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December 3, 2007

**VIA HAND DELIVERY**

Honorable Eddie Roberson, Chairman  
c/o Sharla Dillon, Docket & Records Manager  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

**RE: Petition of Frontier Communications of America, Inc. to Amend Its  
Certificate of Convenience and Necessity  
TRA Docket No. 07-00155**

Dear Chairman Roberson:

Enclosed please find one (1) original and thirteen (13) copies of *The Intervening Cooperatives' Motion to Hold Case in Abeyance*. We have also enclosed one (1) copy of the document to be file stamped for our records. If you have any questions or need additional information, please let me know.

Very truly yours,



Melvin J. Malone

clw  
Enclosures  
cc: Guilford F. Thornton, Jr.  
H. LaDon Baltimore

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

<b>PETITION OF FRONTIER</b>	<b>)</b>	<b>DOCKET NO. 07-00155</b>
<b>COMMUNICATIONS OF AMERICA,</b>	<b>)</b>	
<b>INC. TO AMEND ITS CERTIFICATE</b>	<b>)</b>	
<b>OF CONVENIENCE AND NECESSITY</b>	<b>)</b>	

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**THE INTERVENING COOPERATIVES' MOTION TO HOLD CASE IN ABEYANCE**

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Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., North Central Telephone Cooperative, Inc., Twin Lakes Telephone Cooperative Corporation and West Kentucky Rural Telephone Cooperative, Inc. (collectively the "Intervening Cooperatives"), by and through their undersigned counsel, respectfully submit this Motion to Hold Case in Abeyance (the "*Motion*") until the conclusion of *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6. The Intervening Cooperatives submit the following in support of the *Motion*.<sup>1</sup>

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<sup>1</sup> In the interest of administrative ease, Frontier's *Petition for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6 (Dec. 14, 2005), is attached hereto as **Exhibit A**.

## I.

### BACKGROUND

Frontier Communications, Inc. (“Frontier”) filed the *Petition Of Frontier Communications, Inc. For Declaratory Ruling That It Can Provide Competing Services In The Territory Currently Served By Ben Lomand Rural Telephone Cooperative, Inc.* (the “2004 Petition”) before the Tennessee Regulatory Authority (“TRA” or “Authority”) on or about October 26, 2004, in TRA Docket No. 04-00379. Ben Lomand Rural Telephone Cooperative, Inc. (“Ben Lomand Cooperative”) submitted its *Answer and Motion to Dismiss Of Ben Lomand Rural Telephone Cooperative, Inc.* on or about December 4, 2004. The Authority convened a contested case on or about December 13, 2004. Thereafter, the Intervening Cooperatives were granted permission to intervene and participate therein.

In the *2004 Petition*, Frontier asserted that the Authority had previously granted it a “statewide” certificate of convenience and necessity as a competing telecommunications provider and that said certificate of convenience and necessity provides Frontier with the “necessary authorization” to provide competing telephone service in areas served by Ben Lomand Cooperative.<sup>2</sup> Therefore, the primary threshold question before the Authority in TRA Docket No. 04-00379 was whether the June 27, 1996,<sup>3</sup> Order (hereinafter the “*June 1996 Order*”) granted Frontier the authority to provide telephone service throughout the State of Tennessee, without exception.<sup>4</sup>

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<sup>2</sup> *2004 Petition*, p. 1. The June 27, 1996, Order, upon which Frontier relied, was issued in *In Re: Application of Citizens Telecommunications Company, D/B/A Citizens Telecom For A Certificate of Convenience and Necessity*, TPSC Docket No. 96-00779.

<sup>3</sup> See n. 2 *supra*.

<sup>4</sup> Rather than seeking a declaratory ruling in TRA Docket No. 04-00379 on the question of whether a competing provider can provide telephone service in the geographic area traditionally served by Ben Lomand Cooperative, Frontier asked the Authority for a declaratory ruling “that Frontier [already] has the necessary authorization to provide competing telephone services in areas served by Ben Lomand Rural Telephone Cooperative, Inc.” *2004*

After the submission of briefs and oral arguments, the Authority dismissed the *2004 Petition* on the ground that the *2004 Petition* failed to state a claim upon which relief could be granted.<sup>5</sup> More specifically, the Authority determined that when Frontier originally requested authority to provide competing telecommunications services it only sought, and was only granted, authority to provide statewide services as permitted under then existing law. Hence, Frontier did not request, and was not granted via the *1996 Order*, authority to enter into the territories of small rural telephone carriers or cooperatives.<sup>6</sup>

On or about December 14, 2005, Frontier Communications of America, Inc. (“Frontier”) filed its *Petition for Preemption and Declaratory Ruling* before the FCC (“*FCC Petition*”). In the *FCC Petition*, Frontier claims that “The Tennessee Regulatory Authority (TRA) pursuant to a state statute has ruled that [Frontier], despite having a statewide CLEC certificate of authority, is not permitted to compete as a CLEC in a telephone cooperative’s territory.”<sup>7</sup> Moreover, Frontier alleges that “[t]he requested preemption and declaratory relief are necessary and appropriate because of the obvious anticompetitive impact of the statute and the TRA’s ruling.”<sup>8</sup> Finally, Frontier maintains that “the TRA granted Ben Lomand Coop’s motion for dismissal on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives.”<sup>9</sup>

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*Petition*, p. 1. See also *2004 Petition*, p. 3, para. 7; and p. 3, para. 9 (“Frontier has already been granted a certificate of convenience to operate statewide”) (emphasis added).

<sup>5</sup> Order Denying Petition of Frontier Communications, Inc., *In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling*, TRA Docket No. 04-00379, p. 11 (Mar. 8, 2006) (hereinafter the “*Order*”).

<sup>6</sup> *Order* at 11.

<sup>7</sup> *Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6, Summary (Dec. 14, 2005). See also *id.* at 1 (“This Petition arises from the refusal of the [TRA] to allow an [ILEC] affiliate to enter a market as a [CLEC] on an edge-out basis into the territory of an adjoining telephone cooperative.”).

<sup>8</sup> *Id.* at Summary.

<sup>9</sup> *Id.* at 3.

Finally, on or about June 20, 2007, Frontier submitted the *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity* (“2007 *Petition*”) in this matter, TRA Docket No. 07-00155, seeking “to modify and/or clarify its Certificate of Public Convenience and Necessity . . . granted by Order dated June 27, 1996[.]”<sup>10</sup>

## II.

### ARGUMENT

As outlined above, the underlying basis of the *FCC Petition*, as pled by Frontier, is that the TRA rendered a decision in TRA Docket No. 04-00379 based upon state law and that said ruling and state law should be preempted by 47 U.S.C. § 253(a).<sup>11</sup> To the extent the state law referenced in its *2007 Petition* prohibits Frontier from competing in the areas traditionally served by Tennessee’s telephone cooperatives, including Ben Lomand Cooperative, Frontier seeks to have the same preempted pursuant to § 253(a).<sup>12</sup> Though the Intervening Cooperatives have opposed the gravamen of Frontier’s *FCC Petition*, it is, nonetheless, based upon the same premise as its *2007 Petition*.<sup>13</sup> In both the *FCC Petition* and the *2007 Petition*, Frontier seeks preemption of state law pursuant to § 253(a). By its own admission, Frontier intends on pursuing both the *FCC Petition* and the *2007 Petition* simultaneously.<sup>14</sup>

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<sup>10</sup> *2007 Petition*, p. 1.

<sup>11</sup> In Frontier’s *FCC Petition*, the “challenged requirement” is, presumably, Tenn. Code Ann. § 65-29-102. *See also Reply Comments of Frontier Communications of America, Inc.*, FCC WC Docket No. 06-6, p. 6 (Mar. 8, 2006) (“*Frontier’s FCC Reply Comments*”) (attached hereto as **Exhibit B**) (“The only basis for the TRA to deny Frontier’s [2004 *Petition*] was that the statute bars the TRA from allowing Frontier to compete in Ben Lomand’s territory.”); and *Frontier’s FCC Reply Comments*, p. 7 (“[T]he TRA’s November 2005 action rest squarely and solely on the statute, and Frontier is properly before this Commission to petition for the preemption of the statute.”).

<sup>12</sup> *2007 Petition*, pp. 4-5, 12-13.

<sup>13</sup> The question raised herein by the Intervening Cooperatives is not whether Frontier framed its review before the FCC properly. Rather, the question at hand is whether it is appropriate for Frontier to seek the relief it asked for before the FCC and the relief it seeks in the *2007 Petition* at the same time.

<sup>14</sup> *2007 Petition*, p. 4 (“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.”).

The Authority has long recognized its discretion to oversee the cases pending before it.<sup>15</sup> In fact, the agency customarily stays pending matters when a similar issue is pending before it, even when the same parties are not involved. Therefore, the TRA should most certainly stay this proceeding, as the same or substantially the same issues pending in TRA Docket No. 07-00155 are currently pending in a federal forum and involve the same or substantially the same parties.<sup>16</sup> Moreover, it would not serve the public interest to have the FCC and the Authority to render conflicting rulings on the same issue(s) involving the same parties.<sup>17</sup> If the FCC addresses the issues pled and raised by Frontier in the *FCC Petition*, it may be unnecessary for the Authority to take any substantive action in this matter.

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<sup>15</sup> See, e.g., *Order Holding Docket in Abeyance*, TRA Docket No. 07-00161 (Nov. 21, 2007) (Panel decided to hold the matter in abeyance in reliance upon its inherent discretion to control the agency's docket.). See also, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.")

<sup>16</sup> See, e.g., *City of Miami Beach v. Miami Beach Fraternal Order of Police*, 619 So.2d 447, 448 (Fla. Dist. Ct. App. 1993) (holding that as matter of comity and discretion state court may stay its proceedings pending outcome of federal litigation.); *Municipal Lighting Commission of Peabody v. Stathos*, 13 Mass. App. Ct. 990, 433 N.E.2d 95, 96 (Mass. App. Ct. 1982) (same); and *ITT-Community Development Corp. v. Halifax Paving, Inc.*, 350 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977) (same).

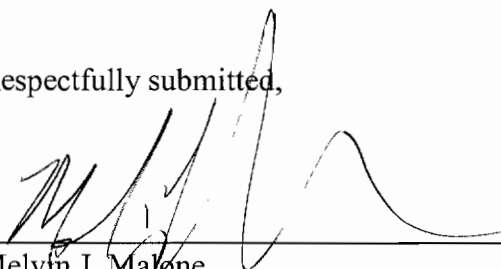
<sup>17</sup> See, e.g., *cf.*, *Wade v Clower*, 114 So. 548, 551 (Fla. 1927) ("Where the jurisdiction of a state or a federal court has once attached, it cannot be taken away or arrested by proceedings subsequently instituted in the other court; but the usual practice is for the court in which the second action is brought not to dismiss such action, but to suspend proceedings therein until the first action is tried and determined."). See also, e.g., *cf.*, *Florida Crushed Stone Co. v. Travelers Indem. Co.*, 632 So. 2d 217, 220 (Fla. Dist. Ct. App. 5th Dist. 1994) (holding a trial court in action brought in state court by insurer after insured had brought action in federal court erred in denying stay of state proceedings, where parties were identical and issues, although not perfectly identical in pleadings, were substantially similar and arose from same nucleus of facts); *Baker v. Harrison*, 445 S.W.2d 498, 500 (Ark. 1969) (similar); and *Schwartz v. DeLoach*, 453 So. 2d 454, 456 (Fla. Dist. Ct. App. 1984) (Trial court abused its discretion in refusing to stay state action commenced on causes of action identical to causes of action in previously filed and pending federal case in same state.).

