits any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory."[12] Although Ben Lomand insists that its interpretation is proper and in conformity with the plain language of the statute, when asked during oral argument to identify the specific language that grants it protection from competition, it was unable to do so.[13] Ben Lomand has also failed to provide any other authority to support its interpretation of the statute.

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[11] *Frontier Communications of America, Inc's Initial Brief,* p. 7 (March 27, 2008); see also, *Frontier Communications of America, Inc's Reply Brief,* p. 4-5 (April 10, 2008).

[12] *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.,* p.2 (March 27, 2008); see also, *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.,* p. 2 (April 10, 2008).

[13] Transcript of April 21, 2008 Authority Conference, p. 120

The Tennessee Supreme Court reiterated the well-settled law of statutory construction in the case of *Gleaves v. Checker Cab Transit Corp.*:[14]

> A "basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. State Dep't. of Revenue,* 865 S.W.2d 1, 2 (Tenn.1993). In determining legislative intent and purpose, a court must not "unduly restrict[ ] or expand[ ] a statute's coverage beyond its intended scope." *Worley v. Weigels, Inc.,* 919 S.W.2d 589, 593 (Tenn.1996)(quoting *Owens v. State,* 908 S.W.2d 923, 926 (Tenn.1995)). Rather, a court ascertains a statute's purpose from the plain and ordinary meaning of its language, *see Westland West Community Ass'n. v. Knox County,* 948 S.W.2d 281, 283 (Tenn.1997), "without forced or subtle construction that would limit or extend the meaning of the language." *Carson Creek Vacation Resorts, Inc.,* 865 S.W.2d at 2.
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> When, however, a statute is without contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from the words of the statute. *Hawks v. City of Westmoreland,* 960 S.W.2d 10, 16 (Tenn.1997). Moreover, if "the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it.' " *Id.* (quoting *Miller v. Childress,* 21 Tenn. (2 Hum.) 320, 321-22 (1841)). Therefore, "[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction." *Henry v. White,* 194 Tenn. 192, 198, 250 S.W.2d 70,72 (1952).
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> Finally, it is not for the courts to alter or amend a statute. *See Town of Mount Carmel v. City of Kingsport,* 217 Tenn. 298, 306, 397 S.W.2d 379, 382 (1965); *see also Richardson v. Tennessee Bd. of Dentistry,* 913 S.W.2d 446, 453 (Tenn.1995); *Manahan v. State,* 188 Tenn. 394, 397, 219 S.W.2d 900, 901 (1949). Moreover, a court must not question the "reasonableness of [a] statute or substitut[e][its] own policy judgments for those of the legislature." *BellSouth Telecomms., Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn.Ct.App.1997). Instead, courts must "presume that the legislature says in a statute what it means and means in a statute what it says there." *Id.* Accordingly, courts must construe a statute as it is written. *See Jackson v. Jackson,* 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948).[15]

A careful review of Tenn. Code Ann. § 65-29-102 shows that it is clear and unambiguous on its face. The plain language of the statute, without a forced interpretation or an expansion of the ordinary terms it employs, makes clear that it is the telephone cooperative that shall not be

[14] *Gleaves v. Checker Cab Transit Corp., Inc.,* 15 S.W.3d 799, 802-803 (Tenn. 2000).
[15] *Id.*

permitted to provide duplicative service in an area where there exists reasonably adequate service. The language imposes a restriction upon the cooperative, and does not grant a corresponding territorial protection from outside competition, as asserted by Ben Lomand. When this statute was enacted, it is possible that this language may have been intended to provide a measure of security for then-existing telephone cooperatives providing telephone service in rural areas. Nevertheless, the statute on its face does not purport to grant refuge from competition for cooperatives organizing under the *Cooperative Act*. There is no language found within the statute that purports to grant a telephone cooperative a right to be free from the competition of a service provider or entity not organized under the *Cooperative Act*.

