

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 20, 2007

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

ORDER DECLINING TO HOLD CASE IN ABEYANCE
SUBJECT TO CONDITION PRECEDENT

This matter came before the Hearing Officer upon the filing of *The Intervening Cooperatives*¹ *Motion to Hold Case in Abeyance* ("Abeyance Motion") with the Tennessee Regulatory Authority (the "Authority" or "TRA") on December 3, 2007. On December 5, 2007, Frontier Communications of America, Inc. ("Frontier") filed its *Response in Opposition to the Motion to Hold Case in Abeyance Filed by the Intervenors* ("Response to Abeyance Motion"). At the Status Conference held on December 5, 2007, all parties presented oral argument concerning the merits of the *Abeyance Motion*, following completion of which the Hearing Officer took the matter under advisement. This Order sets forth the Hearing Officer's findings of fact and conclusions of law regarding the *Abeyance Motion*.

BACKGROUND

On June 27, 1996, an Order was entered by the Tennessee Public Service Commission ("TPSC") in Docket No. 96-00779 approving the Initial Order of an Administrative Judge and

¹ The following telephone cooperatives are collectively referred to herein as the "Intervening Cooperatives:" Highland Telephone Cooperative, Inc., Bledsoe Telephone Cooperative Corporation, Inc., West Kentucky Rural Telephone Cooperative Corporation, Inc., DTC Communications, North Central Telephone Cooperative, Inc., and Twin Lakes Telephone Cooperative Corporation.

granting a certificate of public convenience and necessity (“CCN”) to Citizens Telecommunications Company d/b/a Citizens Telecom (“Citizens”) to operate as a competing telecommunications service provider. The Order of the TPSC specifically adopted the findings and conclusions in the Administrative Judge’s Initial Order entered on May 30, 1996.² The *Initial Order* stated that the application of Citizens sought a CCN to offer “a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company” on a statewide basis. Specifically, the *Initial Order* reflected that Citizens agreed to adhere to TPSC policies, rules and orders and stated that “the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. § 65-4-201(d).”³

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

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

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

³ *Id.* at 3.

2004. Through its *Petition for Declaratory Ruling* and its Interconnection Agreement with Ben Lomand, Frontier sought to compete in territory served by Ben Lomand. Ben Lomand responded to the *Petition for Declaratory Ruling* stating that Frontier did not have authority to compete in Ben Lomand's service territory and moving to dismiss the action.

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

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

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

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

its *Petition for Preemption*, which was filed with the FCC before the issuance of the Order of the Authority in Docket No. 04-00379, Frontier asserts that Ben Lomand's motion to dismiss in that docket was granted by the TRA "on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives."⁶

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

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

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

TRAVEL OF THIS CASE

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

On November 20, 2007, the Hearing Officer issued a *Notice of Status Conference* setting

⁶ *Petition for Preemption*, p. 3 (December 14, 2005).

⁷ *Opposition to Petition for Preemption*, p. 1 (February 21, 2007).

⁸ *Petition to Amend CCN*, p. 1 (June 20, 2007).

a status conference on December 5, 2007. On November 29, 2007, the Intervening Cooperatives each filed a petition to intervene. Thereafter, on December 3, 2007, the Intervening Cooperatives filed their *Abeyance Motion*, and on December 5, 2007, Frontier filed its *Response to Abeyance Motion*. During the Status Conference on December 5, 2007, the Hearing Officer granted all petitions to intervene. Also during the Status Conference, the parties presented oral argument on the merits of the *Abeyance Motion* for consideration by the Hearing Officer.

POSITIONS OF THE PARTIES

In their *Abeyance Motion* and in oral argument, the Intervening Cooperatives assert that this docket should be stayed pending a resolution of Frontier's *Petition for Preemption* currently before the FCC. They contend that the FCC *Petition for Preemption* and the *Petition to Amend CCN* filed in this docket present substantially similar issues and request the same relief: "preemption of state law pursuant to [47 U.S.C.] §253(a)."⁹ The Intervening Cooperatives assert that it is within the discretion of the TRA to suspend this docket, and that the TRA should suspend to avoid rendering a decision that may potentially conflict with a ruling by the FCC on the same or substantially similar issues involving the same or substantially the same parties.¹⁰

Additionally, the Intervening Cooperatives contend that it is the customary practice of the Authority to hold matters in abeyance when there is an open docket pending before it or another tribunal with concurrent jurisdiction.¹¹ They further contend that proceeding with this docket while the FCC docket is pending does not serve the public interest, is inefficient, and is a misuse of Authority resources.¹² The Intervening Cooperatives further assert that holding this docket in

⁹ *Abeyance Motion*, p. 4 (December 3, 2007); 47 U.S.C. §253(a) states, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

¹⁰ *Id.* at 5; See also, Transcript of Status Conference, p. 15, 24 (December 5, 2007).

