

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

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

**FRONTIER COMMUNICATIONS OF AMERICA'S RESPONSE IN
OPPOSITION TO THE MOTION TO HOLD CASE IN ABEYANCE
FILED BY THE INTERVENORS**

Petitioner Frontier Communications of America, Inc. ("FCA" or "Petitioner") respectfully submits this response in opposition to the Motion to Hold Case in Abeyance filed by intervening telephone companies, 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. (the "Intervenors").

INTRODUCTION

In this case, FCA seeks to amend its 1996 statewide certificate of convenience and necessity ("CCN") to allow it to provide services in territory currently served by Ben Lomand Rural Telephone Cooperative ("Ben Lomand") in accordance with the ruling of the TRA in Docket No. 04-00379 entered March 8, 2006.¹ In that prior action FCA sought a declaratory ruling that its existing CCN allowed it to compete in Ben Lomand's

¹ FCA has asserted and continues to assert that its existing CCN is "statewide" and includes the territory served by Ben Lomand Rural Telephone Cooperative, and that an amendment is unnecessary. However, the TRA has ruled otherwise, which has precipitated this action and the FCC action referenced herein.

territory, but the TRA ruled that FCA must first seek to amend its CCN to include that territory.

As the Intervenor point out in their motion, on or about December 15, 2005, FCA appealed the TRA's ruling in Docket No.04-00379 to the Federal Communications Commission ("FCC") by filing the matter styled, *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-06. The FCC action has now been pending for approximately two years, and it has been fully briefed by all parties. In fact, the TRA intervened in that action and argued that the FCC action should not proceed because FCA should be required to first proceed to seek to have its CCN amended. A copy of the TRA's filings in the FCC action (without attachments) is attached hereto as Collective Exhibit A.

ARGUMENT

The Intervenor's Motion to Hold Case in Abeyance should be denied for two reasons. First, the TRA intervened in the FCC action and argued that FCA should be seeking to amend its CCN rather than pursuing relief before the FCC. FCA is now seeking to amend its CCN in accordance with the TRA's position in the FCC action. Thus, holding this case in abeyance is inconsistent with the TRA's position in the FCC action.

Second, granting the Intervenor's motion will further delay competition to the consumers of Tennessee, in direct contravention of the procompetitive policy adopted by the General Assembly in TCA § 65-4-123. FCA's petition at the FCC has been pending for two years. It has been fully briefed and awaiting decision since the spring of 2006. Nonetheless there is no indication of when the FCC will act. Meanwhile competition in

Tennessee is further delayed. Justice delayed is, in effect, justice denied. That is precisely the purpose of the Intervenor's motion for stay in this matter. Established State policy calls for the TRA to foster competition, rather than protecting monopoly status for telephone service providers. Accordingly, it should act now to grant FCA's requested amendment to its certificate. There is no "judicial economy" implicated here. It is an issue of an entrenched monopolist using regulatory delay to frustrate state and federal pro-competitive policy over the span of several years, and the TRA should not deny the benefits of competition to the citizens of Tennessee any longer.

CONCLUSION

For the reasons stated herein, the motion to stay this proceeding should be denied.

Respectfully submitted:



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*Attorneys for Frontier Communications of
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Melvin J. Malone, Mark W. Smith, Miller & Martin, PLLC, 150 Fourth Avenue North, 1200 One Nashville Place, Nashville, TN 37219-2433 and H. LaDon Baltimore, Farrar & Bates, LLP, 211 Seventh Avenue, N., Suite 420, Nashville, Tennessee 37219 by placing it in the U.S. Mail postage prepaid on this the 5th day of December, 2007.


CHARLES W. COOK, III

581351.01/602256-000010

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

IN THE MATTER OF:

**Petition of Frontier Communications of
America, Inc. for Preemption and Declaratory
Ruling Regarding Tennessee Code Annotated
Section 65-29-102 and Related Decision of the
Tennessee Regulatory Authority**

