

Washington, DC

Guilford F. Thornton, Jr.

Direct (615) 259-1492

E-Fax (615) 687-1507

gif.thornton@arlaw.com

March 27, 2008

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

Re: Petition of Frontier Communications of America, Inc. to Amend its

Certificate of Convenience and Necessity

File #: 07-00155

Dear Chairman Roberson,

On behalf of Frontier Communications of America, Inc. ("Frontier"), I am enclosing with this letter an original and thirteen copies of Frontier's initial brief in the above referenced matter. Copies are being distributed to counsel for the parties of record.

Should have any questions or require anything further at this time please do not hesitate to contact me.

Sincerely,

Guilford F. Thorhton, Jr

cc: Gregg Sayre

BEFORE THE TENNESSEE REGULATORY AUTHORITY NASHVILLE, TENNESSEE

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

FRONTIER COMMUNICATIONS OF AMERICA, INC.'S INITIAL BRIEF

Frontier Communications of America, Inc. ("Frontier") respectfully submits this brief in support of the relief sought in its petition to amend its Certificate of Convenience and Necessity ("CCN") granted by Order dated June 27, 1996 (Docket No. 96-00779). In this proceeding Frontier seeks authority to provide services in the territory currently served by Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand") and other territories served by rural telephone cooperatives in Tennessee.

In a previous but related proceeding, the Tennessee Regulatory Authority (the "TRA" or the "Authority") ruled that Frontier's existing CCN does not allow Frontier to compete in the territory currently served by Ben Lomand or any other rural telephone cooperative. TRA Order dated March 8, 2006 (Docket No. 04-00379). In that proceeding, the TRA suggested that Frontier amend its CCN to include such territory. *Id.*, fn. 23 ("Director Tate pointed out . . . "I'm not in any way prejudging that issue and whether or not it might come before us in the future and that – there are other appropriate procedural avenues other than the ones that are before us today.") In so doing, the TRA provided Frontier of at least two examples of cases where a CLEC

had sought to amend its CCN to include territory that had been previously excluded from its existing CCN. *Id.*, pp. 10-11 ("*Level Three Communications LLC*, Docket No. 98-00610 and *XO Tennessee Inc.*, Docket No. 03-00567)

In accordance with the TRA's instructions, on June 20, 2007 Frontier filed the petition in this matter to have its CCN amended to allow it to provide telecommunications services on a statewide basis in areas served by telephone cooperatives, including territory served by Ben Lomand. Ben Lomand and the intervening telephone cooperatives (the "Intervening Coops") have opposed this petition based on their assertions that a CLEC is prohibited from competing in the territory of a telephone cooperative.

Neither Ben Lomand nor the Intervening Coops are challenging Frontier's qualifications. Thus, it appears that the sole issue presented before the TRA is whether Frontier can compete in the territory of telephone cooperatives organized under T.C.A. § 65-29-101 *et seq.*, such as Ben Lomand and the Intervening Coops.

BACKGROUND AND SUMMARY OF ARGUMENT

By Order, dated June 27, 1996, the TRA granted Frontier a statewide CCN as a CLEC (Docket No. 96-00779).

Ben Lomand is a telephone cooperative as defined by T.C.A. § 65-29-102. Ben Lomand serves customers in White, Warren, Van Buren, Grundy, and portions of Franklin, Coffee and Bedford counties in Tennessee.

Ben Lomand also owns Ben Lomand Communications, Inc, ("BLC"), a CLEC, which aggressively competes with Frontier' ILEC affiliate Citizens Telecommunications Company of Tennessee, LLC ("Citizens") in McMinnville and Sparta, Tennessee. Ben Lomand also owns

50% of Volunteer First Services, Inc. ("VFS"), which was certificated by the Authority to operate as a CLEC in Crossville, Tennessee, another market served by Citizens. (Docket No. 03-0067)

By Order dated November 24, 2004 (Docket No. 04-00233), the TRA approved an interconnection agreement (the "Interconnection Agreement") between Frontier and Ben Lomand, dated July 6, 2004 (with August 2, 2004 cover letter), which provides as follows:¹

13.1 This Agreement will become effective upon:

- (a) issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies; and
 - (b) approval of this Agreement by the Commission.

The TRA stated "The agreement is in the public interest as it provides customers with alternative sources of telecommunications services within the service area of [Ben Lomand]." TRA Order dated November 24, 2004 (Docket No. 04-00233).

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Telecommunications Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* (Docket No. 04-00379)(the "Dec. Action"). The Dec Action was opposed by Ben Lomand and the Intervening Coops. In its ruling dated March 8, 2006, the TRA ruled, "the TRA has jurisdiction . . to review and approve requests for CCNs and the possibility that such approval may conflict with cooperatives' territory does not necessarily remove the matter from TRA jurisdiction." TRA Order dated

¹ Upon information and belief, none of the Intervening Coops have entered into interconnection agreements with CLEC' and then refused to allow them to compete in their territories. Likewise, none have set up wholly-owned CLEC's to compete outside their territories.