### III.

#### CONCLUSION

For the foregoing reasons, and based upon both the principles of comity and judicial economy, this matter should be held in abeyance until the conclusion of *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6. Failure to do so would permit Frontier to seek virtually the same result in both a state and federal forum simultaneously and unnecessarily risk unintended consequences. Having voluntarily chosen to pursue its cause before the FCC, Frontier should not be afforded the opportunity to pursue the same or substantially the same before the TRA until the conclusion of its *FCC Petition*.

Respectfully submitted,



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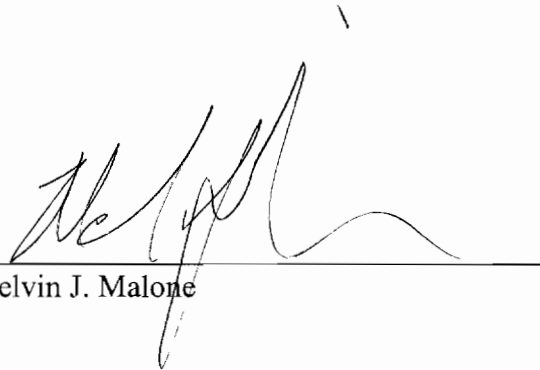
Bledsoe Telephone Cooperative  
DTC Communications  
Highland Telephone Cooperative, Inc.  
North Central Telephone Cooperative, Inc.  
Twin Lakes Telephone Cooperative Corporation  
West Kentucky Rural Telephone Cooperative, Inc.

### Certificate of Service

I hereby certify that a true and correct copy has been forwarded via U.S. Mail and Electronically to the following on this the 3<sup>rd</sup> day of December, 2007.

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Melvin J. Malone

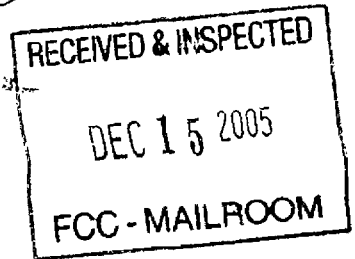


# EXHIBIT A

WC 06-6

DOCKET FILE COPY / OTHER

Before the  
Federal Communications Commission  
Washington, D.C. 20554



In the Matter of	)	
	)	
Frontier Communications of America, Inc.	)	WC Docket No. 05-_____
Petition for Preemption of Tennessee Code	)	
Annotated § 65-29-102 and the Tennessee	)	
Regulatory Authority's Decision That This	)	
Statute Restricts Frontier's Statewide	)	
Certificate of Convenience to Operate as a	)	
CLEC	)	

**PETITION FOR PREEMPTION AND DECLARATORY RULING**

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Date: December 14, 2005

## SUMMARY

The Tennessee Regulatory Authority (TRA) pursuant to a state statute has ruled that Frontier Communications of America, Inc., despite having a statewide CLEC certificate of authority, is not permitted to compete as a CLEC in a telephone cooperative's territory. By this Petition Frontier requests the Commission to preempt this statute, T.C.A. § 65-29-102, and to rule that Frontier is entitled to begin competing with the telephone cooperative pursuant to the terms and conditions of an interconnection agreement that has been duly filed and approved by the TRA.

Frontier and Ben Lomand have adjoining ILEC territories. The only legal difference between the two is that Frontier is organized as a corporation while Ben Lomand is organized as a telephone cooperative. This distinction, however, has allowed Ben Lomand to compete in Frontier's territory through an affiliate CLEC while insulating its cooperative territory against Frontier's competitive entry under color of state law. The requested preemption and declaratory relief are necessary and appropriate because of the obvious anticompetitive impact of the statute and the TRA's ruling. It is manifestly anticompetitive, unfair and unlawful to give a cooperative an exemption from competition under color of state law while at the same time allowing the cooperative to use an affiliate to compete within the territory of its adjoining ILEC. Such a complete lack of competitive neutrality calls for a remedy. Because the TRA apparently felt that its hands were tied by its governing statutes, the Commission must preempt.

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Frontier Communications of America, Inc.	)	WC Docket No. 05-_____
Petition for Preemption of Tennessee Code	)	
Annotated § 65-29-102 and the Tennessee	)	
Regulatory Authority's Decision That This	)	
Statute Restricts Frontier's Statewide	)	
Certificate of Convenience to Operate as a	)	
CLEC		

**PETITION FOR PREEMPTION AND DECLARATORY RULING**

**Introduction and Factual Background**

This Petition arises from the refusal of the Tennessee Regulatory Authority ("**TRA**") to allow an Incumbent Local Exchange Carrier ("**ILEC**") affiliate to enter a market as a Competitive Local Exchange Carrier ("**CLEC**") on an edge-out basis into the territory of an adjoining telephone cooperative. The cooperative is already itself competing through an affiliate as a CLEC on an edge-out basis within the first ILEC's territory. This Petition seeks redress from this grossly anticompetitive situation, which allows a telephone cooperative to compete in another ILEC's territory while insulating its own base from similar competitive entry under cover of state law.

On April 28, 1999 in Docket No. 98-00600, the TRA granted a Certificate of Convenience to Ben Lomand Communications ("**BLC**"), a subsidiary of Ben Lomand Rural Telephone Cooperative, Inc. ("**Ben Lomand Coop**")<sup>1</sup> to compete as a CLEC outside of Ben Lomand Coop's territory. BLC proceeded to enter the adjoining territory of Citizens Telecommunications Company of Tennessee L.L.C., an ILEC doing business as Frontier Communications of Tennessee ("**Frontier of Tennessee**"). BLC built its own distribution

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<sup>1</sup> Ben Lomand Coop and BLC are jointly herein referred to as "Ben Lomand."

network in Frontier of Tennessee's territory, using Ben Lomand Coop's switching capacity. BLC achieved a great deal of success in its CLEC activities and has taken substantially more than half of Frontier of Tennessee's former customers in the areas that BLC serves.

Frontier Communications of America, Inc. ("**Frontier of America**"), an affiliate of Frontier of Tennessee,<sup>2</sup> had previously obtained a statewide Certificate of Convenience from the TRA by order dated June 27, 1996<sup>3</sup> to operate as a CLEC outside of Frontier of Tennessee's territory. Frontier determined that it would be appropriate to exercise this certificate by competing as a CLEC in Ben Lomand Coop's territory. At Frontier of America's request, Frontier of America and Ben Lomand Coop entered into interconnection negotiations and on July 6, 2004 executed an interconnection agreement, attached hereto as **Exhibit A**. This interconnection agreement was approved by the TRA by order dated November 24, 2004 in Docket No. 04-00233. In that order, the TRA stated, "The agreement is in the public interest as it provides customers with alternative sources of telecommunications services within the service area of [Ben Lomand Coop]. "

During the negotiations, Ben Lomand Coop maintained that Frontier of America lacked the legal authority to act as a CLEC in Ben Lomand Coop's territory, citing (among other things) Tennessee Code Annotated § 65-29-102, which states:

Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; provided, that there shall be no duplication of service where reasonably adequate telephone service is available.

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<sup>2</sup> Both Frontier companies are under the common ownership of Citizens Communications Company, a publicly held corporation. Frontier of Tennessee and Frontier of America are jointly herein referred to as "Frontier."

<sup>3</sup> At that time Frontier of America was named Citizens Telecommunications Company.

Accordingly, in order to preserve each party's rights and to avoid the need to arbitrate an interconnection agreement, the parties agreed to a clause in the interconnection agreement that 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

Based on this language, on October 26, 2004 Frontier of America filed a Petition for Declaratory Ruling with the TRA seeking a determination that it has the authority to provide CLEC service in Ben Lomand Coop's territory. Ben Lomand Coop moved for dismissal of the petition primarily on the ground that only the Federal Communications Commission has the authority to determine whether the 1996 Telecommunications Act, 47 U.S.C. §253(a), preempts Tennessee Code Annotated § 65-29-102. There can be no doubt that if Frontier had filed initially with the FCC, Ben Lomand Coop would have moved for dismissal on the ground that only the TRA has the authority to determine that Frontier of America is certified to provide CLEC services in Ben Lomand Coop's territory.

Despite Frontier's efforts to move the case forward, it languished at the TRA. Ultimately, on November 7, 2005, the TRA granted Ben Lomand Coop's motion for dismissal on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives. A transcript of the conference at which the TRA made this decision is attached as **Exhibit B**.<sup>4</sup> Two of the three TRA directors making statements at the conference stated that this matter might more appropriately be handled at the FCC.

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<sup>4</sup> Frontier has requested but the TRA has not issued a written order. If and when such an order is issued, Frontier will supplement the record in this proceeding.

Ben Lomand has now managed to thwart CLEC competition within its territory on procedural grounds for nearly 17 months since the execution of the interconnection agreement, all the while it continues to act as a CLEC in Frontier's territory and continues to erode Frontier's customer base. The Commission should not countenance this bare-faced anticompetitive conduct, and should promptly grant the relief requested by Frontier so that Frontier can at long last compete with Ben Lomand on the same basis that Ben Lomand is competing with Frontier.

**I. T.C.A. § 65-29-102 Is Preempted by 47 U.S.C. § 253(a).**

The relevant Federal statute, 47 U.S.C. § 253(a) unequivocally states, "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The Commission has previously ruled that this statute preempts T.C.A. § 65-4-201(d), which was supposed to protect the territory of ILECs with less than 100,000 lines. *In The Matter Of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999), *pet. for reh'g den.*, 16 FCC Rcd 1247 (2001) ("**Hyperion Preemption Order**"). This case raises preemptive issues that are nearly identical to those in the Hyperion case.<sup>5</sup> For the reasons set forth in the *Hyperion Preemption Order*, the federal statute should preempt T.C.A. § 65-29-102 as anticompetitive.

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<sup>5</sup> This case is also similar in its essential facts to two previous preemption decisions cited as precedent in the *Hyperion Preemption Order*. *The Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum opinion and Order, 12 FCC Rcd 15639 (1997) ("**Silver Star Preemption Order**").



Consistent with 47 U.S.C. § 253(a) and the Commission's ruling cited above, Tennessee's legislature has stated that it is the policy of this state "to foster the development of an efficient, technologically advanced, statewide system of telecommunication services by permitting competition in all telecommunications services markets ...". T.C.A. § 65-4-123. In fact, when the TRA approved the Certificate of Convenience for BLC to compete outside Ben Lomand Coop's territory, it held that the "application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State ...". TRA Order, dated April 28, 1999 (Docket No. 98-00600). In addition, T.C.A. § 65-29-102 has been construed by the Tennessee Attorney General to prohibit telephone cooperatives from providing service where "reasonably adequate service is available," not as a means for a telephone cooperative to protect its own territory. See Op. Atty. Gen. No. 90-83, Aug. 27, 1990. Finally, as noted above, when approving the interconnection agreement between Frontier of America and Ben Lomand Coop the TRA found that additional sources of telecommunications services within the territory of Ben Lomand Coop would be in the public interest. Despite the Federal statute, the State statute, the Tennessee Attorney General opinion and its own previous findings, the TRA has issued an order improperly exempting a cooperative from competition within its territory, regardless of the fact that the cooperative is actively competing through a wholly owned subsidiary outside of its territory.

