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March 27, 2008

VIA HAND DELIVERY

Honorable Eddie Roberson, Chairman
c/o Sharla Dillon, Dockets and Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 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 *Brief of Comcast Phone of Tennessee, LLC* in the above-captioned matter. We have also enclosed one (1) copy of the document to be stamp filed for our records. If you have any questions or need additional information, please feel free to contact me. I am

Very truly yours,

Charles B. Welch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

BRIEF OF COMCAST PHONE OF TENNESSEE, LLC

The Intervenor, Comcast Phone of Tennessee, LLC ("Comcast"), by and through undersigned counsel, submits to the Tennessee Regulatory Authority (the "Authority" or "TRA") this Brief in support of the *Petition of Frontier Communications of America, Inc.* ("Frontier") *to Amend its Certificate of Convenience and Necessity* ("CCN"). It is the position of Comcast that Frontier's Petition to Amend its Certificate of Convenience and Necessity should be granted based upon Frontier's compliance with the requirements of Tenn. Code Ann. § 65-4-201, particularly as interpreted in light of the superseding provisions of 47 U.S.C. § 253(a) and the Supremacy Clause of the United States Constitution, U.S.C.S. Const. Art. VI, CL 2. Further, Comcast, an authorized provider of telephone services in Tennessee, submits it is similarly situated with Frontier in that it is willing and capable of providing telephone service to areas currently served by cooperatively owned telephone companies.

I. FACTS AND PROCEDURAL HISTORY

On June 27, 1996, the Tennessee Public Service Commission granted Frontier a statewide CCN as a competing telecommunications provider (Docket No. 96-00779). On October 11, 2004, the Authority approved an interconnection agreement (the "Interconnection Agreement")

between Frontier and Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand"). Due to a disagreement concerning the scope of the Interconnection Agreement, Ben Lomand has refused to provide interconnection in the absence of additional regulatory or judicial action requiring enforcement of its terms.

By Petition dated October 26, 2004, Frontier sought from the Authority a declaratory ruling to allow it to provide service in Ben Lomand's cooperative service area (Docket No. 04-00379) in accordance with the terms of the Interconnection Agreement and its CCN. In its March 8, 2006 Order, the Authority ruled Frontier's CCN does not include territory served by Ben Lomand until and unless Frontier amends its CCN to include such territory (Docket No. 04-00379). At issue was the fact Frontier's original statewide CCN did not include rural areas and/or areas already served by a cooperative. As a result, Frontier's October 26, 2004 petition was denied as Ben Lomand was already serving the area sought to be interconnected by Frontier. In response, and in anticipation of filing an amended CCN application with the TRA, Frontier filed a *Petition for Preemption and Declaratory Ruling Regarding Tennessee Code Annotated § 65-29-102 and Related Decisions of the Tennessee Regulatory Authority* ("FCC Petition") with the Federal Communication Commission ("FCC"). The FCC Petition relied primarily upon 47 U.S.C. § 253(a) and other related FCC decisions to preempt Tenn. Code Ann. § 65-29-102, which on its face disallows competition for telephone services in areas being served by a telephone cooperative.

On June 20, 2007, Frontier filed its *Petition of Frontier Communications of America, Inc to Amend Its Certificate of Convenience and Necessity* ("Petition") with the TRA requesting amendment to its existing authority "to provide telecommunications service… in areas served by a telephone cooperative, including territory served by Ben Lomand Rural Telephone

Cooperative, Inc." (Docket No. 07-00155). On July 11, 2007, Ben Lomand Filed its *Petition to Intervene* pursuant to Tenn. Code Ann. §4-5-310.

On November 29, 2007, the Authority received a petition for leave to intervene from multiple cooperative organizations (collectively the "Intervening Cooperatives"), and on December 3, 2007, the Intervening Cooperatives filed their *Motion to Hold Case in Abeyance*, citing the outstanding FCC Petition for preemption filed by Frontier. On December 5, 2007, Frontier filed its *Response in Opposition to the Motion to Hold Case in Abeyance Filed by the Intervenors*. On December 20, 2007, the Authority issued its *Order Declining to Hold Case in Abeyance Subject to Condition Precedent*, holding the Condition Precedent, an approval or denial of Frontier's amended CCN petition, was the controlling factor.