Furthermore, as cited by Frontier, the Tennessee Attorney General has interpreted the conditional language found within the statute to be a prohibition or restriction on the telephone cooperative:

> 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 § 65- 4-107; ***a telephone cooperative is prohibited by § 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 § 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 (emphasis added).[16]
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> * * *
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> A municipality can only allow a telephone cooperative organized under T.C.A. §65-29-101, et seq. . . .to conduct business in the municipality if it is determined under T.C.A. §54-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be

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

> shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative.[17]

In the absence of case law concerning the *Cooperative Act*, the Tennessee Attorney General, in a variety of opinions, has stated the purpose of the *Cooperative Act* by referencing specific statutory language:

> Under T.C.A. §65-29-102, cooperative, nonprofit, membership corporations may be organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there is no duplication of service where reasonably adequate telephone service is available.[18]

> The purpose of telephone cooperatives organized under Chapter 29 of Title 65 is to "furnish telephone service in rural areas to the widest practical number of users of such service."[19]

> Telephone cooperatives are organized and operated pursuant to the provisions of T.C.A. §65-29-101, et seq. (the 'Telephone Cooperative Act'). Such cooperatives are organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there shall be no duplication of service where reasonably adequate telephone service is available, pursuant to T.C.A. 65-29-102.[20]

It is apparent that an interpretation of the statute which fosters territorial protection for cooperatives has been perpetuated for many years and has inured to the benefit of cooperative telephone companies. Such a misinterpretation or misconstruction of the statute continues and it is the genesis of the dispute in this docket. Upon a careful review of the *Cooperative Act*, statements in various Attorney General Opinions, and after a review of recordings of the House and Senate discussions of the legislation which passed in 1961,[21] it is clear that the bestowing of

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[17] *Id.*
[18] Tenn. Op. Atty. Gen. No. 92-44, 1992 WL 545017 (Tenn. A.G.).
[19] Tenn. Op. Atty. Gen. No. 92-65, 1992 WL 545032 (Tenn. A.G.).
[20] Tenn. Op. Atty. Gen. No. 88-140, 1988 WL 410216 (Tenn. A.G.).
[21] There was no discussion by legislators which would either directly or impliedly give entities organized under the *Cooperative Act* exclusive rights to service territory. In Tenn. Op. Atty. Gen. No. 92-65, the Tennessee Attorney General characterized legislative discussions concerning the *Cooperative Act* as follows:

> House Bill 957 was introduced and read by Representative James H. Cummings to the General Assembly on March 13, 1961. The most important topic of debate at the reading of the bill was

territorial protection to the benefit of telephone cooperatives is not supported by the *Cooperative Act*. Undoubtedly, Ben Lomand has enjoyed this "protection" and would like for it to continue. The Intervening Cooperatives[22] chose to withdraw their intervention prior to the submission of briefs on these important issues.

In several dockets in the past, the TRA has alluded to the widely held belief of a statutorily-sanctioned monopoly position for the telephone cooperatives. In his Concurring Opinion to an order granting a CCN to Ben Lomand Communications, Inc. (an affiliate of Ben Lomand Rural Cooperative) to provide telecommunication services as a CLEC in 1999, former Director Lynn Greer stated "the certificate granted to Ben Lomand will allow the for-profit subsidiary to compete in the telephone business against other telephone providers while at the same time allowing the not-for-profit cooperative to protect its territory from outside competition. . . . I realize that the General Assembly made a policy decision in this area. . ."[23]

In the predecessor docket to this case, Docket No. 04-00379, "the panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide competing service as allowable by state law at the time. The 1996 TPSC order did not extend Citizens' authority statewide to enter into

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> the potential for conflicting jurisdiction between telephone cooperatives and the Public Service Commission concerning, for example, rate-making power and dispute resolution authority.
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> . . . yet it is clear from the House discussion that the primary concern and objective was to provide technological services to rural communities of Tennessee comparable to the level of service enjoyed by constituents in more urban areas.
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> Senate Bill 833 was introduced and read by Senator Gilbert F. Parker. This bill evoked even less discussion on the Senate floor than its House counterpart.

[22] The following telephone cooperatives are collectively referred to herein as the "Intervening Cooperatives:" Highland Telephone Cooperative, Inc., Bledsoe Telephone Cooperative Corporation, Inc., West Kentucky Rural Telephone Cooperative Corporation, Inc., DTC Communications, North Central Telephone Cooperative, Inc., and Twin Lakes Telephone Cooperative Corporation.

[23] *See In Re: Application of Ben Lomand Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services as a Competing Telecommunications Service Provider,* Docket No. 98-00600, *Concurring Opinion of H. Lynn Greer* attached to the *Order Granting Certificate of Convenience and Necessity* (April 28, 1999).

territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives."[24] Additionally, during the deliberations of Frontier's petition concerning whether competition was permitted in the territory of Ben Lomand, former Director Pat Miller made the following comments, "after reviewing the pleadings and applicable statutory provisions, I do not find specific language contained within existing state law that would permit the TRA to grant authority to CLECs to serve territories served by telephone cooperatives. I am also convinced that prior to the 1995 act this agency did not have authority to allow competitive entry into areas served by cooperatives."[25]

The Authority is not foreclosed from taking a position on interpreting this statute, which may be contrary to the remarks of Directors in earlier dockets. In addition, none of the Directors assigned to the voting panel of this docket have considered this issue before.