March 8, 2006, p. 9 (Docket No. 04-00379). The TRA also ruled that Frontiers' CCN did not allow it to provide services in areas served by telephone cooperatives, including Ben Lomand, and that, if Frontier wants to provide services in those areas, it should file a petition to amend its CCN. *Id.*, p. 11, fn. 23.

Frontier has also filed an action with the FCC (*Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling,* FCC Docket No. 06-6) seeking a declaration that its CCN allows it to compete on a truly state wide basis, including territories served by Ben Lomand and other telephone cooperatives. By its Order dated December 20, 2007, the Hearing Officer allowed this action to proceed despite motions by Ben Lomand and the Intervening Coops to stay this proceeding. Order dated December 20, 2007.²

Notwithstanding Ben Lomand's willingness to enter into the Interconnection Agreement, citing T.C.A. § 65-29-102, Ben Lomand remains steadfast that Frontier cannot compete within its territory, and it clearly does not want such competition.³ The Intervening Coops join Ben Lomand in seeking to preserve their self defined monopoly status within their own territories. However, notwithstanding the arguments of Ben Lomand and the Intervening Coops: (a) the TRA has jurisdiction to decide this dispute; (b) T.C.A. § 65-29-102 does not preclude Frontier from competing in Ben Lomand's territory, and (c) any territorial protection granted by state law is preempted by 47 U.S.C. 253(a).

² This Order also provides a fairly detailed procedural history of the related proceedings and procedural history of this matter.

³ Although Ben Lomand seeks to repel competition in its territory, it has formed a wholly-owned subsidiary, Ben Lomand Communications, Inc., which competes with Frontier's ILEC affiliate Citizens Telecommunications Company of Tennessee, LLC in McMinnville and Sparta. As is stated below, pursuant to T.C.A. § 65-29-102, a telephone cooperative such as Ben Lomand would otherwise be prohibited from entering the areas served by those exchanges absent a showing that "reasonably adequate" phone service was unavailable.

LEGAL ANALYSIS

T.C.A. 65-4-123 sets forth Tennessee General Assembly's legislative intent that the "policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets..." (emphasis added). That is exactly the relief that Frontier seeks, namely the ability to compete in all telecommunications service markets.

Consistent with T.C.A. § 65-4-123, the TRA has already ruled "The [interconnection] agreement [between Frontier and Ben Lomand] is in the public interest as it provides customers with alternative sources of telecommunications services within the service area of [Ben Lomand]." Order dated November 24, 2004 (Docket No. 04-00233).

Despite the clear statements of both the State legislature and the TRA cited above, Ben Lomand and the Intervening Coops seek to preserve their self proclaimed monopoly status. However, as is set forth below, not only is their position contrary to a strong policy favoring competition, but there is no Tennessee law or statute that gives them territorial protection, and any such protection is preempted by federal law.

I. The TRA Has Jurisdiction Over Ben Lomand And The Other Telephone Cooperatives.

There are at least four bases for jurisdiction for this matter.

First, in its prior docket, in which Ben Lomand and the Intervening Coops were parties, the TRA ruled that Frontier should seek to amend its CCN in order to obtain permission to provide services in territories served by telephone cooperatives. (Docket No. 04-00379, Order, March 8, 2006). Neither Ben Lomand nor the Intervening Coops took issue with that ruling.

Second, the TRA has express jurisdiction to grant and amend CCNs of CLECs in Tennessee. *See* Chapter 1220-4.8 of the TRA Rules and Regulations. The TRA ruled in Docket 04-00379 that the TRA has authority "to review and approve requests for CCNs and the possibility that such approval may conflict with cooperatives' territory does not necessarily remove the matter from TRA jurisdiction." Order dated March 8, 2006 (Docket No. 04-00379).

Third, Ben Lomand and the other Intervening Coops have voluntarily appeared in this proceeding in order to oppose Frontier's request.

Fourth, T.C.A. § 65-29-130 provides that 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; ..." T.C.A. § 65-29-130(a)(2). Contrary to the arguments of Ben Lomand, this portion of T.C.A. § 65-29-130(a) does not employ the word "boundary" but gives the TRA the jurisdiction to adjudicate "territorial disputes."

In this regard, 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 T.C.A. § 65-29-130. *See* Op.Atty.Gen. No. 90-83, Aug. 27, 1990 (copy attached as <u>Exhibit A</u>). This case presents the same form of territorial dispute, namely one entity seeking to provide service within another entity's boundary without regard to a dispute about the boundary itself.

In this case, Frontier wants to provide services in Ben Lomand's territory. This will provide the customers in that territory with competitive service offerings. However, Ben

Lomand and the Intervening Coops contend that Frontier cannot enter the territory of a telephone cooperative.