The preemption analysis set forth in the *Hyperion Preemption Order* turns primarily upon whether the challenged state restriction is "competitively neutral," and a finding that the restriction is not competitively neutral is fatal to the restriction.<sup>6</sup> In the case at hand, the lack of competitive neutrality is painfully obvious. Frontier and Ben Lomand each have both ILEC and out-of-territory CLEC operations. The TRA allows Ben Lomand, through its CLEC, to compete in Frontier's territory. Ben Lomand has, in the course of its competition with Frontier, taken

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<sup>6</sup> *Hyperion Preemption Order*, ¶¶8, 18; 47 U.S.C. § 253(b).

away many of Frontier's customers. On the other hand, the TRA refuses to allow Frontier, through its CLEC, to compete in Ben Lomand's territory. Ben Lomand thus has the enviable ability to finance its competitive CLEC operations from an untouchable ILEC base, and its captive ILEC customers are denied the benefits of competition.

A single example suffices to prove the anticompetitive effect of the TRA's refusal to allow Frontier to compete in Ben Lomand's territory. The Warren County school system recently issued a request for proposals ("RFP") to serve all schools within its district. Some of the Warren County schools are within Frontier's ILEC territory, and the rest of the schools are within Ben Lomand Coop's ILEC territory. The RFP specifically states that there must be a single vendor for the entire contract. As a result, Ben Lomand will be able to submit a compliant bid, and Frontier will not. It is long past time to redress this situation and to end Ben Lomand Coop's unlawful monopoly.

In summary, Ben Lomand takes full advantage of its ability to compete outside its territory, but contrary to the policies set forth by U.S. Congress, the Tennessee legislature, the Commission and even the TRA, it resists competition when it comes knocking on its own door. Unfortunately the TRA yielded to Ben Lomand's procedural stalling tactics, and it is necessary for the Commission to take preemptive action to allow consumers in Ben Lomand Coop's territory to have a choice of local service providers.

**II. The Commission Should Rule That The Interconnection Agreement Between Frontier of America And Ben Lomand Cooperative Is Now Effective.**

Frontier of America already has a "statewide" Certificate of Need from the TRA. The only basis for the TRA to deny Frontier of America the ability to compete within the territory of Ben Lomand Coop is T.C.A. § 65-29-102. Frontier recognizes that in the *Hyperion* case the

Commission declined to direct the TRA to grant Hyperion's application for a CPCN.<sup>7</sup> In the case at hand, by contrast, Frontier of America already holds a statewide certificate and is being prevented from exercising it solely because the TRA is insulating Ben Lomand Coop from competition contrary to law. Accordingly, the Commission should rule that Frontier of America is entitled to compete in Ben Lomand Coop's territory, and more specifically, that the conditions of the interconnection agreement are satisfied. There is no need for this proceeding to be remanded to the TRA, and it would be contrary to the public interest to do so. If the Commission remands any portion of this case, it may be confidently predicted that Ben Lomand Coop will again attempt to delay the advent of competition in its territory for yet another year by raising still more procedural issues with the TRA.<sup>8</sup>

## **Conclusion**

For the reasons stated herein, the Commission should issue a declaratory ruling that T.C.A. § 65-29-102 is preempted by 47 U.S.C. § 253(a), that the conditions to the effectiveness of the interconnection agreement between Frontier of America and Ben Lomand Coop are

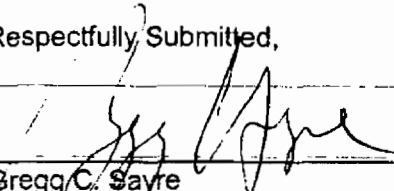
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<sup>7</sup> Hyperion Preemption Order, ¶ 22.

<sup>8</sup> It appears that the TRA in this proceeding ignored the encouragement given to states and regulatory agencies by the Commission in the *Hyperion Preemption Order* "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." *Hyperion Preemption Order* at ¶23. This case is therefore unlike the situation in the *Silver Star Preemption Order*, in which the Commission declined to reverse the Wyoming PSC's denial of a CPCN. In the *Silver Star Preemption Order*, the Commission grounded its decision on the petitioner's statement that it was "confident that the PSC ... will quickly and completely abide by this Commission's preemption decision." *Silver Star Preemption Order* at ¶47.

satisfied, and that Frontier of America is now entitled to compete in the territory of Ben Lomand Coop pursuant to the terms of the interconnection agreement.

Respectfully Submitted,

  
\_\_\_\_\_  
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Associate General Counsel – Eastern Region

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Date: December 14, 2005

Attachments: Exhibit A - Interconnection Agreement Between Frontier of America and Ben Lomand Coop

Exhibit B - Transcript of TRA Conference Rejecting Frontier's Petition for a Declaratory Ruling

**AGREEMENT FOR  
LOCAL WIRELINE NETWORK INTERCONNECTION**

**between**

**Ben Lomand Telephone Cooperative, Inc.**

**and**

**Frontier Communications of America, Inc.**

**Dated: July 6, 2004**

**Frontier-Ben Lomand Document**

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**AGREEMENT FOR  
LOCAL WIRELINE NETWORK INTERCONNECTION**

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## **AGREEMENT FOR LOCAL WIRELINE NETWORK INTERCONNECTION**

This Agreement For Local Wireline Network Interconnection ("Agreement") made this 6th day of July 2004, is by and between Ben Lomand Telephone Cooperative, Inc. a Tennessee corporation, having its principal place of business at 311 North Chancery Street, P O Box 670, McMinnville, Tennessee 37111 ("BLTC") and Frontier Communications of America, Inc., a Delaware corporation, having its principal place of business at 180 S. Clinton Avenue, Rochester, New York 14646 ("FCA"). BLTC and FCA may also be referred to herein singularly as a "Party" or collectively as "the Parties"

### **SECTION 1. RECITALS AND PRINCIPLES**

BLTC is a telephone cooperative local exchange carrier authorized to provide telecommunications services in the State of Tennessee, and

FCA is a local exchange carrier authorized to provide telecommunications services in the State of Tennessee, and

The nature of the interconnection arrangement between the Parties established pursuant to this Agreement is of mutual benefit to both Parties and is intended to fulfill their needs to exchange local traffic, and

The Parties have in good faith negotiated, and agreed on local interconnection terms and conditions as set forth below, and

Notwithstanding the mutual commitments contained in this Agreement, the Parties nevertheless enter into this Agreement without prejudice to any positions they have taken previously, or may take in the future in any legislative, regulatory, judicial or other public forum addressing any matters, including matters related specifically to this Agreement, or other types of arrangements prescribed in this Agreement. In consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, BLTC and FCA hereby covenant and agree as follows:

### **SECTION 2. GENERAL DEFINITIONS**

Except as otherwise specified herein, the following definitions will apply to all sections contained in this Agreement. Additional definitions that are specific to the matters covered in a particular section may appear in that section.

2.1. "Access Service Request" ("ASR") means the industry standard forms and supporting documentation used for ordering access services. The ASR will be used to identify the specific trunking and facilities request for interconnection.

2.2. "Automatic Number Identification" ("ANI") refers to the number transmitted through the network identifying the calling party.

2.3. "Carrier" means a telecommunication company authorized by the Commission to provide local exchange telecommunications services in the State of Tennessee.

2.4. "CLLI Codes" means Common Language Location Identifier Codes.

2.5. "Commission" means the Tennessee Regulatory Authority.

2.6. "DS1" is a digital signal rate of 1.544 Megabits per second ("Mbps").

2.7. "DS3" is a digital signal rate of 44.736 Mbps.

2.8 "Interconnection" in this Agreement refers only to the physical linking of two networks for the mutual exchange of traffic and only for purposes of transmitting and routing telephone exchange traffic or access traffic or both. Interconnection does not include the transport and termination of interexchange traffic.

2.9 "Local Exchange Routing Guide" ("LERG") is a Telecordia reference document used by carriers to identify NPA-NXX routing and homing information as well as network element and equipment designations.

2.10 "Local Traffic" means traffic that is originated by an end user of one Party and terminates to an end user of the other Party within BLTC's local serving area, including mandatory local calling scope arrangements established and defined by the applicable state commission. A mandatory local calling scope arrangement is an arrangement that provides end users a local calling scope, i.e. Extended Area Service ("EAS"), beyond their basic exchange serving area. Therefore local traffic, for purposes of this Agreement, includes both intra-exchange calls and EAS calls.

2.11 "Point of Interconnection" ("POI") means the physical location(s) at which the Parties' networks meet for the purpose of establishing interconnection.

2.12 "Rating Point" is the V&H coordinates associated with a particular telephone number for rating purposes.

2.13 "Transport and Termination" denotes transmission and switching facilities used for the exchange of local traffic between interconnected carrier networks.

2.14 "Wire Center" denotes a building or space within a building which serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building in which one or more central offices, used for the provision of basic exchange services and access services, are located. However, for purposes of interconnection service, Wire Center will mean those points eligible for such connections as specified in the FCC Docket No. 91-141 (Expanded Interconnection with LEC Facilities, Transport, Phase I), and rules adopted pursuant thereto.

### SECTION 3. NETWORK INTERCONNECTION

The Parties hereto, agree to interconnect their facilities and networks for the transport and termination of local traffic.

#### 3.1 Interconnection Trunking Arrangements

3.1.1 The Parties will interconnect their networks as specified in the terms and conditions contained in Attachment A attached hereto and incorporated by reference. POIs set forth in this Agreement, may be modified from time to time by either Party with the written consent of the other Party, which consent will not be unreasonably withheld.

3.1.2 Each Party will be responsible for the engineering and construction of its own network facilities on its side of the POI.

3.1.3 The Parties mutually agree that all interconnection facilities will be sized according to mutual forecasts and sound engineering practice, as mutually agreed to by the Parties during planning-forecasting meetings.

3.1.4 The Parties agree to establish trunk groups of sufficient capacity for local interconnection purposes. The Parties will mutually agree where one-way or two-way trunking will be available. The mutually agreed upon technical and operational interfaces, procedures, grade of service and performance standards for interconnection between the Parties are set forth in Attachment B, attached hereto and will conform with all generally accepted industry standards with regard to facilities, equipment, and services.



*Each Party shall make available to the other Party trunks over which the originating Party can terminate Local Traffic of the end users of the originating Party to the end users of the terminating Party.*

3.1.5 This Agreement is applicable only to the incumbent service areas of BLTC within the State of Tennessee. Both Parties agree to deliver only traffic within the scope of this Agreement over the connecting facilities as specified in Attachment A. Neither Party shall provide an intermediary or transit traffic function for the other Party's connection of its end users to the end users of a third party telecommunications carrier without the consent of all parties and without the establishment of mutually agreeable terms and conditions governing the provision of the intermediary functions. This Agreement does not obligate either Party to utilize any intermediary or transit traffic function of the other Party.