If, however, the *Cooperative Act,* or Tenn. Code Ann. § 65-29-102 specifically, is capable of more than one reasonable interpretation, then the statute is ambiguous. The Court of Appeals in *Consumer Advocate Div. v. Tennessee Regulatory Authority* stated,

> The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts.[26]

Thus, in the event that a statute logically has more than one meaning, or is capable of conflicting yet wholly reasonable interpretations, the court will customarily defer to the interpretation of the administrative agency. An interpretation that Tenn. Code Ann. § 65-29-102 does not convey or bestow territorial protection from competition by entities not organized thereunder, is supported by a reading of the plain language of the statute itself.

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[24] *See In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling,* Docket No. 04-00379, *Order Denying Petition of Frontier Communications, Inc.,* p. 11 (March 8, 2006).
[25] *Id.* p. 11, footnote 23.
[26] *Consumer Advocate Div. v. Tennessee Regulatory Authority,* 2002 WL 1579700, 3 (Tenn. Ct. App. 2002) *citing Collins v. McCanless,* 169 S .W.2d 850 (Tenn. 1943) and *Riggs v. Burson,* 941 S.W.2d 44 (Tenn. 1997).

As a part of Title 65 of the Tennessee statutes, it must be addressed how the *Cooperative Act* is integrated into the overall statutory scheme for telecommunications declared by the General Assembly in 1995. Even if the *Cooperative Act* did somehow grant territorial protection to cooperatives, with the enactment of Tennessee's Telecommunications Act in 1995, the General Assembly declared clearly that the fostering of competition in *all* areas of Tennessee is the mandate of this state and the charge of the TRA. Tenn. Code Ann. §65-4-123 states:

> T.C.A. § 65-4-123. Declaration of telecommunications services policy
>
> The general assembly declares 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,*** and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. *To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider;* universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable. (Emphasis added).

The courts have addressed the overarching implications and sweeping changes made and intended as a result of Tennessee's Telecommunications Act in 1995. In *BellSouth Telecommunications, Inc. v. Greer,*[27] the Tennessee Court of Appeals discussed the dramatic actions taken by the state legislature and Governor in 1995 concerning the regulation of the telecommunications market in Tennessee:

> . . . two competing telecommunications bills were introduced in the first session of the Ninety-Ninth General Assembly that had convened in January 1995. The avowed purpose of both bills was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. Filed concurrently with these bills was a bill to replace the Commission [Public Service Commission] with a new regulatory entity. On May 26, 1995, the Governor signed a bill replacing the Commission with the Tennessee Regulatory Authority effective July 1, 1996.[FN6] Two weeks later, the Governor signed another bill dramatically altering the regulation of local

[27] *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663 (Tenn. App. 1997).

telephone companies and opening up the local telecommunications market to unprecedented opportunities for competition.[FN7]

> FN6. Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.
> FN7. Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703, codified at Tenn. Code Ann. §§ 65-4-101, -123 & -124, 65-4-201, -203, -207, and 65-5-208 to -213 (Supp.1996).

The expressed goal of the new regulatory structure was to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers.

*See* Tenn. Code Ann. § 65-4-123 (Supp.1996). In broad terms, the 1995 legislation set out to accomplish this goal in five ways. First, it mandated the universal availability of basic telephone service at affordable rates and froze basic and non-basic telephone rates for four years [footnote omitted]. Second, it required incumbent local telephone companies to make available non-discriminatory interconnection to their public networks to other providers [footnote omitted]. Third, it eased the traditional limitations on the ability of new providers to enter the market.[FN10] Fourth, it provided a transition procedure to enable existing local telephone companies to take advantage of the newly relaxed regulatory environment [footnote omitted]. Fifth, it established a five-year, $10 million loan guarantee program to induce small and minority businesses to enter the telecommunications market [footnote omitted].