II. T.C.A. § 65-29-102 Does Not Protect Ben Lomand's Territory From Competition.

Ben Lomand and the Invervening Coops have attempted to argue that they are protected by T.C.A. § 65-29-102, which states: "Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; provided, that there shall be no duplication of service where reasonably adequate telephone service is available." T.C.A. § 65-29-102. However, this statute has been construed by the Tennessee Attorney General to prohibit telephone cooperatives from providing service where "reasonably adequate service is available," not as a means for a telephone cooperative to protect its own territory. See Op.Atty.Gen. No. 90-83, Aug. 27, 1990. One court, faced with a similar statute, ruled, "Private telephone companies are free to compete at any time. Telephone cooperatives may compete when no 'reasonably adequate service' is available." Intermountain Telephone and Power Co. v. Department of Public Service Regulation, 201 Mont. 74, 78, 651 P.2d 1015, 1017 (Mont. 1982) (copy attached as Exhibit B). Thus, Frontier is free to compete in the State of Tennessee including territories served by rural telephone cooperatives.

III. T.C.A. § 65-4-201 Does Not Protect Ben Lomand's Territory.

T.C.A. §65-4-201, which protects ILECs with less than 100,000 access lines from encroachment, is not applicable because neither Ben Lomand nor any other telephone cooperative is an ILEC. T.C.A. § 65-4-101(d) defines "incumbent local exchange telephone company" as a "public utility offering and providing basic local exchange telephone service . . . pursuant to tariffs approved by the [TRA] . . ." T.C.A. § 65-4-101(d). A "cooperative organization" is not a "public utility." T.C.A. § 65-4-101(a)(5). Moreover, neither Ben Lomand nor other telephone cooperatives file tariffs with the TRA. Thus, this statute provides no territorial protection to a telephone cooperative such as Ben Lomand.

IV. Even If State Law Precludes Frontier From Providing Service In Ben Lomand's Territory, It Is Preempted By 47 U.S.C. § 253(a).

Even assuming that T.C.A. § 65-29-102 (or § 65-4-201 for that matter) provides Ben Lomand or other telephone cooperatives with the ability to exclude a competing provider from entering its territory, 47 U.S.C. § 253(a) unequivocally states, "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Accordingly, the FCC has ruled that this statute preempts T.C.A. § 65-4-201(d), which was supposed to protect the territory of ILECs with less than 100,000 lines. *In The Matter Of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated* § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, 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) (copies attached as collective <u>Exhibit C</u>). For this same reason, the federal statute should preempt T.C.A. § 65-29-102 as anticompetitive.

Consistent with 47 U.S.C. § 253(a) and the FCC's ruling cited above, Tennessee's legislature has stated that it is the policy of this state "to foster the development of an efficient, technologically advanced, statewide system of telecommunication services by permitting competition in all telecommunications services markets . . " T.C.A. § 65-4-123. In fact, when the TRA approved, the Certificate of Convenience for Ben Lomand's wholly owned subsidiary, BLC, to compete outside Ben Lomand's territory, it held that the "application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State . . . " See TRA Order dated April 28, 1999 (Docket No. 98-00600).

In its March 8, 2006 Order in Docket No. 04-00379, the TRA cited two examples of instances when it granted relief such as that sought in this case. As cited therein, post *Hyperion*, the TRA allowed the amendments of CCNs of Level 3 Communications, LLC (Docket No. 98-00610) and XO Tennessee, Inc. (Docket No. 03-00567). TRA Order dated March 8, 2006, pp. 10-11 (Docket No. 04-00379). Thus, the TRA should grant the relief requested by Frontier consistent with these proceedings.

In this case, Ben Lomand appears to favor competing outside its territory, but contrary to the policies set forth by U.S. Congress, the Tennessee legislature, the FCC and the TRA, it resists competition when it comes knocking on its own door. For these reasons, Frontier is entitled to compete on a statewide basis, including territory served by telephone cooperatives.

CONCLUSION

For the reasons set forth herein, this Court should grant Frontier's Motion to Amend its Certificate of Convenience and Necessity and allow Frontier to compete in any area in Tennessee including territory served by telephone cooperatives.

Respectfully submitted,

Guilford F. Thornton (No. 14508) Charles W. Cook, III (No. 14274)

ADAMS AND REESE LLP 424 Church Street, Suite 2800 Nashville, Tennessee 37219

(615) 259-1450

Attorneys for Frontier Communications of America, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the 8th day of June, 2005.

H. LaDon Baltimore Farrar & Bates, LLP 211 Seventh Avenue, N., Suite 420, Nashville, Tennessee 37219

The Office of the Attorney General for the State of Tennessee Consumer Advocate Division P.O. Box 20207 Nashville, Tennessee 37202

Melvin J. Malone 1200 One Nashville Place 150 Fourth Avenue North Nashville, TN 37219

Charles B. Welch Farris Mathews Brobango & Hellen PLC 618 Church Street, Suite 300 Nashville, Tennessee 37219

Charles W. Cook, III

Westlaw.

Tenn Op Atty Gen No.