### 3.2 Testing and Trouble Responsibilities

BLTC and FCA agree that each will share responsibility for all maintenance and repair of trunks/trunk groups. The Parties agree to:

3.2.1 Cooperatively plan and implement coordinated repair procedures for the meet point and local interconnection trunks and facilities to ensure trouble reports are resolved in a timely and appropriate manner.

3.2.2 Provide trained personnel with adequate and compatible test equipment to work with each other's technicians.

3.2.3 Promptly notify each other when there is any change affecting the service requested, including the date service is to be started.

3.2.4 Coordinate and schedule testing activities of their own personnel, and others as applicable, to ensure its interconnection trunks/trunk groups are installed per the interconnection order, meet agreed upon acceptance test requirements, and are placed in service by the due date.

3.2.5 Perform sectionalization to determine if a trouble condition is located in its facility or its portion of the interconnection trunks prior to referring any trouble to each other.

3.2.6 Provide each other with a trouble reporting number to a work center that is staffed 24 hours a day/7 days a week.

3.2.7 Immediately report to each other any equipment failure which may affect the interconnection trunks.

3.2.8 Based on the trunking architecture, provide for mutual tests for system assurance for the proper recording of AMA records in each company's switch. These tests are repeatable on demand by either Party upon reasonable notice.

### 3.3 Interconnection Forecasting

3.3.1 Consistent with Section 3.1, the Parties agree to work cooperatively to forecast local traffic trunk requirements. The Parties will establish joint forecasting responsibilities for traffic utilization over trunk groups. The Parties recognize that planning for, and the availability of, facilities and/or equipment are dependent on cooperative forecasting between the Parties. Intercompany forecast information will be provided by the Parties to each other at least twice a year. When necessary, the Parties agree to provide additional trunking needed to maintain the grade of service. The Parties agree to connect trunks at a minimum DS1 level to exchange local traffic on a bi-directional basis. All connecting facilities will be at a DS1 level, multiple DS1 level, or DS3 level and will conform to industry standards. Where local traffic volumes are not established, two-way trunk groups will be provisioned initially based on forecasts jointly developed by the Parties. FCA must provide the initial two year forecast of its trunk requirements. All trunk facilities will be engineered to a P 01 grade of service. Should a Party identify the

need for more or less trunking facilities between the parties to maintain the grade of service, the Party will provide notice to the other Party in writing

3.3.2 The forecasts will include the number, type and capacity of trunks as well as a description of major network projects anticipated for the following six months. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecast period. The Parties agree to jointly plan for the effects of other traffic on their networks, including issues of network capacity, forecasting and compensation calculation.

3.3.3 All requests from one Party to the other Party to establish, add, change, or disconnect trunks will be made in writing using the industry standard Access Service Request.

#### 3.4 Reciprocal Compensation For the Transport and Termination of Interchanged Traffic

3.4.1 The Parties agree that the mutual provisions and relative obligations of the Parties pursuant to this Agreement represent good and valuable consideration, the sufficiency of which between the Parties is acknowledged, and that neither Party has any obligation to provide any monetary compensation to the other Party for the other Party's origination or termination of local traffic originating on one Party's network and terminating on the other Party's network within the scope of this Agreement. The specific compensation terms and conditions set forth in this Agreement are related to, dependent on, and limited to the provision of local exchange service to end users located in the specific geographic areas that are the subject of this Agreement and all other terms and conditions set forth in this Agreement.

3.4.2 A maintenance service charge applies whenever either Party requests the dispatch of the other Party's personnel for the purpose of performing maintenance activity on the interconnection trunks, and any of the following conditions exist:

3.4.2.1 No trouble is found in the interconnection trunks, or

3.4.2.2 The trouble condition results from equipment, facilities or systems not provided by the Party whose personnel were dispatched, or

3.4.2.3 Trouble clearance did not otherwise require a dispatch, and upon dispatch requested for repair verification, the interconnection trunk does not exceed maintenance limits.

3.4.3 If a maintenance service charge has been applied and trouble is subsequently found in the facilities of the Party whose personnel were dispatched, the charge will be canceled.

3.4.4 Billing for maintenance service by either party is based on each half-hour or fraction thereof expended to perform the work requested. The time worked is categorized and billed at one of the following three rates: (1) basic time, (2) overtime, or (3) premium time as defined in BLTC's interstate access tariff.

#### 3.5 Reserved for Future Use

#### 3.6 Coordination of Transfer of Service

3.6.1 Coordination of Transfer of Service To serve the public interest of end users, the Parties agree that when an end user transfers service from one Party to the other Party it will be necessary for the parties to coordinate the timing for disconnection from one Party and connection with the other Party so that transferring end users are not without service for any extended period of time. Other coordinated activities associated with transfer of service will also need to be coordinated between the Parties to ensure quality services to the public.

3.6.2 Procedures for Coordinated Transfer of Service Activities The Parties agree to establish mutually acceptable, reasonable, and efficient transfer of service procedures that utilize the industry

standard LSR format for the exchange of necessary information for coordination of service transfers between the Parties. Each party will designate a local representative for the purpose of exchanging requests for disconnect, service announcement initiation, and number portability activity between the Parties. Ben Lomand will develop mutually agreeable, specific procedures for the exchange of the necessary information pursuant to this subsection.

**3.6.3 No Charges for Coordinated Transfer of Service Activities.** There will be no charges between the Parties or compensation provided by one party to the other Party for the coordinated transfer of service activities described in this Section 3.6.

**3.6.4 Letter of Authorization.** Each Party is responsible for obtaining a Letter of Authorization (LOA) from each end user initiating transfer of service from one Party to the other Party. The Party obtaining the LOA from the end user will furnish it to the other Party. Transmission of the LOA by facsimile is preferred in order to expedite order processing.

**3.6.5 Transfer of Service Announcement.** In the case where an end user changes service from one Party to the other Party and the end user does not retain its original telephone number, the Party formerly providing service to the end user will provide a transfer of service announcement on the vacated telephone number. This announcement will provide details regarding the new number that must be dialed to reach this end user. The service announcement will be provided by the Party formerly providing service for a minimum of four months.

**3.6.6 Disconnect and Transfer of Service Announcement Coordination for Service Transfers with Change of Number.** In the case where an end user changes service from one Party to the other Party and the end user does not retain its original telephone number, the Party from which the end user is transferring will honor requests for disconnect and service announcement initiation from the Party to which the end user is transferring. The Party to which the end user is transferring service will provide to the other Party the end user's name, address, current telephone number, new telephone number, and date service should be transferred using the industry standard LSR format. The Party from which the end user is transferring will coordinate with the other Party the disconnect and service announcement initiation to coincide with the service transfer request date. In instances where the transferring end user changes its telephone number, the Party from which the end user is transferring service will place a service announcement on the vacant number no later than 5:00 P.M. local time on the next business day following the service transfer date. It is recommended that the installation date precede the disconnection date.

**3.6.7 Disconnect and Coordination of Local Number Portability for Service Transfers without Change of Number.** In the case where an end user changes service from one Party to the other Party and the end user retains its original telephone number(s), the Party from which the end user is transferring will honor requests for disconnect and local number portability from the Party to which the end user is transferring. The Party to which the end user is transferring will provide the other Party the end user's name, address, current telephone number, new network number porting information, and date service should be transferred using the industry standard LSR format. The Parties will coordinate the disconnect, connect, and number portability activities in accordance with the North American Numbering Council (NANC) flows.

**3.6.8 Combined Transfer of Service Requests.** Each Party will accept transfer of service requests from the other Party for one end user that includes combined requests for transfers where the end user will retain one or more telephone numbers and where the end user will not change one or more telephone numbers.

**3.6.9 Bulk Requests for Transfer of Service.** From time to time, either Party may benefit from the transfer of service for groups. The Parties agree to process bulk transfer of service requests for end users having the same billing account number.

**3.6.10 Access to the Network Interface Device (NID).** Each Party will allow the other Party access to the customer side of the Network Interface Device (NID) consistent with Federal Communication Commission rules. The Party to which the end user is transferring service may move all inside wire from

the other Party's existing NID to one provided by the Party to which the end user is transferring service. Where a NID is of the type which provides for customer access to one side of the NID, the Party to which the end user is transferring service may elect to remove the inside wire at the connection(s) within the customer side of the NID. Where a NID is of an older type not allowing access to the customer side of the NID, the Party to which the end user is transferring service must make a clean cut of the inside wire at the closest point to the NID.

### 3.7 Service Ordering

Access Service Requests (ASR) will be used by both parties to request trunks and special circuits ordered under this agreement. Local Service Requests (LSR) will be used to order local service including Local Number Portability.

## SECTION 4. AUDIT

Either Party may, upon written notice to the other Party, conduct an audit, during normal business hours, only on the source data/documents as may contain information bearing upon the services being provided under the terms and conditions of this Agreement. An audit may be conducted no more frequently than once per 12 month period, and only to verify the other Party's compliance with provisions of this Agreement. The notice requesting an audit must identify the date upon which it is requested to commence, the estimated duration, the materials to be reviewed, and the number of individuals who will be performing the audit. Each audit will be conducted expeditiously. Any audit is to be performed as follows: (i) following at least 45 days' prior written notice to the audited Party, (ii) subject to the reasonable scheduling requirements and limitations of the audited Party, (iii) at the auditing Party's sole cost and expense, (iv) of a reasonable scope and duration, (v) in a manner so as not to interfere with the audited Party's business operations.

## SECTION 5. DISPUTE RESOLUTION

The Parties agree that in the event of a default or violation hereunder, or for any dispute arising under this Agreement or related agreements, the Parties will first confer to discuss the dispute and seek resolution prior to taking any action before any court or regulator, or before authorizing any public statement about or authorizing disclosure of the nature of the dispute to any third party. Such conference will occur at least at the Vice President level for each Party. In the case of FCA, its Vice President of Interconnection, or equivalent officer, will participate in the meeting, and for BLTC, its Executive Vice President, or management person one level below that level, will participate. In the event the Parties are unable to resolve the dispute through conference, either Party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction.

## SECTION 6. FORCE MAJEURE

If the performance of the Agreement, or any obligation hereunder is prevented, restricted or interfered with by reason of any of the following:

- 6.1 Fire, explosion, flood, earthquake, hurricane, cyclone, tornado, storm, epidemic, breakdown of plant or power failure;
- 6.2 War, revolution, civil commotion, acts of public enemies, blockade or embargo,
- 6.3 Any law, order, proclamation, regulation, ordinance, demand or requirement of any government or any subdivision, authority, or representative of any such government,
- 6.4 Labor difficulties, such as strikes, picketing or boycotts;
- 6.5 Delays caused by other service or equipment vendors;

6.8. Any other circumstance beyond the reasonable control of the Party affected; then the Party affected, upon giving prompt notice to the other Party, will be excused from such performance on a day-for-day basis to the extent of such prevention, restriction, or interference (and the other Party will likewise be excused from performance of its obligations on a performance so prevented, restricted or interfered with), provided that the Party so affected will use its best efforts to avoid or remove such causes of nonperformance and both Parties will proceed to perform with dispatch whenever such causes are removed or cease.