The FCC Petition has yet to be ruled upon. Presumably, at such time as the TRA rules upon Frontier's amended CCN petition, Frontier's state-level regulatory remedies will have been exhausted. If Frontier's amended CCN petition is denied based upon Tenn. Code Ann. § 65-29-102, the FCC will be in a position to rule upon the FCC Petition seeking to preempt Tenn. Code Ann. § 65-29-102.

II. LAW AND ARGUMENT

A. Frontier, In Its Petition to Amend Its CCN, Has Met the Requirements of Tenn. Code Ann. § 65-4-201(c), and Should Be Granted a Statewide Certificate of Convenience and Necessity.

Tenn. Code Ann. § 65-4-201(c) requires that in order to grant a CCN, the Authority must find (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." Tenn. Code Ann. § 65-4-201(c) (2005).

The Authority granted Frontier its current CCN based in part upon a finding that Frontier had demonstrated an ability and willingness to comply with all rules, regulations and guidelines governing the provision of telephone services as a competing local exchange carrier ("CLEC") in Tennessee. Additionally, the Authority found Frontier possessed the requisite managerial and technical qualifications to provide telecommunications services in Tennessee, including services as a CLEC. Frontier has cited to its continued compliance with the requirements set forth in § 65-4-201(c) since being granted the initial CCN.[1] As Frontier has successfully maintained compliance with the requirements of Tenn. Code Ann. § 65-4-201(c), its Petition to amend filed in this proceeding would ordinarily be granted as a matter of course but for the restrictions of § 65-29-102.

B. Tenn. Code Ann. § 65-29-102 Is Preempted by 47 U.S.C. § 253(a) in This Matter, as Having the Effect of Prohibiting the Ability of Frontier to Provide Intrastate Telecommunications Services.

The preemption of state law by contradictory federal law is well-settled.

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, Jones v. Rath Packing Co., 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, e. g., Free v. Bland, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Hines v. Davidowitz, 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141 (1982); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

[1] *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity*, TRA Docket No. 07-00155, p. 8 (June 20, 2007).

La. Public Serv. Com v. FCC, 476 U.S. 355, 368-369 (U.S. 1986).

Although, the TRA has not been conferred jurisdictional authority to make a determination to invalidate a state statute as being unconstitutional on its face, it is abundantly clear it has the authority to consider the constitutionality of a state statute in its application to a utility it regulates. The TRA has been granted the power to issue declaratory orders regarding contradictory state and federal law when applied to a specific case. "The Authority may grant petitions to determine questions as to the constitutional application of a statute to specific circumstances, or as to the constitutionality of a rule promulgated, or order issued, by the Authority." *Tenn. Comp. R. & Regs. R. 1220-1-2-.05 (2)* (2008). Comcast is not requesting the TRA rule Tenn. Code Ann. § 65-29-102 is unconstitutional on its face; rather, Comcast asserts a waiver of the application of § 65-29-102 is appropriate in these specific circumstances as it is inconsistent with and contradictory to federal law, invoking the Supremacy Clause of Article VI of the U.S. Constitution. In support of this request for the TRA to exercise its authority to waive such statutory application, the Tennessee Supreme Court has held:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA]... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn. Code Ann. § 65-4-106. The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n, 844 S.W.2d 151, 159 (Tenn.App.1992).

Bellsouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506, 512 (Tenn.2002).

