

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

IN RE:

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

DOCKET NO: 07-00155

**INITIAL BRIEF OF BEN LOMAND RURAL
TELEPHONE COOPERATIVE, INC.**

Ben Lomand Rural Telephone Cooperative, Inc., (“Ben Lomand”), by and through its undersigned counsel, and in accordance with the procedure set forth in the Hearing Officer’s Order Setting Procedural Schedule of March 7, 2008, respectfully files its initial brief.

I. INTRODUCTION

On or about June 20, 2007, Frontier Communications, Inc. (“Frontier”) filed its petition in this matter seeking to “to modify and/or clarify its Certificate of Public Convenience and Necessity...granted by Order dated June 27, 1996[.]”¹ Frontier’s petition is the result of Frontier having filed a Petition For A Declaratory Ruling on or about October 26, 2004, in Docket No. 04-00379. Ben Lomand and other “intervening cooperatives” were granted permission to intervene and participate therein. Frontier requested a declaratory ruling that its “statewide” Certificate of Convenience and Necessity (“CCN”) authorized it to provide competing telephone service in areas served by Ben Lomand. After briefs and oral arguments, the Tennessee Regulatory Authority (“Authority”) dismissed Frontier’s petition on the ground that it failed to state a claim upon which relief could be granted. The Authority also determined that when Frontier originally requested authority to provide competing telecommunications services it only

¹ Petition, page 1.

sought, and was only granted, authority to provide statewide services as permitted under then-existing law. Therefore, Frontier did not request, and was not granted, authority to enter into the territories of small, rural telephone carriers or cooperatives.²

On or about December 14, 2005, Frontier filed with the Federal Communications Commission (WC Docket No. 06-6) seeking relief from the Authority's Order of March 8, 2006. The Authority opposed Frontier's position on the basis that, by failing to have its CCN amended, Frontier has failed to exhaust its administrative remedies. As a result of such opposition, and while the FCC matter is still pending, Frontier filed its petition in this docket.

Ben Lomand filed a Petition To Intervene and such petition was granted by the Authority on December 6, 2007. Other cooperatives filed to intervene and their petitions were also granted. On March 26, 2008, such intervenors filed a Notice of Withdrawal. On February 22, 2008, Comcast Phone of Tennessee, LLC ("Comcast"), filed a Petition To Intervene which was granted March 6, 2008.

II. ARGUMENT

A. Tenn. Code Ann. § 65-29-102 prohibits Frontier from offering service in Ben Lomand's territory.

T.C.A. § 65-29-102 prohibits any telecommunications service provider other than the rural telephone cooperative serving its territory, from providing service in such cooperative's territory.

The statute provides for the establishment of telephone cooperatives in areas where "there shall be no duplication of service where reasonably adequate telephone service is available".

² Order Denying Petition of Frontier Communications, Inc., In re: Petition of Frontier Communications, Inc. for a

T.C.A. § 65-29-102 is a valid and enforceable statute. No court of law nor the Federal Communications Commission has preempted this statute. Any statute, or even a portion of a statute, which has not been preempted by the Federal Communications Commission or court of law is valid, according to the Attorney General. See attached Attorney General Opinion 01-036 in which the Attorney General opines that, even though the FCC preempted subsection (c) of T.C.A. § 65-4-201, the other subsections are valid and enforceable.

Attorney General Opinion No. 90-83, cited in Frontier's petition, does not, in any manner whatsoever, invalidate T.C.A. § 65-29-102. In such Opinion, the question was asked if a telephone cooperative, upon receiving a franchise from a municipality, could offer telephone service in such municipality that already had telephone service. The Attorney General opined that the municipality alone could not grant authority to the telephone cooperative. In such Opinion, the Attorney General opines that the Authority has jurisdiction to determine if "reasonably adequate service is available" in order for a telephone cooperative to offer service in a municipality which already has telephone service. That is a far different issue from the one in this matter. Nowhere in such Opinion is there any statement or finding that other telecommunications service providers may provide service in the territory of a rural telephone cooperative.

B. T.C.A. § 65-29-102 is not preempted by 47 U.S.C. § 253(a).

T.C.A. § 65-29-102 is a valid and enforceable statute. No court of law nor the FCC has found such statute invalid or preempted by 47 U.S.C. § 253(a), as alleged by Frontier in its petition. As stated above, unless the statute is preempted by a court of law or the FCC, it is valid and enforceable, even to the extent that if one subsection of a statute is preempted, the remaining subsections are valid and enforceable. (Op. No. 01-036, at 4.)