## **SECTION 7. COMMISSION DECISION**

This Agreement will at all times be subject to such review by the Commission or FCC as permitted by the Telecommunications Act of 1996. If any such review renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties agree to negotiate in good faith to agree upon any necessary amendments to the Agreement.

## **SECTION 8. REGULATORY CHANGES**

Either Party may request an amendment to take into account any changes in Commission or FCC rules and requirements, including changes resulting from judicial review of applicable regulatory decisions.

## **SECTION 9. REGULATORY APPROVAL**

Each Party is responsible for obtaining and maintaining in effect all state regulatory commission approvals and certifications that are required for that Party's provision of local exchange and/or local exchange access services in the service areas covered by this Agreement. The Parties agree to jointly file this Agreement with the Commission and to fully cooperate with each other in obtaining Commission approval. Notwithstanding this Section 9 or any other provision of this Agreement, BLTC has not waived its status or rights as a telephone cooperative in Tennessee pursuant to, but not limited to, Tennessee Code Annotated 65-4-101, 65-29-101, and 65-29-130.

## **SECTION 10. DIRECTORY LISTINGS**

### **10.1 Introduction**

This Directory Listings section sets forth terms and conditions with respect to the inclusion of FCA's customer listings in BLTC's published directories.

10.1.1 In those areas where FCA and BLTC both provide local exchange telephone service and have established interconnection for the exchange of traffic pursuant to the terms of this Agreement (defined as the "Listing Area"), BLTC or its contractors will include White Pages and Yellow Pages listing information for FCA's end users in the Listing Area in appropriate BLTC directories provided that FCA provides listing information to BLTC on a timely basis. BLTC will include the White Pages and Yellow Pages listing information in BLTC directories at no charge to FCA provided that FCA provides subscriber listing information at no charge to BLTC.

10.1.2 Any references in this Section 10 to BLTC procedures, practices, requirements, or words of similar meaning, shall also be construed to include those of BLTC's contractors that produce directories on its behalf.

### **10.2 Directory Listings**

10.2.1 At no charge to FCA, BLTC will include in appropriate White Pages directories the primary alphabetical listings of those end users located within the Listing Area.

10.2.2 At no charge to FCA, BLTC agrees to include one basic White Pages listing for each FCA customer located within the geographic scope of BLTC's White Page Directories within the Listing Area.

and a courtesy Yellow Page listing for each FCA business customer located within the geographical scope of BLTC's Yellow Page directories. A basic White Page listing is defined as a customer name, address, and assigned number. Basic White Pages listings of FCA customers will be inter-filed with listings of BLTC and other LEC customers. Directory listings will make no distinction between FCA and BLTC subscribers.

10.2.3 FCA may obtain on behalf of FCA's customers secondary White Page listings from BLTC, and BLTC agrees to provide to FCA secondary White Page listings at the same rate(s) charged to BLTC's end user customers.

10.2.4 For the listings provided by FCA for inclusion in BLTC's directories, FCA will furnish to BLTC on a timely basis subscriber listing information as required to prepare and print the alphabetical listings of said directory.

10.2.5. The Parties will cooperate in the development of a suitable timetable for the submission of customer listing information for inclusion in the appropriate BLTC directories. FCA will provide subscriber listing information to BLTC in such format as is consistent with a basic listing format normally provided to publishers of directories. FCA will use reasonable commercial efforts to provide the subscriber listing information in a format that will accommodate inclusion on a mechanized basis in the BLTC directory publishing process. BLTC will not impose on FCA any service order or any other charges for processing, handling, or inclusion of FCA's listings pursuant to this Section 10.

### 10.3 Limitation Of Liability And Indemnification

10.3.1 Neither Party will be liable to the other Party for any losses or damages arising out of errors, interruptions, defects, failures, delays, or malfunctions relating to the White Pages listings and services, including any and all associated equipment and data processing systems, unless said losses or damages result from the indemnifying party's gross negligence or willful or wanton or intentional misconduct.

10.3.2 FCA shall defend, indemnify and hold BLTC and its affiliates, officers and agents harmless from any and all third party claims, suits, actions, demands, costs, settlements losses, damages expenses and all other liabilities, including reasonable attorney fees arising out of or resulting from a breach of contract, breach of warranty and/or the intentional and negligent acts or omissions on the part of FCA, its employees, officers, affiliates and agents in the performance of, or failure to perform, the activities contemplated by this Section 10 of this Agreement including, but not limited to, the provision of customer listing information on an accurate and timely basis. BLTC shall defend, indemnify and hold FCA and its affiliates, officers and agents harmless from any and all third party claims, suits, actions, demands, costs, settlements losses, damages expenses and all other liabilities, including reasonable attorney fees arising out of or resulting from a breach of contract, breach of warranty and/or the intentional and negligent acts or omissions on the part of BLTC, its employees, officers, affiliates and agents in the performance of, or failure to perform, the activities contemplated by this Section 10 of this Agreement.

10.3.3 Notwithstanding any other provisions of this Agreement, the Parties agree that (a) BLTC has no legal duty or obligation to publish any FCA customer listing in any BLTC directory with respect to any FCA customer for which FCA does not provide BLTC the FCA customer listing information in accordance with this Section 10 of this Agreement, and (b) BLTC will not be liable to FCA or any FCA customer, for BLTC's failure to publish any FCA customer listing in any BLTC directory with respect to any FCA customer which FCA does not provide to BLTC the FCA customer listing information in accordance with this Section 10 of this Agreement.

## **SECTION 11. SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996**

The Parties agree that the provisions of Section 252 of the Telecommunications Act of 1996, including but not limited to Section 252(i), shall apply to this Agreement, together with Tennessee Regulatory Authority and FCC interpretive regulations in effect from time to time.

## **SECTION 12. TERM OF AGREEMENT**

12.1 Term Subject to the termination provisions contained in this Agreement, the initial term of this Agreement shall be one (1) year from the effective date referenced in Section 13 of this Agreement. This Agreement shall continue in force and effect for consecutive one (1) year terms unless on a date no less than three (3) months prior to the expiration of the initial term or any subsequent term, either Party requests the commencement of negotiations pursuant to Section 252 of the Act on a new Agreement. The termination provisions in this section do not at any time affect either Party's rights under Section 252(i) of the Act.

12.2 Post-Termination Arrangements For service arrangements made available under this Agreement and existing at the time of termination, those arrangements will continue without interruption until a replacement agreement has been executed by the Parties either (a) under a new agreement voluntarily executed by the Parties, (b) under a new agreement negotiated pursuant to the provisions of Section 252 of the Act, or c) under any agreement available according to the provisions of Section 252(i) of the Act.

## **SECTION 13. EFFECTIVE DATE**

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 FCA 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 Commission has statutory authority to authorize FCA 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 Commission's statutory authority with respect to geographic areas served by telephone cooperatives or any other matters.

## **SECTION 14. AMENDMENT OF AGREEMENT**

The Parties may mutually agree to amend this Agreement in writing. Because it is possible that amendments to this Agreement may be needed to fully satisfy the purposes and objectives, the Parties agree to work cooperatively, promptly, and in good faith to negotiate and implement any such additions, changes, and/or corrections to this Agreement. Any amendment must be made in writing.

## **SECTION 15. LIMITATION OF LIABILITY**

EXCEPT AS OTHERWISE PROVIDED HEREIN, NEITHER PARTY WILL BE LIABLE TO THE OTHER IN CONNECTION WITH THE PROVISION OR USE OF SERVICES PROVIDED UNDER THIS AGREEMENT. NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR ANY LOSS, COST, CLAIM, INJURY, LIABILITY OR EXPENSE, INCLUDING REASONABLE ATTORNEY'S FEES, RELATING TO OR ARISING OUT OF ANY ORDINARY NEGLIGENT ACT OR OMISSION BY A PARTY. IN NO EVENT

WILL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, INCOME OR REVENUE, EVEN IF ADVISED OF THE POSSIBILITY THEREOF, WHETHER SUCH DAMAGES ARISE OUT OF BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER THEORY OF LIABILITY AND WHETHER SUCH DAMAGES WERE FORESEEABLE OR NOT AT THE TIME THIS AGREEMENT WAS EXECUTED

#### **SECTION 16. INDEMNITY**

Each Party will indemnify and hold the other harmless from any liabilities, claims or demands (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made by third parties for (a) personal injuries, including death, or (b) damage to tangible property resulting from the sole negligence and/or sole willful misconduct of that Party, its employees or agents in the performance of this Agreement. Each Party will defend the other at the other's request against any such liability, claim, or demand. Each Party will notify the other promptly of written claims or demands against such Party of which the other Party is solely responsible hereunder.

#### **SECTION 17. ASSIGNMENT**

This Agreement may not be assigned to another Party without written consent of the other Party, which consent will not be unreasonably withheld.

#### **SECTION 18. CONTROLLING LAW**

This Agreement was negotiated by the Parties in accordance with the terms of the Telecommunications Act of 1996 and the laws of the State of Tennessee. It will be interpreted solely in accordance with the terms of the Telecommunications Act and applicable state law.

#### **SECTION 19. DEFAULT**

If either Party believes the other is in breach of this Agreement or otherwise in violation of law, it will first give sixty (60) days notice of such breach or violation and an opportunity for the allegedly defaulting Party to cure. Thereafter, the Parties will employ the dispute resolution procedures set forth in this Agreement.

#### **SECTION 20. NONDISCLOSURE**

20.1 "Confidential Information" as used herein means any information in written, oral, or other tangible or intangible forms which may include, but is not limited to, ideas, concepts, know-how, models, diagrams, flow charts, data, computer programs, marketing plans, business plans, customer names, and other technical, financial, or business information, which is designated as "confidential" or "proprietary" by either Party in the belief that it contains a trade secret or other confidential research, development, or commercial or financial information.

20.2 All written Confidential Information to be covered by this Agreement will be identified by a restrictive legend which clearly specifies the proprietary nature of the information.

20.3 If the Confidential Information is provided orally, it will be deemed to be confidential or proprietary if specifically identified as such by either Party or if the information is clearly recognizable to be of a confidential and proprietary nature.

20.4 Any Confidential Information produced, revealed, or disclosed by either Party to the other will be used exclusively for purposes of business discussions, negotiations, fulfilling the terms of this Agreement, and/or other purposes upon such terms and conditions as may be agreed upon between the Parties in writing, and will be kept separately from other documents and materials.

20.5 All persons receiving access to Confidential Information will not disclose it nor afford access to it to any other person not specifically authorized by this Agreement to obtain the Confidential information.



nor will such Confidential Information be used in any other manner or for any other purpose than as provided in this Agreement. No copies or reproductions will be made of any Confidential Information or any part thereof, whether by mechanical, handwritten, or any other means, without the prior written consent of the Party providing it. This Agreement authorizes distribution, disclosure or dissemination only to employees and duly authorized agents of the parties with a need to know such Confidential Information and which employees and agents agree to be bound by the terms of this Section.

20.6 Upon request by the disclosing Party, the receiving Party will return all tangible copies of Confidential/Proprietary Information, whether written, graphic or otherwise, except that the receiving Party may retain one copy for archival purposes.