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WC Docket No. 06-6

**OPPOSITION OF THE TENNESSEE REGULATORY AUTHORITY TO
FRONTIER'S PETITION FOR PREEMPTION AND DECLARATORY RULING**

This matter is before the Federal Communications Commission ("FCC") upon the *Petition for Preemption and Declaratory Ruling* ("*Petition for Preemption*") filed by Frontier Communications of America, Inc. ("Frontier") on December 14, 2005. The Petition seeks an Order from the FCC that would overrule the November 7, 2005 decision of the Tennessee Regulatory Authority ("Authority" or "TRA") in TRA Docket No. 04-00379, preempt Tenn. Code Ann. § 65-29-102, and rule that Frontier may compete in the service territory of Ben Lomand Rural Telephone Cooperative ("Ben Lomand"). In response to Frontier's *Petition for Preemption*, the TRA respectfully states that Frontier is not entitled to compete with Ben Lomand because Frontier does not possess statewide authority under its certificate of public convenience and necessity ("CCN") and has not sought approval of an amendment to its CCN from the TRA for a grant of such authority. The *Petition for Preemption* of Frontier should be summarily dismissed on the ground that it is not ripe for consideration because Frontier has not exhausted its remedies at the TRA.

BACKGROUND

On June 27, 1996, the Tennessee Public Service Commission ("TPSC") entered an Order in Docket No. 96-00779 approving the Initial Order of an Administrative Judge and granting a CCN to Citizens Telecommunications Company d/b/a Citizens Telecom ("Citizens") to operate as a competing telecommunications service provider. The Administrative Judge's Initial Order, entered on May 30, 1996, stated that the application of Citizens sought a CCN to offer telecommunications services on a statewide basis but also reflected that the two Citizens incumbent local exchange carriers were not claiming to be entitled to the exemptions from competition found in Tenn. Code Ann. § 65-4-201(d).¹

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* ("Petition"). In the *Petition*, Frontier identified itself as a competing local exchange carrier ("CLEC"). Frontier contended that it had statewide authority from the TRA to provide telecommunications services based on the Order entered in TRA Docket No. 96-00779. The *Petition* described Ben Lomand as a telephone cooperative serving customers in White, Warren, Van Buren, Grundy and portions of Franklin, Coffee and Bedford counties in Tennessee.

Through its *Petition* and the terms of the Interconnection Agreement with Ben Lomand, Frontier sought a declaratory order whereby Frontier could compete in the territory being served by Ben Lomand. By its own terms, the Interconnection Agreement filed with the TRA on August 2, 2004 stated that it would become effective upon the following conditions:

- (a) issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant FCA [Frontier] with all necessary regulatory

¹ As a result of a subsequent merger between Citizens and Frontier Communications of America, Inc., Citizens' name was changed to Frontier.

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 [Frontier] 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 [Ben Lomand] or other telephone cooperatives.²

Frontier alleged that the two conditions necessary to render the Agreement effective have been met. Ben Lomand did not agree that the conditions have been met.

On December 8, 2004, Ben Lomand filed the *Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc.* (“*Answer and Motion to Dismiss*”). In its *Answer and Motion to Dismiss*, Ben Lomand specifically denied that Frontier had the authority to compete in Ben Lomand’s service territory. Ben Lomand asserted that, with the exception of resolving territorial boundary disputes as specified in Tenn. Code Ann. § 65-29-130, it was not subject to the jurisdiction of the TRA because of its cooperative status. Ben Lomand moved to dismiss the *Petition* on the grounds of lack of subject matter and personal jurisdiction and failure to state a claim upon which relief can be granted.

During the December 13, 2004 Authority Conference, the Authority convened a contested case proceeding and appointed a Hearing Officer to establish a procedure for framing and resolving the issues raised in the *Petition*. Through a series of orders, the Hearing Officer granted intervention to Twin Lakes Telephone Cooperative Corporation, North Central Telephone Cooperative, Inc., Bledsoe Telephone Cooperative, DTC Communications, Highland Telephone Cooperative, Inc., West Kentucky Rural Telephone Cooperative Corporation, and

² Exhibit A to the *Petition for Preemption*, p. 9.

Yorkville Telephone Cooperative, Inc. (“Intervening Cooperatives”).

During a Status Conference held on April 27, 2005, the Hearing Officer established a procedural schedule requiring that initial and reply briefs would be filed by the parties on June 8, 2005 and June 15, 2005, respectively, and that oral arguments addressing the threshold issues of the *Answer and Motion to Dismiss* would be heard by the Authority. The Hearing Officer stated that the remainder of the procedural schedule would be determined by the decision of the Authority regarding the threshold issues. Briefs were filed according to the schedule and oral argument was presented to the Authority on June 27, 2005.