C. The Authority cannot preempt a law enacted by the General Assembly.

The Authority has the power to administer the laws of the State of Tennessee, not declare them invalid under federal law, state law or the Tennessee and United States Constitutions. It is the duty of the Authority to enforce state laws, not throw them out the window. Only a court of law or the FCC can preempt T.C.A. § 65-29-102. Preemption must be considered by the FCC in the process of a hearing, with notice and opportunity for public comment. 47 U.S.C. § 253(d).

D. The Authority has limited jurisdiction over rural telephone cooperatives and thus cannot permit Frontier to offer services in Ben Lomand's territory.

The Authority cannot permit Frontier to enter Ben Lomand's territory because the Authority's only jurisdiction over rural telephone cooperatives such as Ben Lomand is limited. Ben Lomand, as a rural telephone cooperative, is specifically excluded from the jurisdiction of the Authority under T.C.A. § 65-4-101(6)(E). Resolving territorial and boundary disputes and approving sales and purchases of telephone properties are the only matters in which the Authority has jurisdiction regarding cooperatives. T.C.A. § 65-29-130(a). This Code section's purpose is reiterated in the very Attorney General's Opinion cited by Frontier. In Opinion No. 90-83, the Attorney General opined that the Authority's jurisdiction over a telephone cooperative was limited to determining whether service in a municipality had "reasonably adequate telephone service available" which, if it did not, a telephone cooperative could obtain a franchise to offer service in that municipality. The Attorney General further opined that the statute limited the Authority's jurisdiction to resolving territorial disputes between a telephone cooperative and any other entity rendering telephone service.

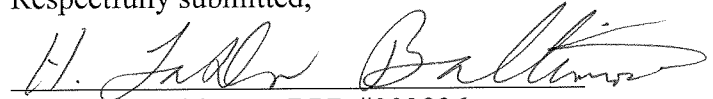
Nowhere in T.C.A. § 65-29-130, not elsewhere in Ch. 29 nor in Title 65, does the General Assembly grant the Authority additional jurisdiction over telephone cooperatives. If the General Assembly had wanted to confer any additional jurisdiction, it would have said so, especially with the re-write of the Tennessee Telecommunications Law with the 1995 Telecommunications Act, Ch. 408 of the Public Acts of 1995. In fact, the General Assembly did just the opposite: it continued the exemption of telephone cooperatives from the jurisdiction of the TRA except as set forth in T.C.A. § 65-29-130.

III. CONCLUSION

In summary, a valid and enforceable state statute prohibits Frontier from offering services in Ben Lomand's territory; the Authority cannot invalidate a law enacted by the General Assembly; and the Authority does not have jurisdiction over cooperatives to permit Frontier to offer services in Ben Lomand's territory.

For the foregoing reasons, the Tennessee Regulatory Authority should deny Frontier's petition in its entirety.

Respectfully submitted,



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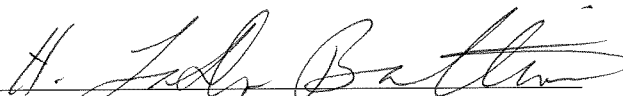
Certificate of Service

The undersigned hereby certifies that on this the 27th day of March, 2008, a true and correct copy of the foregoing has been forwarded via first class U.S. Mail, hand delivery, overnight delivery, or electronic transmission to the following.

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STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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NASHVILLE, TENNESSEE 37243

March 19, 2001

Opinion No. 01-036

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

QUESTION

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

OPINION

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

ANALYSIS

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

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

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

CONCURRENT FEDERAL AND STATE JURISDICTION.

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

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

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

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

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

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and
(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

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

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

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

FCC POWER TO PREEMPT PROVISIONS OF STATE TELECOMMUNICATIONS ACTS.

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

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

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

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

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

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

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

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

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

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

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Requested by:

The Honorable Bobby G. Wood
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The Honorable David Fowler
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*1 Office of the Attorney General
 State of Tennessee

Opinion No 90-83
 August 27, 1990

MUNICIPAL CORPORATIONS Municipal Powers

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

PUBLIC SERVICE COMMISSION

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

PUBLIC UTILITIES AND CARRIERS: Regulation of Public Utilities.

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

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

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

*2 TELEPHONE

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

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

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

QUESTIONS

(1) Whether a municipality may permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company?

(2) Whether a telephone cooperative organized under T.C.A. § 65-29-101 et seq can conduct business in a municipality which already possesses existing telephone service administered by a telephone company?

OPINIONS

(1) No, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107.

(2) A telephone cooperative is prohibited by T.C.A. § 65-29-102 from providing service in an area where "reasonably adequate telephone service is available " The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T.C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service.

ANALYSIS

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

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

Part 2 of Chapter 4, codified at T.C A § 65-4-201 et seq, provides that no public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Tennessee Public Service Commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment and operation T C.A. § 65-4-207 however provides that the "provisions of this part shall not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county " (Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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