Page 1

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

*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 \underline{T} C \underline{A} . § $\underline{65-4-107}$, a telephone cooperative is prohibited by \underline{T} C \underline{A} § $\underline{65-29-130}$ 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 \underline{T} C \underline{A} § $\underline{65-29-130}$ 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 \underline{T} C \underline{A} § $\underline{1-3-103}$, § § $\underline{65-4-104}$, -107, -201 et seq , -207, § § $\underline{65-29-101}$ 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 $\underline{\text{T.C A § 65-4-107}}$; a telephone cooperative is prohibited by R C.A $\underline{\text{§ 65-29-130}}$ 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 $\underline{\text{T.C.A.§ 65-29-130}}$ 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 $\underline{\text{T.C.A.§ 1-3-103}}$, $\underline{\text{§§}}$ $\underline{\text{65-4-104}}$, -107, -201 et seq , -207, $\underline{\text{§§}}$ $\underline{\text{65-29-101}}$ 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 \underline{T} C A. § $\underline{65-4-107}$, a telephone cooperative is prohibited by $\underline{T.C}$ A. § $\underline{65-29-130}$ 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 $\underline{T.C}$ A. § $\underline{65-29-130}$ to establish a telephone

^{© 2005} Thomson/West No Claim to Orig U.S Govt Works

Page 2

Tenn Op Atty. Gen No.
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

٠.

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 \underline{T} C \underline{A} § 65-4-107, a telephone cooperative is prohibited by \underline{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 \underline{T} C \underline{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 \underline{T} C \underline{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 <u>T.C.A. § 65-29-101</u> 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 $T.C\ A\ \S\ 65-4-107$.
- (2) A telephone cooperative is prohibited by \underline{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 \underline{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.

^{© 2005} Thomson/West No Claim to Orig. U.S. Govt Works

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

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 $\underline{\text{T.C A}}$ § 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 $\underline{\text{T.C.A.}}$ § 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 \underline{T} C \underline{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 $\underline{Holston}$ River $\underline{Holston}$ Electric Co. \underline{V} \underline{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

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

Hydro Electric Corporation contended that the approval of the Public Utilities Commission was not necessary, since section 5508 of Code, presently codified as \underline{T} \underline{C} \underline{A} $\underline{\S}$ $\underline{65}$ - $\underline{4}$ - $\underline{207}$, 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 $\underline{\S}$ $\underline{65}$ - $\underline{4}$ - $\underline{207}$, 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 $\underline{T.C.A.}$ § 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 $\underline{T.C.A.}$ § 65-4-107 before the telephone company may operate.

Secondly, a municipality can only allow a telephone cooperative organized under \underline{T} C A § 65-29-101 et seq. (the Telephone Cooperative Act) to conduct business in the municipality if it is determined under \underline{T} C A. § 65-29-102 that "reasonably 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 cooperative

Tenn. Op Atty Gen No Page 5

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

(Cite as: 1990 WL 513064 (Tenn.A.G.))

[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

*5 Charles W Burson

Attorney General and Reporter

John Knox Walkup

Solicitor General

William E Young

Assistant Attorney General

[FN1] Section 13, now codified at \underline{T} C A § 1-3-103, declares, "[1]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)

END OF DOCUMENT

^{© 2005} Thomson/West No Claim to Orig U S. Govt. Works

Westlaw.

651 P 2d 1015 201 Mont 74, 651 P 2d 1015

(Cite as: 201 Mont. 74, 651 P.2d 1015)

Page 1

Supreme Court of Montana INTERMOUNTAIN TELEPHONE AND POWER COMPANY, Petitioner and Appellant,

DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION, Respondent and Respondent No. 81-512.

> Submitted Sept 10, 1982 Decided Oct 7, 1982

Telephone utility petitioned for review of Public Service Commission's order stating that utility was not providing reasonably adequate service. The Thirteenth Judicial District Court, Yellowstone County, Robert Wilson, J., affirmed, and utility The Supreme Court, Morrison, J, held appealed that (1) Commission had authority to issue such order, and (2) finding that utility was not providing reasonably adequate service was supported by substantial credible evidence

Order of Public Service Commission affirmed

West Headnotes

[∐ Telecommunications € 898 372k898 Most Cited Cases

(Formerly 372k261)

Public Service Commission had authority to issue order stating that telephone utility was not providing reasonably adequate service MCA 69-3-102, 69-3-201

[2] Telecommunications \$\infty\$892

372k892 Most Cited Cases

(Formerly 372k261)

In proceeding before Public Service Commission, finding that telephone utility was not providing reasonably adequate service was supported by substantial credible evidence MCA 2-4-704(2)(e), 69-3-201

[3] Telecommunications 767 372k767 Most Cited Cases

(Formerly 372k267)

Though private telephone companies are free to compete at any time, telephone cooperatives may

compete only when no reasonably adequate service is available MCA 35-18-105(2), 69-5-103

*75 **1016 Peterson, Schofield & Leckie, Billings, Kenneth D Peterson argued, Billings, for petitioner and appellant

Calvin K Simshaw argued, Helena, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, for respondent and respondent