> FN10. Prior to 1995, the Commission could not permit new competitors to enter a market already served by another provider unless it found that the current service was "inadequate to meet the reasonable needs of the public." Tenn. Code Ann. § 65-4-203(a) (Supp.1996). The 1995 legislation exempts telecommunications service providers from this requirement. Tenn. Code Ann. § 65-4-203(c). The 1995 legislation also permits new competitors to enter a market if they demonstrate that they will adhere to the applicable legal requirements and that they possess sufficient managerial, financial, and technical abilities to provide the service. Tenn. Code Ann. § 65-4-201(c).

*BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663, 666-667 (Tenn. App. 1997).

In the 2003 case of *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,*[28] the Tennessee Court of Appeals discussed the condition of the telecommunications market in Tennessee prior to the widespread and sweeping legislation enacted by the General Assembly:

> Before the state legislature made significant changes in the law governing telecommunications services in 1995, local telephone service was provided to consumers in a locality by one company under a regulated monopoly system. The adoption of the Tennessee Telecommunication Act, 1995 Tenn. Pub. Acts 408 (effective June 6, 1995), abolished monopolistic control of local telephone service and opened that market to competition. It also changed the way in which providers of such services, and the rates they charge, were regulated.[29]

The *Greer* and *BellSouth BSE* cases demonstrate that even if the *Cooperative Act* at one time had provided territorial protection to cooperatives, the actions of the General Assembly in 1995 would serve to resolve and override conflicting prior legislation. As stated by the *Greer* Court at footnote 10 quoted above, consideration of whether "current service was 'inadequate to meet the reasonable needs of the public[]' Tenn. Code Ann. § 65-4-203(a) (Supp.1996)," is not the law following the 1995 Telecommunications Act. The decision whether to allow competition in the telecommunications market has been decided by the General Assembly. The question is no longer when or under what circumstances should competition be allowed, the law in Tennessee mandates that competition will be fostered in "all telecommunications services markets . . . to protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider . . ."[30] Further, as articulated in *BellSouth BSE,* the 1995 legislation was intended to "abolish[] monopolistic control of local telephone service and open[] that market to competition."[31]

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[28] *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,* 2003 WL 354466 (Tenn. Ct. App. 2003).
[29] *Id.*
[30] Tenn. Code Ann. §65-4-123.
[31] *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,* 2003 WL 354466, p. 1 (Tenn. Ct. App. 2003).

Ben Lomand argues that it was not contemplated that telephone cooperatives would be included in the 1995 Telecommunications Act. Ben Lomand asserts that only "public utilities" within the definition of Tenn. Code Ann. § 65-4-101 are contemplated within the 1995 Telecommunications Act. Therefore, because cooperatives are specifically exempted from this definition by Tenn. Code Ann. § 65-4-101(6)(E),[32] they are likewise free from the imposition of mandated competition. Again, Ben Lomand's argument is not consistent with the rules of statutory construction.

Pursuant to the rules of statutory construction, first and foremost, "courts must presume that the legislature says in a statute what it means and means in a statute what it says there.'"[33] The Tennessee Supreme Court, in the case of *Ki v. State,* stated:

> When construing statutes, we are required to ascertain and effectuate the legislative intent and purpose of the statutes. *State v. Walls,* 62 S.W.3d 119 (Tenn.2001). We should "assume that the legislature used each word in the statute purposely and that the use of [each] word[ ] conveyed some intent." *State v. Levandowski,* 955 S.W.2d 603, 604 (Tenn.1997). Further, courts must presume that the legislature is aware of prior enactments and of the decisions of the courts when enacting legislation. *Id.* Legislative intent must be derived from the plain and ordinary meaning of the statutory language if the statute is devoid of ambiguity. *Mooney v. Sneed,* 30 S.W.3d 304, 306 (Tenn. 2000).[34]

The General Assembly made it clear in Public Chapter 408, the enacted legislation of the 1995 Telecommunications Act, that the overall goal of the Act was to open the "telecommunications services market" to competition. The preamble to Public Chapter 408 states in pertinent part,

> WHEREAS, It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market; and

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[32] Tenn. Code Ann. §65-4-101(6) states, " . . . 'Public utility' as defined in this section shall not be construed to include the following nonutilities: . . . (E) Any cooperative organization, association or corporation not organized or doing business for profit;"

[33] *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn. App. 1997).

[34] *Ki v. State*, 78 S.W.3d 876, 879 (Tenn. 2002).