¹¹ *Abeyance Motion*, p. 5-6 (December 3, 2007); See also, Transcript of Status Conference, p. 23-24 (December 5, 2007).

¹² Transcript of Status Conference, p. 15 (December 5, 2007).

abeyance would not thwart the goal of the TRA and the State of Tennessee to foster competition in the area of telecommunications.

Finally, the Intervening Cooperatives assert that Frontier voluntarily decided to file its *Petition for Preemption* with the FCC following the Authority's decision in Docket No. 04-00379, despite a variety of alternative options, such as petitioning the Authority for reconsideration of its decision, appealing the decision to state court, or petitioning the TRA to amend its CCN as has been done in this docket.¹³ The Intervening Cooperatives argue that it would be unjust to allow Frontier to pursue two identical actions simultaneously, and thereby, avoid the consequences of its decisions in this matter.¹⁴ "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."¹⁵

While Ben Lomand has not filed a written response to the Intervening Cooperatives' *Abeyance Motion*, and is not required under Authority Rules to file such a response, it did present its position through oral argument during the Status Conference on December 5, 2007. In general, Ben Lomand supports the *Abeyance Motion*, and asserts that simultaneous proceedings at the TRA and the FCC on the same action are unnecessary and may result in inconsistent results.¹⁶ Ben Lomand asserts that the FCC action will direct what the TRA can do, and thus, the proper course of action is to wait for the FCC to issue its ruling on the *Petition for Preemption* before moving forward in the current docket.¹⁷

Additionally, Ben Lomand contends that the TRA would not be taking a position inconsistent with its prior actions in Docket No. 04-00379 or statements made in its *Opposition to*

¹³ *Id.*

¹⁴ *Id.* at 25.

¹⁵ *Abeyance Motion*, p. 6 (December 3, 2007).

¹⁶ Transcript of Status Conference, p.16 (December 5, 2007).

¹⁷ *Id.* at 16-17.

Petition for Preemption were it to hold this docket in abeyance pending the resolution of the *Petition for Preemption* by the FCC.¹⁸ Ben Lomand asserts that while the TRA may have directed Frontier to file a petition to amend its CCN, it did not state that such a petition should be filed while another similar docket is pending at the FCC.¹⁹ Nevertheless, although no specific citations to caselaw or TRA dockets are mentioned, Ben Lomand contends that a failure to stay these proceedings while another action is pending would be inconsistent with TRA precedent.²⁰

In its *Response to Abeyance Motion* and in oral argument, Frontier asserts that the *Abeyance Motion* should be denied and its *Petition to Amend CCN* should proceed to resolution before the Authority. While Frontier continues to assert that its CCN should be construed to include the ability to compete within the territory of Ben Lomand, in light of the Authority's decision in Docket No. 04-00379 and comments filed in opposition to Frontier's *Petition for Preemption* with the FCC, Frontier now requests that the Authority approve an amendment of its CCN.²¹ Specifically, Frontier states that the Authority's ruling that Frontier did not have "statewide" authority in Docket No. 04-00379, and the TRA's opposition to Frontier's *Petition for Preemption* citing Frontier's failure to exhaust available remedies before the TRA, precipitated Frontier's request in this docket. Frontier asserts that a decision by the Authority to hold this docket in abeyance would be wholly inconsistent with the positions previously set forth by the TRA.²²

¹⁸ *Id.* at 17, 27.

¹⁹ *Id.* at 27.

²⁰ *Id.* at 26-27.

²¹ *Response to Abeyance Motion*, p. 1-2 (December 5, 2007); see also, Transcript of Status Conference, p. 18-20 (December 5, 2007).

²² *Response to Abeyance Motion*, p. 2 (December 5, 2007); see also, Transcript of Status Conference, p. 20-21 (December 5, 2007).