MORRISON, Justice

On April 2, 1980, the Public Service Commission (PSC) conducted a public hearing in Custer, Montana, concerning the quality of telephone service being provided to the area by Intermountain Telephone and Power Company (Intermountain) The PSC issued a final order October 27, 1980, stating that the service was not "reasonably adequate " Intermountain petitioned the District Court of the Thirteenth Judicial District for judicial teview of that order The District Court affirmed the order of the PSC August 12, 1981, and issued a final judgment to that effect September 15, 1981 Intermountain now appeals that judgment District Court issued a stay of its judgment pending this appeal

For a number of years, the PSC received complaints from the Custer area residents concerning the poor quality of telephone service provided Intermountain These complaints were PSC communicated to Intermountain's by Service did not improve management complaints continued

The PSC began a formal investigation, resulting in a public hearing in Custer on April 2, 1980 than twenty Custer residents testified, along with Norman Mills, Intermountain's spokesman and a representative of Mountain Bell

Testimony by the residents indicated that there were numerous problems with the telephone service Ascertaining whether a phone worked or not was described as similar to playing Russian roulette The weather affected the clarity of the connection Incoming calls often did not ring Wrong *76 connections occurred Long-distance service was sometimes non-existent for extended periods of time Telephone lines were draped over posts and on the

651 P 2d 1015 201 Mont 74, 651 P 2d 1015 (Cite as: 201 Mont. 74, 651 P.2d 1015)

ground in several instances Repairs often took several days as there was no resident repairman in Custer

In response, Norman Mills, owner of Intermountain, testified that fifty-seven miles of long-distance wire was the responsibility of Mountain Bell, not Intermountain and that Mountain Bell failed to relay messages concerning telephone problems until several days after they were received His personal efforts, and those of Bell operators, to duplicate the problem of incoming calls not ringing through to subscribers, were unsuccessful Some telephone wire was in need of replacement, however, no funds existed with which to replace it The switchboard had been updated and was now capable of handling one hundred more calls than before **1017 Further improvements would have to await more funds He was noncommittal on the desire of the Custer residents to have a full-time serviceman located in Custer

Mountain Bell representatives acknowledged joint responsibility for the fifty-seven miles of long-distance telephone wire. They testified that propositions to replace the wire had been conveyed to Intermountain, but that Intermountain refused to contribute its share of money to finance the repairs

Following the hearing and prior to issuing its order, the PSC sent an engineer to Custer to test the phones In his report, the engineer stated he "drove to the last subscriber's house on most of the rural lines and found the quality to be normal, and got a dial tone immediately and talked to the operator in Billings" Individuals reported to him that although their phone service was presently okay, it had been inadequate in Two phone lines which were "bad" were being repaired that day Phone wires lying on the ground were being replaced by underground cable The inside of the exchange was "not as neat as I have normally seen elsewhere, however, with further installations and rewiting *77 in progress and in evidence, I would wish to inspect the premises at a later date after all reconstruction is complete "

On the basis of the above-discussed facts, the PSC issued its final order, which the District Court affirmed. In its appeal, Intermountain presents the following issues for review

- (1) Whether the order of the PSC was issued within the authority of the PSC?
- (2) Whether the order was supported by the evidence

on the record?

[1] Section 69-3-102, MCA, gives the PSC supervision over and regulation of public utilities Section 69-3-201, MCA, mandates that every public utility provide "reasonably adequate service and facilities" If the PSC is to supervise utilities adequately, it must be able to ascertain whether or not a utility is providing "reasonably adequate service" Therefore, the PSC was within its authority when it issued the October 27, 1980, order stating that Intermountain was not providing "reasonably adequate service"

[2] Twenty area residents testified regarding the poor quality of telephone service provided to them. One PSC engineer testified that he found good telephone service to exist the one day he was in the area Clearly, the findings of the PSC regarding the quality of telephone service were supported by substantial ciedible evidence, as required by section 2-4-704(2)(e), MCA

Montana has no statute providing for the licensing, franchising or certifying of telephone companies wherein those companies are granted an exclusive right to serve a certain area. There is also no exclusive property right under the Territorial Integrity Act of 1971, as that Act applies to suppliers of electrical service, not telephone service. Section 69-5-103, MCA

Telephone service competition is basically free and open in Montana, except so far as telephone cooperatives are concerned Section 35-18-105(2) MCA, prohibits telephone *78 cooperatives from duplicating "reasonably adequate service" already in existence But, if no "reasonably adequate service" is being provided, telephone cooperatives may provide service to that area

[3] The language in the order of the PSC stating "there exists no provision of Montana law that would prohibit another telephone company, whether private or cooperative, from providing telephone service to residents of the Custer area " is merely dictum Private telephone companies are free to compete at any time Telephone cooperatives may compete when no "reasonably adequate service" is available

The order of the PSC is affirmed

HASWELL, C J, and HARRISON, DALY, SHEEHY and WEBER, JJ, concur

651 P 2d 1015 201 Mont 74, 651 P 2d 1015 (Cite as: 201 Mont. 74, 651 P.2d 1015)

SHEA, J, did not participate in this decision

201 Mont 74, 651 P 2d 1015

END OF DOCUMENT

14 F C C R 11064

1999 WL 335803 (F C.C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

H

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

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

CC Docket No. 98-92

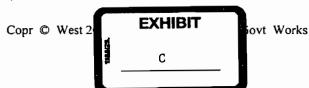
FCC 99-100 Adopted: May 14, 1999 Released: May 27, 1999