At an Authority Conference held on November 7, 2005, the Authority determined that Frontier did not have statewide authority under its CCN to permit it to serve customers in Ben Lomand’s territory because Citizens, in requesting statewide authority to provide competing telephone service, was granted statewide approval only to the extent allowable by state law at the time. The 1996 TPSC Order did not extend to Citizens statewide authority to enter into territories of small rural telephone carriers (those less than 100,000 total access lines) or cooperatives. Based on this finding, the Authority dismissed the *Petition* of Frontier on the ground that its claim for relief could not be granted given its current CCN.³ Frontier filed its *Petition for Preemption and Declaratory Ruling* (“*Petition for Preemption*”) with the FCC on December 14, 2005.

DISCUSSION

In the *Petition for Preemption*, Frontier asserts that Ben Lomand’s motion to dismiss was granted by the TRA “on the ground that state law does not permit the TRA to grant authority for

³ An Order reflecting the action of the Authority at the November 7, 2005 Conference is forthcoming.

CLECs to serve territories served by telephone cooperatives.”⁴ Frontier attached a copy of the transcript of the TRA Conference to its *Petition for Preemption* purportedly in support of this assertion. Nevertheless, the transcript specifically demonstrates that the *Petition* of Frontier was dismissed on the ground that Frontier did not have statewide authority through the CCN granted to Citizens in 1996.

Throughout the *Petition for Preemption*, Frontier represents that it has statewide authority to provide telecommunication services:

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. (*Petition for Preemption*, Summary)

Frontier Communications of America, Inc. (“Frontier of America”), an affiliate of Frontier of Tennessee, had previously obtained a statewide Certificate of Convenience from the TRA by order dated June 27, 1996 . . . (*Petition for Preemption*, p. 2)

Frontier of America already has a “statewide” Certificate of Need from the TRA. (*Petition for Preemption*, p. 6)

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. (*Petition for Preemption*, p. 7)

All of the statements above, which have been asserted by Frontier in support of its claim for preemption, are not supported by the transcript reflecting the decision of the TRA. The *Petition for Preemption* ignores the stated basis for the TRA’s dismissal of Frontier’s *Petition*. The Authority explained that Citizens’ CCN could only convey to Citizens the authority to provide telecommunications services that existed in the state of the law at the time of approval of the CCN by the TPSC. Frontier’s assertions of “statewide” authority are based on its own conclusions and not the findings and conclusions of the TRA. Moreover, Frontier’s assertions in

⁴ *Petition for Preemption*, p. 3.

the *Petition for Preemption* are inconsistent with the terms of the Interconnection Agreement wherein the parties rely on “the issuance of a final order” for the Agreement to become effective.

Frontier also raises the decision of the FCC in the Hyperion case⁵ as a basis for overruling the TRA’s decision in TRA Docket No. 04-00379 and seeking preemption of Tenn. Code Ann. § 65-29-102. The *Petition for Preemption* states:

Frontier recognizes that in the *Hyperion* case the Commission declined to direct the TRA to grant Hyperion’s application for a [CCN]. 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.⁶

The Hyperion case was commenced before the TRA in Docket No. 98-00001 on January 2, 1998. Specifically, Hyperion sought an amendment to its CCN under Tenn. Code Ann. § 65-4-201(b) to provide service as a CLEC in the service territory of Tennessee Telephone Company, an incumbent local exchange carrier with fewer than 100,000 total access lines in Tennessee. Hyperion’s CCN did not provide statewide service at that point in time because of the restriction in Tenn. Code Ann. § 65-4-201(d) limiting competition in the service areas of incumbent carriers having less than 100,000 total access lines. Hyperion’s application was denied by a majority of the Directors.

On May 29, 1998, Hyperion filed a Petition with the FCC asking the FCC to preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) as well as the Authority’s April 9, 1998 Order denying Hyperion a CCN to provide local exchange service in areas of Tennessee served by the

⁵ *AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, CC Docket 98-92, Memorandum Opinion and Order, 14 FCC Rcd. 11064 (1999) (“*Memorandum Opinion and Order*”).

⁶ *Petition for Preemption*, pp. 6-7.

Tennessee Telephone Company. Hyperion also asked the FCC to direct the TRA to grant Hyperion's application for an expanded CCN. Hyperion asserted that the TRA's Order and Tenn. Code Ann. § 65-4-201(d) violated Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,⁷ and fell outside the scope of authority reserved to the states by Section 253(b) of the Act.