Frontier acknowledges that the decision whether to hold the docket in abeyance is one that falls squarely within the Authority's discretion.²³ Further, Frontier contends that there is little risk of inconsistent results should this matter proceed to resolution while the FCC docket is pending. Frontier points out that should the decision of the TRA diverge from that of the FCC, the FCC ruling would preempt or control. Therefore, ultimately, there would be no inconsistency.²⁴

Additionally, Frontier contends that granting the *Abeyance Motion* will delay competition to the detriment of consumers, "in direct contravention of the pro-competitive policy adopted by the General Assembly in T.C.A. §65-4-123."²⁵ Frontier argues that litigation relating to its attempts to compete in the territory of Ben Lomand have been ongoing. Further, its *Petition for Preemption* has been pending with the FCC for two years with no indication of when the FCC may act.²⁶ All the while, it is the consumers who are being deprived of the benefits of competition. Frontier asserts that "the agency's overarching concern when we talk about discretion ought to be pursuing competition, facilitating competition, doing whatever can be done in a regulatory environment to promote competition rather than facilitating the kind of delays that are contemplated here [referring to the *Abeyance Motion*]."

FINDINGS AND CONCLUSIONS

The parties agree that the decision whether or not to hold this matter in abeyance is one of discretion. While conceding that the decision to stay the proceedings rests within the discretionary authority of the TRA, the Intervening Cooperatives suggest that declining to stay the proceedings under certain circumstances, such as those presented in this docket, may

²³ Transcript of Status Conference, p. 20 (December 5, 2007).

²⁴ *Id.* at 21.

²⁵ *Response to Abeyance Motion*, p. 2 (December 5, 2007);

²⁶ *Id.* at 2-3 (December 5, 2007); see also, Transcript of Status Conference, p. 21-22 (December 5, 2007).

constitute an abuse of discretion.²⁷ As support, they cite *Wade v. Clower*,²⁸ *Florida Crushed Stone Co. v. Travelers Indem. Co.*,²⁹ *Baker v. Harrison*,³⁰ and *Schwartz v. DeLoach*,³¹ for the premise that a refusal to stay a subsequent state court action when there is a pending federal action involving similar issues and parties may constitute an abuse of discretion. Nevertheless, these cases are from non-Tennessee jurisdictions, involve non-administrative bodies, and are distinguishable on the facts. Thus, the Hearing Officer does not find these decisions authoritative or controlling in this matter.

While the ultimate relief requested by Frontier in its *Petition for Preemption* and in its *Petition to Amend CCN* may overlap, the Hearing Officer does not necessarily find that the issues presented in those petitions to be identical. The *Petition for Preemption* includes a request that the FCC preempt a Tennessee statute, Tenn. Code Ann. § 65-29-102. The *Petition to Amend CCN* requests an amendment to or expansion of Frontier's current CCN to include the ability to compete in the territory of Ben Lomand.

In support of its request to compete in the territory of Ben Lomand, Frontier asserts that Tenn. Code Ann. §65-29-102³² does not provide territorial protection, citing Attorney General Opinion No. 90-83.³³ Notwithstanding this assertion, Frontier further contends that just as the

²⁷ *Abeyance Motion*, p. 5 (December 3, 2007).

²⁸ *Wade v. Clower*, 94 Fla. 817 (1927).

²⁹ *Florida Crushed Stone Co. v. Travelers Indem. Co.*, 632 So. 2d 217 (Fla. Dist. Ct. App. 5th Dist. 1994).

³⁰ *Baker v. Harrison*, 445 S.W.2d 498 (Ark. 1969).

³¹ *Schwartz v. DeLoach*, 453 So.2d 454, 456 (Fla. Dist. Ct. App. 1984) (2-1 decision) (Campbell, J., dissenting).

³² T.C.A. § 65-29-102 provides in relevant part, "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. . ."

³³ Op. Atty. Gen. No. 90-83 stated, "The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission [predecessor to the Tennessee Regulatory Authority], which has jurisdiction under T.C.A. §65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service." 1990 WL 513064 (Tenn.A.G.)

FCC determined Tenn. Code Ann. §65-4-201(d)³⁴ to be unenforceable as an unlawful prohibition to competition,³⁵ any territorial protection that may be statutorily granted to Ben Lomand in Tenn. Code Ann. §65-29-102 is preempted and prohibited by 47 U.S.C. §253(a). Frontier asserts that Tenn. Code Ann. §65-2-102 provides no barrier to its ability to compete in the territory of Ben Lomand. This question is a matter of first impression before the Authority.