> WHEREAS, Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each; and . . . [35]

Therefore, the language of Tenn. Code Ann. § 65-4-123, "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," should be construed as meaning exactly what it states – all markets. Further, while Ben Lomand does not fall within the definition of "telecommunications service provider"[36] under Tenn. Code Ann. § 65-4-101(8), Frontier does. The additional language of Tenn. Code Ann. § 65-4-123, ". . . the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider. . ." means that regulation under the "new" legislative scheme should not unreasonably prejudice or disadvantage Frontier.

It is a legal assumption that the General Assembly was aware of the *Cooperative Act* and its provisions when it enacted the 1995 Telecommunications Act. Whether one considers the meaning of the *Cooperative Act* on its face (no territorial protection afforded) or the interpretation of the *Cooperative Act* advocated by Ben Lomand, the clear directives of the General Assembly set forth in the 1995 Telecommunications Act must prevail, ultimately resulting in the entry of Frontier and other CLECs into *all* telecommunications services markets in Tennessee. As stated by the Tennessee Attorney General in an opinion concerning the statutory jurisdiction of the TRA over cooperatives, and which is equally applicable to the question presented in this matter, "[t]his interpretation is consistent with the well established rule

[35] 1995 Tenn. Pub. Ch. 408.

[36] Tenn. Code Ann. §65-4-101(8) states, "'Telecommunications service provider' means any incumbent local exchange telephone company or certificated individual or entity or individual or entity operating pursuant to the approval by the former public service commission of a franchise within §65-4-207(b), authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law [citations omitted]."

of statutory construction that statutes relating to the same subject matter must be construed so as to make the legislative scheme operate in a consistent and uniform matter. See, e.g., State v. Hughes, 512 S.W. 2d 552, 552 (Tenn. 1974)."[37]

A legislative scheme designed to encourage competition in telecommunications service markets for the benefit of consumers cannot operate as intended under the restrictions placed on the 1995 Telecom Act by Ben Lomand. In particular, not permitting Frontier to compete in Ben Lomand's territory would be unfair and inequitable. This is especially true under the circumstances presented in this docket, where Ben Lomand is a "nonutility" by definition, while its for-profit subsidiary, Ben Lomand Communications, Inc. ("BLC"), is a "competing telecommunications service provider"[38] ("CLEC') pursuant to Tenn. Code Ann. §65-4-101(1) and has been operating in the areas served by Frontier. In light of the fact that Ben Lomand intentionally created BLC for the purpose of actively competing with Frontier and other CLECs over nine years ago, a proper implementation of the 1995 Telecommunications Act would serve to avoid the continuation of unreasonable prejudice and disadvantage experienced by Frontier. Again, the preamble to the Public Chapter 408, articulates the intentions of the General Assembly, ". . . Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination. . ."[39]

The TRA has jurisdiction over such disputes between cooperatives and non-cooperative telephone service providers pursuant to Tenn. Code Ann. § 65-29-130. Frontier asserts that pursuant to Tenn. Code Ann. § 4-5-223(a) the TRA has jurisdiction and authority to declare

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[37] Tenn. Op. Atty. Gen. No. 88-06, 1988 WL 410167 (Tenn. A.G.).
[38] Tenn. Code Ann. §65-4-101(1) states, "'Competing telecommunications service provider' means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after June 6, 1995 unless otherwise exempted from this definition by state or federal law.
[39] 1995 Tenn. Pub. Ch. 408. (Preamble).

Tenn. Code Ann. § 65-29-102, as interpreted by Ben Lomand, preempted.[40] Tenn. Code Ann. § 4-5-223(a) states:

> Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency.[41]

Further, Frontier cites TRA Rule 1220-1-2-.05 in support of the Authority's power to nullify statute. TRA Rule 1220-1-2-.05 provides:

> The Authority may grant petitions to determine questions as to the constitutional application of a statute to specific circumstances, or as to the constitutionality of a rule promulgated, or order issued by the Authority.[42]

Ben Lomand asserts that Tenn. Code Ann. § 65-29-102 is a valid and enforceable statute and that the TRA has no authority to preempt it. "It is the duty of the Authority to enforce state laws, not throw them out the window."[43] Nevertheless, in this instance, the Authority can enforce the statute without supporting Ben Lomand's interpretation thereof. The plain language of the statute does not act as a bar to competition, particularly from entities not organized under the *Cooperative Act* as asserted by Ben Lomand. Even if it did, the provisions of the 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123, would supersede such an anticompetitive result. Therefore, it is not necessary that the TRA should rule upon the constitutionality of the statute specifically.