*11064 By the Commission:

- 1. On May 29, 1998, AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (Hyperion) filed the above-captioned petition (Petition) asking the Commission to: (i) preempt Tenn. Code Ann. § 65-4-201(d), and (ii) preempt the enforcement of the April 9, 1998, order of the Tennessee Regulatory Authority (Authority or Tennessee Authority) denying Hyperion a Certificate of Public Convenience and Necessity (CPCN) to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company (Denial Order). [FN1] Hyperion also asks the Commission to direct the Tennessee Authority to grant Hyperion's application for a CPCN. [FN2] Hyperion asserts that the Tennessee Authority's Denial Order and Tenn. Code Ann. § 65-4-201(d) violate section 253(a) of the Communications Act of 1934, as amended, [FN3] *11065 fall outside the scope of authority reserved to the states by section 253(b) of the Act, [FN4] and thus satisfy the requirements for preemption by the Commission pursuant to section 253(d) of the Act. [FN5]
- 2. For the reasons described below, we grant Hyperion's Petition in part and deny it in part. Specifically, we preempt the enforcement of the Tennessee Authority's Denial Order and Tenn. Code Ann § 65-4-201(d), [FN6] but we decline to direct the Tennessee Authority to grant Hyperion's CPCN application. We expect, however, that upon a request from Hyperion, the Authority will expeditiously reconsider Hyperion's CPCN application in a manner consistent with the Communications Act and with this Memorandum Opinion and Order.

II. BACKGROUND

- 3. Hyperion is a facilities-based competitive local exchange carrier operating in twelve states. [FN7] Hyperion has constructed a fiber-based network in the Nashville, Tennessee area, and is in the process of extending that network into outlying areas of Tennessee, including areas currently served by the Tennessee Telephone Company (Tennessee Telephone). [FN8] Tennessee Telephone serves fewer than 100,000 residential and business customers in Tennessee. [FN9]
 - 4. On August 24, 1995, the Tennessee Public Service Commission (TPSC, the



14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

predecessor to the Tennessee Authority) found that Hyperion possessed the requisite technical, managerial, and financial qualifications to render local exchange services, and granted *11066 Hyperion a CPCN to provide such services in Tennessee. [FN10] The following March, however, the TPSC issued an order limiting Hyperion's certificate to only those areas of Tennessee that are served by companies having 100,000 access lines or more within the state. [FN11] The TPSC explained that, under Tennessee law, incumbent LECs serving fewer than 100,000 access lines were protected from competition "until the incumbent LEC either '. voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider' or the incumbent LEC ... 'applies for a certificate to provide telecommunications services in an area outside its service area."' [FN12]

- 5. Hyperion, believing the restriction to be inconsistent with the 1996 Act, petitioned the Tennessee Authority on January 2, 1998, for permission to extend its service into the areas served by Tennessee Telephone On April 9, 1998, the Authority denied Hyperion's application. The Authority based its denial on Tenn. 65-4-201, which in relevant part 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 provider if after examining the evidence presented, the authority finds:
- (1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules, and orders, and
- (2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

- (d) Subsection (c) is not applicable to areas served by an incumbent local exchange 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 the June 6, 1995. [FN13]
- *11067 6. The transcript of the Tennessee Authority's March 10, 1998, hearing denying Hyperion's application reveals that disagreement arose within the Authority on the effect of Tenn. Code Ann. § 65-4-201(d) on Hyperion's petition. [FN14] The incumbent LEC into whose service territory Hyperion wished to expand, Tennessee Telephone, served fewer than 100,000 access lines in Tennessee, so it clearly fell within the class protected from competition by Tenn. Code Ann. § 65-4-201(d). During the hearing, however, the Authority's Chairman argued that subsection (d) was inconsistent with the 1996 Act's purpose and the plain meaning of section 253(a), which preempts state legal requirements that prohibit the provision of telecommunications service. [FN15] The Authority's two other Directors argued that subsection (d) lay within the regulatory authority reserved to the states in section 253(b), which excludes from preemption state or local requirements necessary to protect universal service and certain other public interest goals, if such requirements are competitively neutral and consistent with the Act's universal service provisions. [FN16] In its Denial Order, the Authority concluded that Tenn. Code Ann. § 65-4-201(d) does satisfy the requirements of section 253(b), and that

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

therefore section 253(b) operates as a limitation on Hyperion's challenge under 253(a). [FN17] Hyperion contends that <u>Tenn. Code Ann. § 65-4-201(d)</u> is inconsistent with section 253 and with Commission precedent, and on that basis petitions us to preempt <u>Tenn. Code Ann. § 65-4-201(d)</u> and the Tennessee Authority's Denial Order. [FN18]