When there is concurrent jurisdiction between a federal and state court or agency, leading action by the federal court is not a foregone conclusion. The Sixth Circuit Court of Appeals has stated that a federal decision-maker must engage in careful consideration of the principles of abstention and issue exhaustion before proceeding,

Before deciding whether federal law preempts state law, federal court must consider carefully whether it should abstain to allow state court to resolve preemption question.³⁶

Federal courts abstain out of deference to paramount interests of another sovereign, and concern is with principles of comity and federalism.³⁷

Courts decline to consider issues not raised before an agency because to do so otherwise would “deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.”³⁸

The appropriate scope of review by the FCC following a decision on the merits by a state administrative agency is an important distinction to be considered in this docket. While the FCC

³⁴ T.C.A. § 65-4-201(d) provides, “Subsection (c) [regarding approval of a CCN to provide services subject to notice and a hearing] is not applicable to areas served by an incumbent local exchange company [ILEC] with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.”

³⁵ See, *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 1999 WL 335803 (F.C.C.), 14 F.C.C. Rcd. 11064 (1999), *pet. for reh'g den.*, 2001 WL 12939 (F.C.C.), 16 F.C.C. Rcd. 1247 (2001) (hereinafter referred to as *Hyperion*).

³⁶ *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 475 (6th Cir. 1997) (*pet. for reh'g den.*).

³⁷ *Id.* at 481 (citing *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996)).

³⁸ *Coalition for Government Procurement v. Federal Prison Industries, Inc.*, 365 F.3d 435, 461 (6th Cir. 2004) (citing *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. (1946)).

preempted Tenn. Code Ann. § 65-4-201(d) and the enforcement of the TRA's order denying a CCN in the *Hyperion* matter, it declined to direct the TRA to grant Hyperion's CCN Application. Instead, the FCC remanded the matter back to the TRA for further consideration. In *Hyperion*, the issue of the enforceability of Tenn. Code Ann. § 65-4-201(d) was appealed to the FCC only after the issue was considered and ruled upon, on the merits, by the Authority.

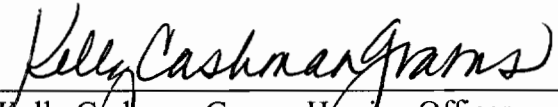
The Authority dismissed Frontier's request for a declaratory ruling in Docket No. 04-00379, never reaching the merits of the issue before it, because Frontier had not followed the proper procedure as mandated by the FCC in the *Hyperion* matter. In its *Opposition to Petition for Preemption*, the TRA asserted that the FCC should not rule on the *Petition for Preemption* because Frontier had failed to exhaust its remedies before the TRA. Specifically, the TRA asserted that Frontier did not have the requisite authority under its current CCN to compete with Ben Lomand, and that Frontier had not sought amendment to or an expansion of its CCN to include such authority. Frontier has seemingly now followed the implication of the TRA by filing its petition for amendment to its CCN in this docket.

Therefore, because Frontier has now filed its petition to expand its CCN as suggested by the TRA in its decision in Docket No. 04-00379 and its *Opposition to Petition for Preemption*, and because the Authority has not yet had the opportunity to consider the merits of Frontier's requested relief, the Hearing Officer finds that the proceedings in this docket should not be held in abeyance. Nevertheless, as a decision by the TRA in this docket may affect or impact the *Petition for Preemption* currently pending before the FCC, the Hearing Officer further finds that before moving ahead with the proceeding in this docket, Frontier must provide proper and adequate notice to the FCC in FCC WC Docket 06-6 of the filing of Frontier's *Petition to Amend CCN* with the TRA and that Frontier has asked the TRA to proceed with this docket. Upon filing

in this docket a copy of such notification to the FCC by Frontier, this docket shall proceed forward with a procedural schedule, unless or until the Authority is advised by the FCC not to proceed or the FCC rules upon the *Petition for Preemption*. In the event and depending upon the nature of such objection or ruling by the FCC, the Hearing Officer may revisit this issue.

IT IS THEREFORE ORDERED THAT:

1. *The Intervening Cooperatives' Motion to Hold Case in Abeyance* is denied.
2. Upon the filing in this docket of a copy of the notice submitted in the Federal Communications Commission docket WC 06-6 of the filing of the *Petition of Frontier Communications of America, Inc to Amend Its Certificate of Convenience and Necessity* and that Frontier Communications of America, Inc. has requested that the Tennessee Regulatory Authority proceed on its petition, this docket shall move forward and the parties shall thereafter have seven business days (excluding weekends and holidays) to submit an agreed proposed procedural schedule for consideration of the Hearing Officer.


Kelly Cashman-Grams, Hearing Officer