**B. Tenn. Code Ann. § 65-4-201(d) and federal preemption under *Hyperion***

The General Assembly has been clear in its intention and desire that Tennessee's telecommunications markets should be open. Yet, the legislature provided an exception, Tenn.

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[40] *Frontier Communications, Inc.'s Reply Brief,* p. 5-6 (April 10, 2008).
[41] Tenn. Code Ann. §4-5-223(a).
[42] TRA Rule 1220-1-2-.05.
[43] *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.,* p. 4 (March 27, 2008).

Code Ann. § 65-4-201(d) in which the General Assembly specifically considered rural communities and the telephone service providers serving them.

As part of the 1995 Telecommunications Act, the General Assembly enacted Tenn. Code Ann. § 65-4-201(d), which purported to insulate incumbent local exchange telephone companies ("ILECs") with fewer than 100,000 access lines from competition unless an ILEC entered into an interconnection agreement voluntarily or it applied for a certificate to compete outside its service area. In a memorandum opinion and order adopted on May 14, 1999, the FCC in *In re AVR, L.P. d/b/a Hyperion of Tennessee, L.P.*[44] exercised its authority under 47 U.S.C. § 253(d) to preempt enforcement of Tenn. Code Ann. § 65-4-201(d). In so doing, the FCC stated:

> 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).[45] 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).[46] 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. § 65-4-210(d) and the Denial Order, as directed by section 253(d).[47]

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[44] *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 98-92, Memorandum Opinion and Order, 14 F.C.C. Rcd. 11064 (1999) ("*Hyperion Memorandum Opinion and Order*").

[45] 47 U.S.C. §253(a) states "No 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."

[46] 47 U.S.C §253(b) states "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 section, 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] 47 U.S.C. 253(d) states "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." *See, Hyperion Memorandum Opinion and Order* at 11070.

> 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.[48]
>
> 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.[49]
>
> 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 judgment violate section 253 as applied by this commission.[50]

Thus, ultimately, the FCC found Tenn. Code Ann. § 65-4-201(d) to be anticompetitive in violation of Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,[51] and outside the scope of authority reserved to the states by Section 253(b). Importantly, although the FCC preempted the enforcement of Tenn. Code Ann. § 65-4-201(d) and TRA's Denial Order, it did not mandate the granting of Hyperion's application for a CCN. Rather, it stated, "[b]ased 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 [CCN] consistent with the Communications Act and this decision."[52] Hyperion never filed any additional requests with the TRA following the FCC decision. Nevertheless, the TRA has granted similar requests from at least two CLECs post-*Hyperion,* allowing them entry into the previously exempted rural territory.[53]

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[48] *Hyperion Memorandum Opinion and Order* at 11072
[49] *Id.* at 11072.
[50] *Id.* at 11076.
[51] 47 U.S.C. § 253(a). Section 253 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*
[52] *Hyperion Memorandum Opinion and Order* at 11075.
[53] See, *In re: Application of Level 3 Communications, LLC for a CCN to Provide Facilities-Based and Resold Local Exchange and Interexchange Telecommunications Services throughout the State of Tennessee,* Docket No. 98-00610, *Order Granting Certificate of Public Convenience and Necessity* (November 24, 1998) and *In re: Petition of*

Ben Lomand contends that Tenn. Code Ann. § 65-4-201(d) and the FCC decision in *Hyperion* are not relevant to the TRA's consideration in this docket because Ben Lomand is a cooperative, operating under Tenn. Code Ann. § 65-29-102, not a rural ILEC. Tenn. Code Ann. § 65-29-102 has not been specifically preempted by the FCC and Ben Lomand asserts that the FCC would not likely preempt the *Cooperative Act*:

> [t]he mere fact that T.C.A. § 65-29-102 restricts entry into a cooperative's territory is not grounds for preemption. Like the General Assembly with T.C.A. § 65-29-102, the U.S. Congress in the 1996 Federal Communications Act recognizes special exemptions for rural telephone companies. 47 U.S.C. 251(f)(1). . . . the statute does not prohibit a state from imposing 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). The General Assembly has done so with T.C.A. § 65-29-102.[54]
>
> The FCC has refused to preempt a local law which is not an absolute prohibition. In the Matter of California Payphone Association Petition, Memorandum Opinion and Order, 12 F.C.C. Rec. 14191 (1997). T.C.A. § 65-29-102 is **not** an absolute prohibition – if a rural cooperative is found to not be providing reasonable and adequate service, a competing provider may offer services in such cooperative's territory (emphasis in original).[55]