7. In assessing whether to preempt enforcement of the Denial Order and <u>Tenn.</u>

<u>Code Ann. § 65-4-201(d)</u> pursuant to section 253, we first determine whether those legal requirements are proscribed by section 253(a), which states:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the *11068 ability of any entity to provide any interstate or intrastate telecommunications service. [FN19]

8. If we find that the Denial Order and <u>Tenn. Code Ann. § 65-4-201(d)</u> are proscribed by section 253(a) considered in isolation, we must then determine whether, nonetheless, they fall within the reservation of state authority set forth in section 253(b), which provides:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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. [FN20]

- 9. If the Denial Order and Tenn. Code Ann. § 65-4-201(d) are proscribed by section 253(a), and do not fall within the scope of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d), which provides:
- 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), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. [FN21]
- 10. Hyperion maintains that because it has met the technical, managerial, and financial qualifications to provide service, only Tenn. Code Ann. § 65-4-201(d)'s protection of incumbent LECs serving fewer than 100,000 lines, and the Denial Order enforcement of that statutory provision, prevented Hyperion from providing local exchange service in Tennessee Telephone's service areas [FN22] Hyperion further maintains that these legal requirements fall squarely within section 253(a)'s proscription of state legal requirements that prohibit the ability of any entity to provide any telecommunications service. [FN23] According to *11069 Hyperion, Tenn. Code Ann. § 65-4-201(d) and the Denial Order are virtually identical to two previous state requirements which ran afoul of section 253(a), and which the Commission preempted in the Texas Preemption Order and Silver Star Preemption Order decisions. [FN24]
- 11. Neither the Tennessee Authority nor TDS Telecommunications Corporation (TDS) argues that the Denial Order or Tenn Code Ann. § 65-4-201(d) can survive section 253(a) considered in isolation, but they insist that the statutory provision and the Denial Order fall within the reservation of state authority provided in 253(b) [FN25] Specifically, the Tennessee Authority argues that Tenn. Code Ann. § 65-4-

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals, [FN26] and because the provision applies in a competitively neutral manner to all non-incumbent LECs. [FN27] The Authority explains that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because the restriction on entry into the service areas of small LECs applies to all providers within the state, and thus they argue that no provider is given a competitive advantage over any other. [FN28] TDS likewise maintains that the Authority's denial of Hyperion's application is a proper exercise of state authority under 253(b) because it is consistent with the universal service provisions of the 1996 Act, [FN29] is necessary to protect consumer interests, [FN30] and is competitively neutral. [FN31] TDS 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. [FN32] Hyperion and its supporters disagree, and argue that section 253(b) does not exempt Tenn. Code Ann. § 65-4-201(d) and the Denial Order from preemption, because the *11070 code and the Denial Order favor the incumbent LEC over new entrants, and are therefore not "competitively neutral" under section 253(b). [FN33]

III. Discussion

- 12. We conclude that, in denying Hyperion the right to provide competing local exchange service in the 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). Finally, we conclude that, because the requirements violate section 253(a), and do not fall within the boundaries of section 253(b), we must preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) and the Denial Order, as directed by section 253(d)
- 13. The case before us is similar to two cases the Commission has previously decided. In the Silver Star Preemption Order, the Commission preempted the enforcement of a provision of the Wyoming Telecommunications Act of 1995 [FN34] that empowered incumbent LECs serving 30,000 or fewer access lines in Wyoming to preclude anyone from providing competing local exchange service in their territories until at least January 1, 2005. [FN35] The Commission also preempted the enforcement of an order of the Wyoming Public Service Commission denying, on the basis of that provision, the application of Silver Star Telephone Company to provide competing local service in a neighboring incumbent's local exchange area. [FN36] In ordering the preemption, the Commission determined that the rural incumbent protection provision and the Wyoming Commission's Denial Order fell within the proscription of entry barriers set forth in section 253(a) because they enabled certain incumbent LECs to bar other entities from providing competing local service. [FN37] The Commission found that the rural incumbent protection provision's lack of competitive neutrality placed the Wyoming legal requirements outside the authority reserved to the States by section 253(b). [FN38]
- *11071 14. Similarly, in the Texas Preemption Order, [FN39] the Commission preempted a section of the Texas Public Utility Act of 1995 that prohibited the

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

Public Utilities Commission of Texas from permitting certain competitive LECs to offer service in exchange areas of incumbent LECs serving fewer than 31,000 access lines. [FN40] The Commission found that the moratorium on competition violated the terms of section 253(a) of the Act. [FN41] The Commission also found that the Texas provision did not fall within the exempted state regulation described in section 253(b), because the prohibition was neither competitively neutral nor necessary to achieve any of the policy goals enumerated in section 253(b). [FN42]