20.7 Notwithstanding any other provision of this Agreement, this section will apply to all information furnished by either Party to the other in furtherance of the purpose of this Agreement, even if furnished before the date of this Agreement.

20.8 These obligations shall not apply to any Confidential Information that (1) was legally in the recipient's possession prior to receipt from the source, (2) was received in good faith from a third party not subject to a confidential obligation to the source, (3) now is or later becomes publicly known through no breach of confidential obligation by the recipient, (4) was developed by the recipient without the developing persons having access to any of the Confidential Information received in confidence from the source, or (5) that is required to be disclosed pursuant to subpoena or other process issued by a court or administrative agency having appropriate jurisdiction, provided, however with respect only to this last exception that the recipient shall give prior notice to the source and shall reasonably cooperate if the source deems it necessary to seek protective arrangements.

20.9 The obligation of confidentiality and use with respect to Confidential Information disclosed by one Party to the other shall survive any termination of this Agreement for a period of three (3) years from the date of the initial disclosure of the Confidential Information.

#### **SECTION 21. DISCLAIMER OF AGENCY; NO THIRD PARTY BENEFICIARIES; INDEPENDENT CONTRACTOR**

Neither this Agreement, nor any actions taken by either Party, in compliance with this Agreement, shall be deemed to create an agency or joint venture relationship between the Parties or any relationship. Neither this Agreement, nor any actions taken by either Party in compliance with this Agreement, shall create an agency, or any other type of relationship or third party liability between the Parties or between either Party and the customers of the other Party. This Agreement is for the sole benefit of the Parties and their permitted assigns, and nothing herein express or implied shall create or be construed to create any third-party beneficiary rights hereunder. Nothing in this Agreement shall constitute a Party as a legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, no Party undertakes to perform any obligation of the other Party, whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

#### **SECTION 22. DISCLAIMER OF REPRESENTATIONS AND WARRANTIES**

EXCEPT AS EXPRESSLY PROVIDED UNDER THE AGREEMENT, NEITHER PARTY MAKES ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES, FUNCTIONS AND PRODUCTS IT PROVIDES UNDER OR CONTEMPLATED BY THIS AGREEMENT AND THE PARTIES DISCLAIM THE IMPLIED WARRANTIES OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

## **SECTION 23. NO LICENSE**

**23.1** Nothing in this Agreement shall be construed as the grant of a license, whether express or implied, with respect to any patent, copyright, trademark, trade name, trade secret or any other proprietary or intellectual property now or hereafter owned, controlled or licensable by either Party. Neither Party may use any patent, copyrightable materials, trademark, trade name, trade secret or other intellectual property right of the other Party except in accordance with the terms of a separate license agreement between the parties granting such rights.

**23.2** Neither Party shall have any obligation to defend, indemnify or hold harmless, or acquire any license or right for the benefit of, or owe any other obligation or have any liability to, the other Party or its customers based on or arising from any claim, demand, or proceeding by any third party alleging or asserting that the use of any circuit, apparatus, or system, or the use of any software or the performance of any service or method, or the provision of any facilities by either Party under this Agreement, alone or in combination with that of the other Party, constitutes direct, vicarious or contributory infringement or inducement to infringe, misuse or misappropriation of any patent, copyright, trademark, trade secret, or any other proprietary or intellectual property right of any Party or third party. Each Party, however, shall offer to the other reasonable cooperation and assistance in the defense of any such claim.

**23.3** NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, THE PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT THERE DOES NOT EXIST, ANY WARRANTY, EXPRESS OR IMPLIED, THAT THE USE BY THE PARTIES OF THE OTHER'S FACILITIES, ARRANGEMENTS, OR SERVICES PROVIDED UNDER THIS AGREEMENT SHALL NOT GIVE RISE TO A CLAIM BY ANY THIRD PARTY OF INFRINGEMENT, MISUSE, OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHT OF SUCH THIRD PARTY.

## **SECTION 24. JOINT WORK PRODUCT**

This Agreement is the joint work product of the Parties and has been negotiated by the Parties and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

## **SECTION 25. NON-WAIVER**

Failure of either Party to insist on performance of any term or condition of this Agreement or to exercise any right or privilege hereunder shall not be construed as a continuing or future waiver of such term, condition, right or privilege.

## **SECTION 26. ENTIRE AGREEMENT**

This Agreement and any Exhibits, Schedules, or tariffs which are incorporated herein by this reference, sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

## **SECTION 27. TAXES**

It is the mutual understanding of the Parties to this Agreement that there are no taxes specifically applicable to the subject matter of this Agreement or to either Party as a result of entering into this Agreement that would not otherwise be applicable to each respective Party. In the event that any government authority, however, determines to the contrary that a tax or taxes are applicable to the subject matter of this Agreement, then the following provision will apply. Any state or local excise, sales, or use taxes, if any (excluding any taxes levied on income), resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party.

# EXHIBIT B

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Frontier Communications of	)	WC Docket No. 06-6
America, Inc. for Preemption and Declaratory	)	
Ruling Regarding Tennessee Code	)	
Annotated Section 65-29-102 and Related	)	
Decisions of the Tennessee Regulatory	)	
Authority	)	

**Reply Comments of Frontier Communications of America, Inc.**

Kenneth F. Mason  
Director – Federal Regulatory

**Frontier Communications**  
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585-777-5645  
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Gregg C. Sayre  
Associate General Counsel – Eastern Region

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Rochester, NY 14646-0700  
(585) 777-7270  
[gregg.sayre@frontiercorp.com](mailto:gregg.sayre@frontiercorp.com)

Date: March 8, 2006

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Frontier Communications of	)	WC Docket No. 06-6
America, Inc. for Preemption and Declaratory	)	
Ruling Regarding Tennessee Code	)	
Annotated Section 65-29-102 and Related	)	
Decisions of the Tennessee Regulatory	)	
Authority	)	

**Reply Comments of Frontier Communications of America, Inc.**

**Introduction**

Frontier Communications of America, Inc. ("Frontier") hereby submits its reply comments in the above captioned matter pursuant to the Commission's January 19, 2006 Public Notice.<sup>1</sup> Only Ben Lomand Rural Telephone Cooperative ("Ben Lomand") out of the three commenting parties attempts to justify the prohibition in Tennessee Code Ann. §65-29-102 against competition in the territories of telephone cooperatives as passing muster under §253(a) of the Telecommunications Act. Ben Lomand's general and conclusory allegations, however, fail to hide the blatantly anticompetitive nature of the statute, and Ben Lomand's plea for an exemption from competition rings hollow in light of its own foray outside of its statutorily protected boundaries to compete with Frontier's affiliate Incumbent Local Exchange Carrier ("ILEC").

The primary argument made in the three filings in opposition to Frontier's Petition is the claim that Frontier, allegedly lacking a statewide certificate of authority to act as a Competitive Local Exchange Carrier ("CLEC"), should have first petitioned the Tennessee Regulatory

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<sup>1</sup> Public Notice, DA 06-81 (released January 19, 2006).

Authority ("TRA") for an amendment of its certificate and as a result is not entitled to petition the Commission to preempt the anticompetitive statute. As will be shown herein, these arguments are without merit because (1) Frontier already has a statewide certificate of authority that requires no amendment; and (2) the only stated basis for claiming that Frontier's certificate is limited is the anticompetitive state statute itself, thus establishing that the argument of Frontier's opponents is wholly circular.

Ben Lomand has now forestalled competition in its territory for more than 18 months since execution of the interconnection agreement, all the while it continues to compete through an affiliate as a CLEC in Frontier's ILEC territory. The Commission should see through Ben Lomand's procedural ploy and issue the declaratory ruling requested by Frontier.

**I. Tennessee Code Annotated §65-29-102 Is Blatantly Anticompetitive.**

Neither the TRA nor the Tennessee Cooperatives attempt to justify Tennessee Code Ann. §65-29-102 in light of 47 U.S.C. §253, which overrides a state statute that has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service unless the statute is shown to be, among other things, competitively neutral. The Commission's preemption analysis set forth in a nearly identical case, the *Hyperion Preemption Order*,<sup>2</sup> turns primarily upon whether the challenged state restriction is "competitively neutral," and a finding that the restriction is not competitively neutral is fatal to the restriction.<sup>3</sup>

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<sup>2</sup> *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*, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999), *pet. for reh'g den.*, 16 FCC Rcd 1247 (2001) ("**Hyperion Preemption Order**").

<sup>3</sup> *Hyperion Preemption Order*, ¶¶8, 18; 47 U.S.C. § 253(b).

Only Ben Lomand attempts to make the case that the statute is competitively neutral. Ben Lomand's entire showing on this point is an assertion that competition from Frontier would drain revenue from Ben Lomand's profitable customers, which would be "to the detriment of the residential customers of Ben Lomand."<sup>4</sup> If this were a valid consideration, then all competition should be prohibited forthwith, Ben Lomand should retain its monopoly ILEC status<sup>5</sup> forever, and presumably all other ILECs should be re-established as monopolies. Nowhere in this argument does Ben Lomand even begin to establish a claim that the statute is competitively neutral.

Ben Lomand also complains that Frontier has received authority from the TRA to price services below a statutory price floor.<sup>6</sup> This argument is a pure smokescreen. The "Frontier" that has obtained this authority is Frontier's ILEC Citizens Telecommunications Company of Tennessee, not Frontier Communications of America. This price floor does not apply either to Ben Lomand's ILEC or to its CLEC, nor did it ever apply to Frontier Communications of America, which is Frontier's CLEC. The Frontier ILEC's relief from this price floor has nothing to do with Frontier Communications of America's CLEC entry into Ben Lomand's ILEC territory.

Finally, Ben Lomand takes its arguments to the extreme by alleging that it could even be forced out of business by Frontier's competition.<sup>7</sup> Apparently Ben Lomand, one of the last ILECs in the United States with a statutory monopoly, is afraid that it cannot compete successfully within its own territory. Public policy has long since passed beyond this kind of argument. The appropriate inferences that the Commission should draw from Ben Lomand's

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<sup>4</sup> Ben Lomand Comments, p. 5.

<sup>5</sup> Under Tennessee law, Ben Lomand as a cooperative is not an ILEC that would have been entitled to territorial protection under Tenn. Code Ann. § 65-4-201(d), the small ILEC statute that was at issue in the *Hyperion Preemption Order*. See Tenn. Code Ann. § 65-4-101(a)(5) and (d). Due to its cooperative status, Ben Lomand does not file tariffs with the TRA.

<sup>6</sup> Ben Lomand Comments, pp. 5-6.

<sup>7</sup> Ben Lomand Comments, p. 6.

argument are that Ben Lomand is earning super-competitive monopoly profits, and that Ben Lomand is concerned that only these monopoly profits allow it to survive. Otherwise Ben Lomand should have no concern about going out of business as a result of competition. It is obviously long past time for Ben Lomand to experience the same kind of competition within its territory that it so freely engages in outside of its territory. It is long past time for Ben Lomand's captive customers to see the benefits of competition.