On May 27, 1999, the FCC issued an Order granting in part and denying in part Hyperion's Petition. Specifically, the FCC preempted the enforcement of the TRA's Order of April 9, 1998 and Tenn. Code Ann. § 65-4-201(d), but declined to direct the TRA to grant Hyperion's CCN application. The FCC stated that upon a request from Hyperion, the Authority should reconsider Hyperion's application in a manner consistent with the Act and the FCC's *Memorandum Opinion and Order*.⁸ Hyperion never re-filed or otherwise pursued its Application with the TRA.

Frontier's *Petition* filed with the TRA involves a different factual scenario than that presented in the Hyperion case. Hyperion was specifically seeking an amendment to its CCN for statewide authority to compete in the service territory of Tennessee Telephone Company. Frontier has not sought an amendment to its CCN, instead it asserts that it has statewide authority regardless of the position of the TRA. Notwithstanding, the FCC's express preemption of Tenn. Code Ann. § 65-4-201(d), the FCC did not grant Hyperion's request to direct the TRA to grant Hyperion's application for an amendment to the CCN. Instead, the FCC recognized that the TRA, under its certification statutes, should take the action of approving the amendment to the state-awarded CCN of Hyperion. In its *Petition for Preemption*, Frontier relies on the FCC's decision in Hyperion, but ignores the action of the FCC in remanding the matter to the TRA.

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

⁸ *Memorandum Opinion and Order*, at ¶ 22.

Finally, the *Petition for Preemption* asks the FCC to declare that the Interconnection Agreement between Frontier and Ben Lomand is effective. This request is not supported by the record in this docket in that Frontier has not demonstrated, and indeed does not have the statewide authority to offer telecommunications services in the service territory of Ben Lomand. For these reasons, Frontier's *Petition for Preemption* is premature and must be denied.

WHEREFORE, for the foregoing reasons, the Tennessee Regulatory Authority requests that the Federal Communications Commission dismiss Frontier's *Petition for Preemption and Declaratory Ruling*.

Respectfully submitted,

s/J. Richard Collier

J. Richard Collier, BPR # 015343
General Counsel

s/Monica Smith-Ashford

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2006, a true and exact copy of the foregoing was filed electronically with the Federal Communications Commission. The original document has been delivered via U.S. Mail, postage pre-paid, to:

Marlene H. Dortch
Office of the Secretary
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Washington, DC 20554

In addition, a true and exact copy of the foregoing document was served on the following persons, via the method indicated:

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s/J. Richard Collier

J. Richard Collier, BPR #15343

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

IN THE MATTER OF:

**Petition of Frontier Communications of
America, Inc. for Preemption and Declaratory
Ruling Regarding Tennessee Code Annotated
Section 65-29-102 and Related Decision of the
Tennessee Regulatory Authority**

WC Docket No. 06-6

**NOTICE OF FILING OF TRA ORDER IN SUPPORT OF OPPOSITION TO
FRONTIER'S PETITION FOR PREEMPTION AND DECLARATORY RULING**

This matter is before the Federal Communications Commission ("FCC") upon the *Petition for Preemption and Declaratory Ruling* ("*Petition for Preemption*") filed by Frontier Communications of America, Inc. ("Frontier") on December 14, 2005. The *Petition for Preemption* seeks an Order from the FCC that would overrule the November 7, 2005 decision of the Tennessee Regulatory Authority ("Authority" or "TRA") in TRA Docket No. 04-00379, preempt Tenn. Code Ann. § 65-29-102, and rule that Frontier may compete in the service territory of Ben Lomand Rural Telephone Cooperative ("Ben Lomand").

On February 21, 2006, the TRA filed its Opposition to Frontier's *Petition for Preemption*, stating that Frontier is not entitled to compete with Ben Lomand because Frontier does not possess statewide authority under its certificate of public convenience and necessity ("CCN") and has not sought approval of an amendment to its CCN from the TRA for a grant of such authority. The TRA hereby files its *Order Denying Petition of Frontier Communications, Inc.*

issued on March 8, 2006, in support of its Opposition and renews its position that the *Petition for Preemption* of Frontier should be summarily dismissed on the ground that it is not ripe for consideration because Frontier has not exhausted its remedies at the TRA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2006, a true and exact copy of the foregoing was filed electronically with the Federal Communications Commission. The original document has been delivered via U.S. Mail, postage pre-paid, to:

Marlene H. Dortch
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In addition, a true and exact copy of the foregoing document was served on the following persons, via the method indicated:

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