Frontier asserts that if the interpretation of Tenn. Code Ann. § 65-29-102 as advocated by Ben Lomand were to prevail, and the *Cooperative Act* does in fact prohibit any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory, then applying the analysis of *Hyperion*, the FCC should find it anticompetitive in violation of 47 U.S.C. § 253(a) and preempt its enforcement.[56] Accordingly, considering the final comments of the FCC in *Hyperion* urging states and regulatory agencies to "review any similar statutes and regulations, and to repeal or

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*XO Tennessee, Inc. to Amend Its CCN,* Docket No. 03-00567, *Initial Order Granting Amendment to Certificate of Public Convenience and Necessity* (February 23, 2004).

[54] *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 4 (April 10, 2008).

[55] *Id.* at 4-5.

[56] *Frontier Communications, Inc.'s Initial Brief,* p. 8-9 (March 27, 2008).

otherwise nullify any that in their judgment violate section 253 as applied by this commission," Frontier contends that Ben Lomand's interpretation of Tenn. Code Ann. § 65-29-102 is therefore (impliedly) preempted. Comcast Phone of Tennessee, who filed a petition to intervene in this docket on February 22, 2008, also asserts that the interpretation of Tenn. Code Ann. § 65-29-102 by Ben Lomand contradicts federal law and would thus be preempted under the Supremacy Clause of Article VI of the United States Constitution.[57]

While Ben Lomand may not be a rural ILEC and is not relying upon Tenn. Code Ann. § 65-4-201(d) to protect it from competitors, the FCC's pronouncement in *Hyperion* is applicable to this case. The FCC has not specifically reviewed Tenn. Code Ann. § 65-29-102, nor the *Cooperative Act* as a whole, and declared it preempted. Nevertheless, the analysis conducted by the FCC in *Hyperion,* combined with the directive to states and regulatory agencies to review and repeal or otherwise nullify anticompetitive statutes, requires that the TRA carefully scrutinize the statute that has been brought to its attention by the application filed by Frontier in this docket.

**FINDINGS AND CONCLUSIONS**

The panel unanimously voted that the Authority has statutory authority over this docket. Further, the panel unanimously voted that state law encourages telephone competition in all service markets and that it does not prohibit a duly authorized telecommunications service provider from providing telecommunications services in the entire state, including the service territories of the state's rural telephone cooperatives. The prevailing motion set out the following findings as the basis for the panel's unanimous decisions.[58, 59]

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[57] *Brief of Comcast Phone of Tennessee, LLC,* p.4-5 (March 27, 2008).

[58] Director Jones voted yes with regard only to the results of the prevailing motion. Director Jones explained that the threshold issue here is the proper interpretation of Tenn. Code Ann. § 65-29-102. He concluded that a careful review of Tenn. Code Ann. § 65-29-102 shows that the statute is clear and unambiguous. The language provides

Jurisdiction

1. The TRA has statutory authority under Tenn. Code Ann. §§ 65-29-130, 65-4-201, 65-4-123 and 65-5-110 over the issues in this docket which involve a territorial dispute between Ben Lomand Cooperative and Frontier Communications.

2. Tenn. Code Ann. § 65-29-130 specifically grants the TRA jurisdiction to adjudicate territorial boundary disputes between cooperatives and other telephone companies. The Tennessee Attorney General's opinion, OAG 90-83, supports this interpretation.

3. Tenn. Code Ann. § 65-4-201 delegates to the TRA the duty of reviewing company petitions seeking to offer telecommunications services within the state or to amend existing CCNs to expand service.

4. Tenn. Code Ann. § 65-4-123 which "declares 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, by permitting competition in all telecommunications service markets..." vests in the TRA the duty to implement the state policy on telecommunications and the instant petition must be weighed in light of this important legislative directive.

5. Tenn. Code Ann. § 65-5-110 (a) which states "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995. ch. 408 [the Tennessee Telecommunications Act]" also provides statutory authority to the

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that it is the telephone cooperative that shall not be permitted to provide duplicative service in an area where there exists reasonably adequate service and does not grant cooperatives territorial protection from outside competition. Based on these findings, Director Jones concluded that Tenn. Code Ann. § 65-29-102 is inapplicable to the facts of this docket and there is no need to address the remaining legal issues, including the application of Tenn. Code Ann. § 65-4-201(d).