The TRA may exercise jurisdiction over telephone cooperatives such as Ben Lomand for "(2) the hearing and determining of disputes between telephone cooperatives and any other type

of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes..." Tenn. Code Ann. § 65-29-130(a)(2). The current dispute involves one entity seeking to provide service within another entity's boundary without regard to a dispute about the boundary itself. Similarly, the Attorney General for the State of Tennessee has opined that if a telephone cooperative wants to provide service within an area served by a municipality, the TRA (then the "Public Service Commission") has jurisdiction to decide the dispute pursuant to Tenn. Code Ann. § 65-29-130. *1990 WL 513064 (Tenn.A.G.).* This same logic necessarily applies to the converse situation where a telecommunications provider attempts to provide service in an area served by a cooperative.

Tenn. Code Ann. § 65-29-102 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." Per this statute, if reasonably adequate telephone services are provided to an area by a telephone cooperative, no competition with that cooperative is allowed in that served area by any other entity. The practical effect of the statute is to exclusively authorize a telephone service monopoly so long as that monopoly is held by a telephone cooperative providing reasonably adequate services.

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 interstate or intrastate telecommunications service." This federal code section is the legal authority relied upon by the FCC in its decision, 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, FCC Docket No. 99-100, ("Hyperion"), *Memorandum Opinion and Order*, 14 FCC Rcd. 11064 (1999) ("Hyperion Order"). In Hyperion, the FCC reviewed the denial of a CCN application filed by Hyperion that would allow entry into a rural area already served by another local exchange carrier ("LEC"). The TRA's denial of Hyperion's CCN was based upon the language of Tenn. Code Ann. § 65-4-201(d), which states,

> "Subsection (c) [providing the method for a CLEC to obtain a CCN in an area already serviced by an incumbent local exchange carrier ("ILEC")] 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."

Tenn. Code Ann. § 65-4-201(d).

The ILEC in Hyperion, Tennessee Telephone Company ("Tennessee Telephone") provided telephone services to an area with fewer than 100,000 total access lines – the very type of scenario contemplated in the statute. While the TRA gave consideration to 47 U.S.C. § 253(a), which would preempt the anti-competitive language of Tenn. Code Ann. § 65-4-201(d), the TRA cited to 47 U.S.C. § 253(b), which states, "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." It was opined by the TRA that this subsection (b) provided the reservation of state regulatory authority necessary to deny Hyperion's CCN despite the language of subsection (a).

In its petition for preemption of Tenn. Code Ann. § 65-4-201(d) before the FCC, Hyperion argued the language in 47 U.S.C. § 253(b) requiring a "competitively neutral basis" for denial of an otherwise sufficient CCN petition precluded the denial of their CCN petition, considering the TRA averred that it provided disparate treatment for ILECs and CLECs. The neutrality, the TRA claimed, arose from the equal treatment of ILECs and CLECs within their separate classifications. "TDS [Telecommunications Corporation] contends that potential competing LECs are not subject to the same terms and conditions as incumbent LECs and that the Tennessee Authority may therefore treat them differently and still maintain competitive neutrality." Hyperion, 14 FCC Rcd. at 11069. That position was roundly rejected by the FCC.

> "We conclude that, in denying Hyperion the right to provide competing local exchange service in an area served by Tennessee Telephone, Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's Denial Order violate section 253(a). We further conclude that, **because these state and local legal requirements shield the incumbent LEC from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b).**"

Hyperion, at 11070. (Emphasis added).

The FCC further strengthened its ruling by holding, "Indeed, in various similar contexts the Commission has consistently construed the term 'competitively neutral' as requiring competitive neutrality among the entire universe of participants and potential participants in a market." Hyperion, at 11072. "TDS...argues that the principle of 'competitive neutrality' does not preclude carriers in dissimilar situations from being treated somewhat differently. Providing for 'somewhat' different treatment, however, is an entirely distinct proposition from barring competitive entry altogether." Id. "We find here that because Tenn. Code. Ann. § 65-4-201(d) favors incumbent LECs with fewer than 100,000 access lines by preserving their monopoly status, it raises an insurmountable barrier against potential new entrants in their service areas and

therefore is not competitively neutral." Id. at 11072. The FCC, with this language, has made it clear that for a state statute or regulation to effectively prohibit competition in the telephone service industry is squarely afoul of the prohibitions of 47 U.S.C. § 253.