The competitive situation between Frontier and Ben Lomand proves conclusively that the statute is not competitively neutral. Ben Lomand and Frontier have adjoining ILEC territories. Ben Lomand competes through its affiliated CLEC in Frontier's ILEC territory, and in fact has taken away a large percentage of Frontier's ILEC customers. The statute, as interpreted by the TRA, does not permit Frontier's CLEC to compete in Ben Lomand's ILEC territory. There could hardly be a clearer example of a failure of competitive neutrality.<sup>8</sup>

## **II. Frontier Has a Statewide Certificate.**

All three parties commenting in opposition to Frontier's petition allege that Frontier does not have a statewide certificate of convenience and necessity. Frontier is at a loss to understand this position. Attached as **Exhibits 1 and 2**, respectively, are the 1996 TRA order granting Frontier's certificate, and the Administrative Law Judge's Initial Order that the TRA adopted as its own. Relevant portions of the Initial Order include the following statements: "Application [sic] requests a Certificate to offer these services on a statewide basis."<sup>9</sup> ... I find

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<sup>8</sup> Ben Lomand argues that the TRA must be given an opportunity under the statute to determine whether there is a lack of "reasonably adequate telephone service" in its protected territory, which lack would end the statutory monopoly granted by Tenn. Code Ann. §65-29-102. Ben Lomand Comments, p. 4. The proposal of such an inquiry falls far short of any kind of competitive neutrality. No such inquiry or showing was required before Ben Lomand's CLEC entered into Frontier's ILEC territory. If the TRA were to make such an inquiry and were to find that Ben Lomand's service was "reasonably adequate", that result would only further underline the lack of competitive neutrality and the unfair and unlawful monopoly protection granted by the statute to telephone cooperatives.

<sup>9</sup> Initial Order, p. 1.



that the requested certificate should be granted.<sup>10</sup> ... IT IS THEREFORE ORDERED: 1. That the application of Citizens ... to provide service statewide is hereby granted.”<sup>11</sup>

The parties opposing Frontier's Petition argue that Frontier should have petitioned the TRA for an amendment to its certificate, and that for this reason Frontier's Petition is premature.<sup>12</sup> Given the explicit grant of statewide authority in the certificate, it is difficult to understand exactly what amendment Frontier is supposed to have requested. Frontier does not need to amend its certificate from “statewide” to “statewide”. Ben Lomand and the Tennessee Cooperatives were given every opportunity in the certification proceeding to appeal if they objected to the order. Both the Initial Order and the final TRA Order explicitly gave any aggrieved party the remedy of filing a Petition for Reconsideration. Ben Lomand and the Tennessee Cooperatives filed no such petition, nor did they appeal from the TRA's grant of Frontier's statewide certificate. The fact of the matter is that it is not Frontier that is coming to the Commission too early, but instead it is Ben Lomand and the Tennessee Cooperatives that are raising their objections to Frontier's certificate nearly 10 years too late.

Frontier is surprised by the TRA's procedural objection to Frontier's Petition. Although the transcript of the TRA's action in November 2005 indicates a belief on the part of the Commissioners that Frontier lacked a statewide certificate of authority, this transcript falls far short of an order retroactively amending and restricting the statewide certificate of authority that the TRA granted Frontier in 1996.<sup>13</sup> The certificate speaks for itself. The opinions in the

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<sup>10</sup> Initial Order, p. 2.

<sup>11</sup> Initial Order, p. 5.

<sup>12</sup> Opposition of TRA, p. pp. 7-8; Ben Lomand Comments, p. 4; Tennessee Cooperatives Comments, p. 11.

<sup>13</sup> The TRA explicitly amended the CLEC certificate in the Hyperion case to areas of Tennessee served by ILECs with more than 100,000 lines. *Hyperion Preemption Order*, ¶4. For this reason, it was necessary for Hyperion to seek an amendment. There is no such need in Frontier's case.

November 2005 transcript do not alter what the certificate actually says. The certificate requires no amendment.

Moreover, two of the three TRA Commissioners participating in the November 2005 deliberations expressed on the record their belief that Frontier should pursue this matter at the FCC. Director Miller stated "for the record that this complaint might be more appropriately handled at the FCC."<sup>14</sup> Director Tate suggested that the company pursue relief at the FCC in addition to requesting the TRA to expand its certificate.<sup>15</sup> Thus, the majority view of the Commissioners at the hearing was that it would be appropriate for Frontier to seek relief from the FCC.

### **III. The Only Argument That Frontier's Certificate Is Not Statewide Is Circular.**

No commenting party offers any basis for the mistaken assertion that Frontier's certificate is not statewide other than the statute itself that is the subject of Frontier's petition. The logical flow of the argument is that Frontier's certificate cannot be statewide despite its express terms because the statute exempted, and continues to exempt, telephone cooperatives such as Ben Lomand from competition. In other words, these parties are arguing that Frontier cannot be heard to ask for relief from the statute because of the statute itself. This argument is obviously circular and falls of its own weight. Because it is only the statute itself that even arguably prevents Frontier's certificate from being "really truly" statewide, it follows that Frontier has fully exhausted its remedies at the TRA. The only basis for the TRA to deny Frontier's Petition for Declaratory Ruling was that the statute bars the TRA from allowing Frontier to compete in Ben Lomand's territory. Otherwise Frontier's certificate would be "really truly"

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<sup>14</sup> Transcript of November 7, 2005 hearing, attached hereto as Exhibit 3, p. 2.

<sup>15</sup> Transcript of November 7, 2005 hearing, pp. 4-5.

statewide. Accordingly, the TRA's November 2005 action rests squarely and solely on the statute, and Frontier is properly before this Commission to petition for the preemption of the statute.

It is far from clear that the TRA would even entertain an amendment of Frontier's certificate from "statewide" to "statewide." When the TRA denied Frontier's Petition for Declaratory Ruling, Director Miller stated that he did 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."<sup>16</sup> If Frontier were to be sent back to the TRA to seek an amendment of its certificate from "statewide" to "statewide", under this analysis the result could only be the same – a denial of Frontier's request and a continuation of Ben Lomand's unjustifiable monopoly status for another year and maybe longer.

#### **IV. Conclusion: Justice Delayed Would Be Justice Denied.**

Ben Lomand has now been stalling competition for well over a year while it continues to engage in exactly the same kind of "edge-out" competition that Frontier has been anxious to begin in the other direction since 2004. The Interconnection Agreement was executed on July 6, 2004. Ben Lomand managed to drag out the TRA proceeding on Frontier's Petition for Declaratory Ruling from October 26, 2004 to November 7, 2005. If Frontier were sent back to the TRA to seek an unnecessary amendment of its Tennessee certificate from "statewide" to "statewide," Ben Lomand would probably get at least another year of unjustifiable monopoly protection. Such a result would be antithetical to the public policy of the United States, which is a policy of "opening all telecommunications markets to competition."<sup>17</sup>

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<sup>16</sup> Transcript of November 7, 2005 hearing, p. 4.

<sup>17</sup> Conference Report on S. 652, Telecommunications Act of 1996, January 31, 1996 *Congressional Record - House*, p. H 1079.

This case is very simple. Based on an anticompetitive statute, the TRA has refused to allow Frontier to enter the statutorily protected territory of a telephone cooperative, while at the same time the cooperative is actively competing in Frontier's territory. This situation has been going on for an extended period of time and it is past time for it to end.

Quite naturally the cooperative, with the support of its fellow cooperatives, is throwing up every procedural argument it can muster to protect its unjustifiable monopoly. This has led to Ben Lomand's arguing out of one side of its mouth before the TRA and out of the other side of its mouth before this Commission. When it was before the TRA, Ben Lomand argued that "the TRA does not have jurisdiction to determine if the 1996 Telecommunications Act preempts state law. ... Preemption must be considered by the FCC in the process of a hearing, with notice and opportunity for public comment."<sup>18</sup> Now that it is before the FCC, Ben Lomand argues that only the TRA can decide this case, and that it should be decided on the basis of the state statute.<sup>19</sup> If this case were sent back to the TRA, no doubt Ben Lomand would go back to its position that only the FCC can overturn the statute.

The Commission should see through these procedural ploys to the heart of the matter, that Ben Lomand has an unlawful statutory monopoly, that it has used this statutory monopoly to forestall competition for well over a year, and that the TRA is unwilling to overturn this

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<sup>18</sup> Ben Lomand Reply Brief to the TRA, p. 4 (June 15, 2005).

<sup>19</sup> Ben Lomand Comments, p. 4.

blatantly anticompetitive statute. Frontier respectfully submits that the only fair, reasonable and lawful result is for the Commission to grant the relief requested by Frontier.

Respectfully Submitted,



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Gregg C. Sayre  
Associate General Counsel – Eastern Region

Kenneth F. Mason  
Director – Federal Regulatory

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Date: March 8, 2006

Attachments: Exhibits 1-3

## **EXHIBIT 1**

**FAXED**

JUL 02 1996

11-5-99

**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;

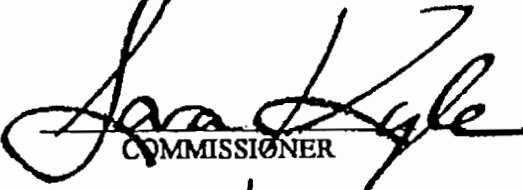
6. That any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this order; and

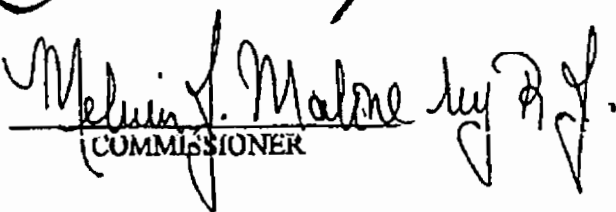
7. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review with the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

ATTEST:

  
Eddie Robinson  
Executive Director

  
CHAIRMAN

  
COMMISSIONER

  
COMMISSIONER



## **EXHIBIT 2**

**TENNESSEE PUBLIC SERVICE COMMISSION**  
460 JAMES ROBERTSON PARKWAY  
NASHVILLE, TENNESSEE 37243-0505

JUN 06 1996



May 30, 1996

Mr. Charles W. Cook, II  
Attorney at Law  
424 Church Street, Suite 2800  
Nashville, Tennessee 37219

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

**DOCKET NO. 96-00779**

Dear Mr. Cook:

I have enclosed a copy of the Initial Order of the Administrative Judge in the case noted above.

The Commission will review all of the issues addressed by the Judge in his decision and will provide all parties an opportunity to express their opinion of the findings of the Judge.

Enclosed is a copy of the Order setting the matter for review. This order does not affect your right to request reconsideration of the Initial Order of the Administrative Judge.

Sincerely,

A handwritten signature in black ink, appearing to read "Eddie Roberson", with a long horizontal stroke extending to the right.

Eddie Roberson  
Executive Director

Enclosures

**BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION  
NASHVILLE, TENNESSEE**

**May 30, 1996**

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

**Docket No. 96-00779**

**INITIAL ORDER**

This matter is before the Tennessee Public Service Commission upon the application of Citizens Telecommunications Company, d/b/a Citizens Telecom (hereinafter the "Applicant" or "Citizens Telecom") for a Certificate of Public Convenience and Necessity ("Certificate") to become a Competing Telecommunications Service Provider as defined by T.C.A. §65-4-101(e). The Applicant has filed this application as a Competing Telecommunications Service Provider pursuant to Section 7 of Chapter 408 of the Public Acts of 1995, codified at T.C.A. §65-4-201(c). Applicant seeks authority to operate statewide and to provide a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company. Application requests a Certificate to offer these services on a statewide basis.