[59] Director Hargett found that the Authority must examine and interpret Tenn. Code Ann. § 65-29-102 to determine whether that statute prohibits telecommunications service providers from providing service in Ben Lomand Rural Telephone Cooperative's territory. The Tennessee Supreme Court has held that when statutory language is clear, the plain meaning of the language must be applied without the statute's application being limited or expanded through a forced interpretation. Director Hargett determined that Tenn. Code Ann. § 65-29-102 is not ambiguous and that the plain language of the Telephone Cooperative Act, Tenn. Code Ann. § 65-29-101, et seq., generally, and Tenn. Code Ann. § 65-29-102 specifically, does not bestow territorial protection upon telephone cooperatives. However, he noted that where the language of the statute did not yield a clean interpretation, the Supreme Court has held that statutes which relate to the same subject or have a common purpose should be construed together and the construction of one statute can help resolve any ambiguity in another statute. Using this rule of construction, he found that even if there is some ambiguity in the Cooperative Act regarding whether telephone cooperatives enjoy a protected status, Tennessee's 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123 which fosters competition in telecommunications markets, is useful in construing the Cooperative Act and supports an interpretation that the telephone cooperatives are not shielded from other telecommunications carriers seeking to provide service in their territories.

TRA to hear this matter.

6. TRA precedent provides guidance on the jurisdictional question. In Docket 04-00379,[60] the TRA unanimously determined it has jurisdiction to review and determine request for CCNs that may conflict with cooperatives' territory.

Interpretation of TCA § 65-29-101, et seq.

1. It is not the role of the Authority in interpreting a statute to nullify, strike down, alter or amend state law, but rather to determine the meaning of the "plain language" of the statute in context to other applicable state law. If ambiguity exists in interpretation, the Court of Appeals in *Consumer Advocate Division v. Tennessee Regulatory Authority* has opined that the courts will give customary respect and deference to administrative agencies in their interpretations of statutes.

2. It is clear that the legislative intent of *The Telephone Cooperative Act* was to provide comparable telephone service to rural areas that existed in urban areas. There is nothing in the legislative history to indicate that the legislature intended to prohibit future competition.

3. The crux of the question is not whether Tenn. Code Ann. § 65-29-101, et seq. allows competition, but rather whether it allows cooperatives to maintain their monopoly status.

4. In looking at the plain and ordinary meaning of the language contained within the four corners of the statute it is clear that the statute sets conditions for the establishment of cooperatives, i.e., to "furnish telephone service in rural areas to the widest practical number of users of such services; provided, that there shall be no duplication of service where reasonable adequate telephone service is available." The intent of this condition was to meet a need that privately owned telephone companies were not meeting. There is nothing in the statutory language that would prohibit the TRA from considering a petition of a telecommunications service provider to offer competitive local telephone service in cooperative areas.

5. The action that changed the status quo and reversed over a century of regulatory certainty was the Telecommunications Act, passed by the General Assembly in 1995. This Act's goal is to promote competition in the local market. Tenn. Code Ann. § 65-4-123 directs the TRA to promote policies that enhance the opportunity of competitive choice for consumers in all telecommunications service markets.

6. This policy had one condition, found in Tenn. Code Ann. § 65-4-201(d), to exempt incumbent local exchange telephone companies with fewer than

[60] See Footnote 11 above.

100,000 access lines from competition.

7. The TRA faithfully enforced Tenn. Code Ann. § 65-4-201(d) until the Federal Communications Commission preempted this law due to its conflict with federal law that prohibits anti-competitive barriers to local telephone service competition. The Federal government preempted and nullified this subsection in *Hyperion*.[61] Even if the plain language of Tenn. Code Ann. § 65-29-102 suggested that competition was prohibited in areas served by cooperatives, the FCC has made clear in *Hyperion* that any such anti-competitive affect is pre-empted by the 1996 Telecom Act.

**IT IS THEREFORE ORDERED:**

1. The Tennessee Regulatory Authority has jurisdiction in this matter.

2. Frontier Communications of America, Inc. may proceed with its *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity* in which it seeks to expand its authority to provide telecommunications service statewide, including areas served by telephone cooperatives, specifically including territory served by Ben Lomand Rural Telephone Cooperative, Inc.

Eddie Roberson, Chairman

Tre Hargett, Director

6-30-08

Ron Jones, Director

[61] See Footnote 44 above.