Turning to the statutory provisions relied upon in the instant case, Ben Lomand's argument is based upon the language of Tenn. Code Ann. § 65-29-102, which allows cooperatives to provide telephone service "provided, that there shall be no duplication of service where reasonably adequate telephone service is available." The purpose of this statute is to allow one and only one provider of reasonably adequate telephone service to an area served by a cooperative – no means for competitive entry into that service area by any other entity of any kind is permitted. While the language of Tenn. Code Ann. § 65-4-201(d) provides at least some opportunity, albeit in a way that has been deemed not competitively neutral, Ben Lomand is asking the TRA to rely upon a statute that completely bars competition of any kind.

The FCC's decision in Hyperion did not specifically address Tenn. Code Ann. § 65-29-102 since the ILEC in that matter was a public utility rather than a cooperative. The FCC did not, however, draw a distinction between the types of entities operating as incumbent telephone providers. Rather, the FCC chose to expand and clarify its ruling in Hyperion to address just such a situation with which this Authority is faced in the instant case.

> "Hyperion brings to our attention that states other than Tennessee have legal requirements that appear to be similar to Tennessee's Section 65-4-201(d), and maintains that these requirements may also restrict competition in a way we have found unlawful here and in the Silver Star and Texas Preemption Orders. Hyperion urges us to clarify generally the scope of section 253 as it might apply in such cases. While the requirements of other states are not before us at this time, **we would expect to apply a similar analysis to other state statutes. We encourage these and any other states, as well as their respective regulatory agencies, to review any similar statutes and regulations, and to repeal or otherwise nullify any that in their judgment violate section 253 as applied by this commission.**"

Hyperion, at 11076. (Emphasis added).

The Supremacy Clause of the United States Constitution states that the laws of the United States "shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.C.S. Const. Art. VI, CL 2.

With its order in Hyperion, the FCC made it very clear that Tennessee or any other state which maintains statutes that create even an effective barrier to competitive entry into a telephone service market need not attempt to enforce those statutes, as a petition to the FCC for preemption under section 253 would be granted consistent with Hyperion. The statute relied upon by Ben Lomand goes well beyond an effective barrier to competition – it is a complete bar to market entry and any competition whatsoever. Any decision by this Authority that denies the amended CCN of Frontier based upon the language of Tenn. Code Ann. § 65-29-102 will most certainly be preempted by the FCC. As such, the only decision by the TRA that may be upheld by the FCC is one that not only ignores the language of Tenn. Code Ann. § 65-29-102, but also one that creates a competitively neutral environment between Ben Lomand and Frontier.

CONCLUSION

Federal law shall preempt state law when the two are at odds, under the Supremacy Clause of the United States Constitution. Frontier has made an application for an amended CCN before this Authority, and such application has been challenged by an incumbent cooperative local exchange carrier, Ben Lomand, which is relying upon a state statute prohibiting competition with telephone cooperatives. However, federal statutory code strictly prohibits the practice of barring competition in the telephone service industry, independent of the type of entity seeking entry or seeking to deny it. The restrictions of Tenn. Code Ann. § 65-29-102 are

in stark opposition to federal law and, therefore, will yield to the same should a review by the FCC become necessary. Frontier has otherwise shown that it is in compliance with all the requirements necessary to be granted their amended CCN petition. For the foregoing reasons, Frontier's Application for an Amended CCN should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Brief has been sent by United States mail, postage pre-paid, to the following parties of record:

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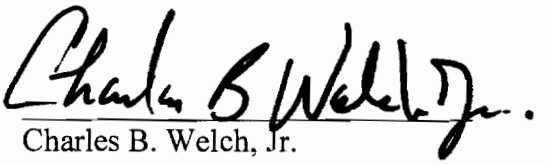
This the 27th day of March, 2008.



Charles B. Welch, Jr.