Notice of this application has been served upon incumbent local exchange carriers and other interested parties.

The matter was heard on May 15, 1996, in Nashville, Tennessee, before Ralph B.

Christian, II, Administrative Judge, at which time the following appearances were entered:

**APPEARANCES:**

CHARLES W. COOK, III, Attorney at Law, STOKES & BARTHOLOMEW, P.A.  
424 Church Street, Suite 2800, Nashville, Tennessee 37219, appearing on behalf of the  
Applicant.

BRYAN C. SPEILMAN, Group Product Manager - Local Products - for Citizens  
Utilities, Applicant's parent company, testified in support of the application.

No other witnesses testified. No parties opposed the application. BellSouth  
Telecommunications, Inc. filed a Motion to Intervene, but did not otherwise enter an  
appearance or oppose the application.

Based upon the application, the testimony and exhibits presented at the hearing and the  
entire record of this proceeding, I find that the requested certificate should be granted. In  
support of those decisions, I hereby make the following findings of fact and conclusions of  
law:

Citizens Telecom seeks authority to offer within its certificated area all legally allowed  
telecommunications services. Such services include, but are not limited to, those normally  
provided by an incumbent local exchange telephone company, local exchange and exchange  
access services, dedicated and switched access services and private line services, Centrex  
services, measured business lines, voice mail, ISDN, and vertical factors. Applicant also  
intends to expand the scope of its interexchange retail authority, awarded in Case No. 95-  
03786. Mr. Speilman testified that this expansion may be necessary because the Applicant is  
installing long distance switching capacity in Powell, Tennessee.

Mr. Speilman stated that Applicant's services will be conducted through the use of owned and leased facilities, resale of other local exchange carrier's retail products and the use of unbundled network elements obtained from incumbent local exchange carriers.

Mr. Speilman testified that Applicant will adhere to all applicable Commission policies, rules and orders. Mr. Speilman 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).

Applicant is a Delaware corporation authorized to do business in the State of Tennessee. It is currently certified as an interexchange reseller in Tennessee. It is headquartered in Stamford, Connecticut. Applicant was originally created to provide interexchange services throughout the United States.

Applicant is a subsidiary of Citizens Utilities Company, a publicly-traded Delaware Corporation which is the parent corporation of a number of local exchange carriers conducting operations in twelve (12) states. Two of those companies, Citizens Telecommunications Company of Tennessee, LLC and Citizens Telecommunications Company of the Volunteer State, LLC conduct local exchange operations in Tennessee. Citizens Utilities and its subsidiaries are also referred to as the "Citizens Utilities Company family of local exchange providers".

Mr. Speilman avers that Applicant's principal corporate officers have substantial managerial experience in the telecommunications field. Mr. Speilman testified that the Citizens Utilities Company, through its family of local exchange carriers, and Applicant has operated in this state since 1993. Its management and technical capabilities, as are more fully

described in its application, are well-known to the Commission. Mr. Speilman further testified that Applicant is funded from advances from Citizens Utilities Company, whose financial strength is demonstrated in the 1995 audited financial statements found in its 1995 Annual Report.

Based upon the facts as described in the Applicant's application and exhibits including, but not limited to, Citizens Utilities Company's 1995 Annual Report and in the testimony of Mr. Speilman, I find that the Applicant possesses sufficient managerial, financial and technical ability to provide the telecommunications services it proposes. Therefore, the Applicant meets the statutory criteria for the award of operating authority as a Competing Telecommunications Service Provider under T.C.A. §65-4-201(c).

In accordance with Section 16 of Chapter 408, Applicant has filed a small and minority owned telecommunications businesses participation plan. The plan, filed on or about April 25, 1996, fulfills the statutory requirements of Section 16. Mr. Speilman testified that the Applicant is committed to implementation of the plan.

Approval of the application will serve the public interest by creating greater competition in the intrastate telecommunications marketplace. In particular, the public will benefit both directly, through the use of competitive telecommunications services to be offered by the Applicant, and indirectly because the presence of the Applicant in the market will increase the incentives for other telecommunications services providers, including the incumbent local exchange carrier, to operate more efficiently, offer more innovative services, and improve the quality of service.

WHEREFORE, based upon the foregoing findings and conclusions, I find that the public convenience and necessity will be served by the issuance of a certificate to the Applicant.

**IT IS THEREFORE ORDERED:**

1. That the application of Citizens Telecommunications Company, D/B/A Citizens Telecom for a certificate of public convenience and necessity as a competing telecommunications service provider pursuant to Section 7 of Chapter 408 of the Public Acts of 1995, T.C.A. §65-2-201(c), to provide service statewide is hereby granted;

2. That the Citizens Telecommunications Company, D/B/A Citizens Telecom 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, 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 ;

3. That the Citizens Telecommunications Company, D/B/A Citizens Telecom may commence service under its certificate once it has filed proper tariffs for service to be offered and such other information required by the Commission;

4. 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.

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

  
RALPH B. CHRISTIAN, II  
ADMINISTRATIVE JUDGE



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## **EXHIBIT 3**

BEFORE THE TENNESSEE REGULATORY AUTHORITY

**CERTIFIED  
COPY**

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TRANSCRIPT OF EXCERPT OF AUTHORITY CONFERENCE

Monday, November 7, 2005

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APPEARANCES:

For Chattanooga Gas Company:	Mr. L. Craig Dowdy
For NuVox:	Mr. John J. Heitman
(by telephone)	Ms. Susan Berlin
For Sprint Nextel:	Mr. Daniel M. Waggoner
(by telephone)	
For Sprint Nextel:	Mr. Edward Phillips
For TRA Staff:	Mr. Richard Collier
	Ms. Sharla Dillon

Reported By:  
Jennifer B. Carollo, RPR, CCR



**NASHVILLE COURT REPORTERS**

P.O. Box 290903  
Nashville, TN 37229-0903  
(615) 885-5798 • (800) 552-DIRPO  
Fax (615) 885-2621

1 (The aforementioned Authority  
2 conference came on to be heard on Monday, November 7,  
3 2005, beginning at approximately 1 p.m., before  
4 Chairman Ron Jones, Director Sara Kyle, Director  
5 Deborah Taylor Tate, and Director Pat Miller. The  
6 following is an excerpt of the proceedings that were  
7 had, to-wit:)

8  
9 MS. DILLON: Next we have Section 2,  
10 Directors Miller, Kyle, and Tate.

11 Docket No. 04-00379, Frontier  
12 Communications, Inc. Petition of Frontier  
13 Communications, Inc., for a declaratory ruling.  
14 Consider motion to dismiss.

15 DIRECTOR KYLE: On October 26, 2004,  
16 the petition of Frontier Communications, Inc., for a  
17 declaratory ruling was filed with the Authority.  
18 Frontier asked the Authority to declare that it has the  
19 authorization to compete in the territory of Ben Lomand  
20 Rural Telephone Cooperative, Inc.

21 On December 8, 2004, Ben Lomand filed  
22 the answer and motion to dismiss of Ben Lomand Rural  
23 Telephone Cooperative, Inc.

24 During the December 13, 2004,  
25 Authority conference, the panel voted unanimously to

1 convene a contested case proceeding in this matter to  
2 determine the issues set forth in the petition.

3 I have a motion that I would be glad  
4 to hear from my colleagues if you have something to say  
5 on this issue. If not I recommend -- I would move to  
6 grant the motion to dismiss as filed by Ben Lomand with  
7 respect to the petition for declaratory ruling  
8 submitted by Frontier Communications, Inc. I find that  
9 Frontier, then known as Citizens Communication, when  
10 requesting authority to provide competing telephone  
11 service was not granted statewide approval to provide a  
12 competing service. The 1996 order did not extend  
13 Citizens authority statewide to enter into territories  
14 of small telephone carriers or cooperatives, and it was  
15 clearly not my intent nor was it supported in the  
16 record.

17 I believe it is appropriate to  
18 dismiss the petition of Frontier at this time as it  
19 simply asks for relief that cannot be granted given its  
20 current certificate of convenience and necessity. And  
21 I so move.

22 (Pause.)

23 DIRECTOR MILLER: I'll second your  
24 motion and vote aye. First of all, from an equity  
25 standpoint, I believe that Frontier has a reasonable

1 argument. However, after reviewing the pleadings and  
2 applicable statutory provisions, I do not find specific  
3 language contained within existing state law that would  
4 permit the TRA to grant authority to CLECs to serve  
5 territories served by telephone cooperatives.

6 I am also convinced that prior to the  
7 1995 act this agency did not have authority to allow  
8 competitive entry into areas served by cooperatives.  
9 Furthermore, nothing in the 1995 state act explicitly  
10 changed or otherwise granted jurisdiction of this  
11 agency over telephone cooperative service areas.

12 So I think with respect to state law,  
13 the legislature is where I would have to point for  
14 Citizens to seek relief. Accordingly, I move that -- I  
15 agree with Director Kyle and would state for the record  
16 that this complaint might be more appropriately handled  
17 at the FCC.

18 DIRECTOR TATE: I will agree in the  
19 outcome. However, I would also like to point out that  
20 at least two other companies have come before us to  
21 expand their CCNs to enable it to extend service into  
22 previously restricted areas. So I'm not in any way  
23 prejudging that issue and whether or not it might come  
24 before us in the future and that -- that there are  
25 other appropriate procedural avenues other than the

1 ones that are before us today. As Director Miller  
2 noted the FCC, in addition, to a company's requests to  
3 expand its CCN instead of a declaratory ruling.

4 So I think with that said, I will be  
5 in agreement with the conclusion of your motion.

6 DIRECTOR KYLE: Thank you.

7 (Excerpt of Proceedings  
8 concluded.)  
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REPORTER'S CERTIFICATE


STATE OF TENNESSEE )  
COUNTY OF WILLIAMSON )

I, Jennifer B. Carollo, Registered Professional Reporter, Certified Court Reporter, and Notary Public for the State of Tennessee, hereby certify that I reported the foregoing proceedings at the time and place set forth in the caption thereof; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I FURTHER CERTIFY that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office this 7th day of December, 2005.



  
JENNIFER B. CAROLLO,  
REGISTERED PROFESSIONAL  
REPORTER, CERTIFIED COURT  
REPORTER, AND NOTARY PUBLIC  
FOR THE STATE OF TENNESSEE

My Commission Expires:  
June 1, 2008

**CERTIFICATE OF SERVICE**

**WC Docket No. 06-6**

I, Gregg C. Sayre, do certify that on March 8, 2006, the aforementioned **Reply Comments of Frontier Communications** were electronically filed with the Federal Communications Commission through its Electronic Comment Filing System and were mailed to the following as indicated below:

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Janice Myles *(via email)*  
Competition Policy Division  
Wireline Competition Bureau  
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By: \_\_\_\_\_



Gregg C. Sayre