- 15. Our decision here to preempt is consistent with these precedents and comports with the analysis set forth therein. Tennessee's restriction of competition in service areas with fewer than 100,000 access lines is essentially the same as the attempt of both Wyoming and Texas to shield small, rural LECs from competition, and cannot be squared with section 253(a)'s ban on state or local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." [FN43] Also, as in both the Silver Star and Texas Preemption Orders, we find that the lack of competitive neutrality renders the Tenn. Code Ann. § 65-4-201(d) and the Denial Order ineligible for the protection of section 253(b).
- 16. We reject the Tennessee Authority's contention that "competitive neutrality" can be interpreted under section 253(b) to mean only that non- incumbents must be treated alike while incumbents may be favored. [FN44] As we explained in our Silver Star Reconsideration, a state legal requirement would not as a general matter be "competitively neutral" if it favors incumbent LECs over new entrants (or viceversa). [FN45] Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to all carriers in that market. The plain meaning of section 253(b) and the predominant pro-*11072 competitive policy of the 1996 Act undermine the Authority's argument. 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. [FN46] We reaffirm our holding in the Silver Star Reconsideration that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, inter alia, the requirement is competitively neutral with respect to, and as between, all of the participants and potential participants in the market at issue.
- 17. TDS elaborates on the Authority's argument by contending that competing LECs do not operate under the same terms and conditions as incumbent LECs, and that this disparity in their regulatory obligations permits the Tennessee Authority to treat them differently and still maintain competitive neutrality. [FN47] TDS thus 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. [FN48] At the very least, "competitive neutrality" for purposes of 253(b) does not countenance absolute exclusion, and we need not and therefore do not reach the question of the extent to which state commissions may treat competing LECs differently from incumbent LECs in certain instances. 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.

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, | 5 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

- 18. That Tenn. Code Ann. § 65-4-201(d) and the Denial Order are not competitively neutral suffices of itself to disqualify these requirements from the 253(b) *11073 exception. [FN49] Therefore, we need not reach the question of whether Tenn. Code Ann. § 65-4-201(d) and the Denial Order are "necessary," or "consistent with section 254" within the meaning of section 253(b). We note, however, that, for the reasons we gave in response to similar arguments that were raised in our Silver Star Preemption Order decision, we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service [FN50] Moreover, by requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never "necessary" to preserve and advance universal service within the meaning of section 253(b). [FN51]
- 19. TDS introduces three arguments by which it attempts to distinguish the case before us from other cases we have decided under section 253. First, TDS points out that the Tennessee legislature provided for Tenn Code Ann. § 65-4-201(d) to be examined every two years to reevaluate the "transitional distinction" in treating applications to serve areas served by incumbent LECs with fewer than 100,000 access lines, and contrasts Tennessee's biennial review with the Wyoming statue at issue in the Silver Star Preemption Order, which gave rural incumbent LECs a veto provision that would apply until 2005. [FN52] This is a distinction without a difference for purposes of our analysis because, as we held in the Silver Star Preemption Order, even a temporary ban on competition can be an absolute prohibition, and section 253 does not exempt from its reach State-created barriers to entry that may expire at some later date. [FN53]
- *11074 20. Second, TDS argues that "unanticipated confusion and controversy surrounding the universal service plan" justifies the Tennessee Authority's delay of competitive entry into rural areas [FN54] As the Commission has previously stated, we reject the assumption that competition and universal service are at cross purposes, and that in rural areas the former must be curtailed to promote the latter. [FN55] Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers. [FN56] We continue to believe that Congress intended new competitors to bring the benefits of competition to rural as well as populous markets. [FN57]
- 21 Third, TDS contends that even if the Commission is correct in preempting enforcement of the Authority's Denial Order, the Commission should not preempt Tenn Code Ann. § 65-4-201(d) itself. [FN58] TDS argues that although the Authority has applied the statute to preclude competition in this case, the statute permits the Authority to allow competition in *11075 other circumstances. [FN59] TDS suggests that Tenn. Code Ann. § 65-4-201(d) might therefore be applied in way that would not offend section 253, [FN60] and therefore should be left standing, in obedience to 253(d)'s instruction to the Commission to preempt only "to the extent necessary to correct such violation or inconsistency " [FN61]
- 22. We are mindful of the limits that section 253 (d) places on our preemption authority. Further, the construction of a state statute by a state commission informs our determination of whether the statute is subject to preemption under section 253. [FN62] In this case, however, TDS's construction of Tenn. Code Ann. §

65-4-201(d) conflicts with that of the Tennessee Authority, which we regard as dispositive. [FN63] According to the Authority, Tenn. Code Ann. § 65-4-201(d) does require the Tennessee Authority to deny any and all CPCN applications within its scope. [FN64] For this reason we reject TDS's argument that Tenn. Code Ann. § 65-4-201(d) may stand even if the Authority's Denial Order must fall. We decline, however, to grant Hyperion's request that we direct the Tennessee Authority to grant Hyperion's application for a CPCN because we do not believe such a step is necessary at this time. [FN65] Based on our explanation regarding the force and effect of section 253 in this case, we expect that the Authority will respond to any request by Hyperion to reconsider Hyperion's application for a concurrent CPCN consistent with the Communications Act and this decision. [FN66]

23. 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 the way we have found unlawful here and in the Silver Star and Texas Preemption Orders. [FN67] Hyperion urges us to clarify generally the *11076 scope of section 253 as it might apply in such cases. [FN68] 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. Thus, 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 judgement violate section 253 as applied by this Commission

IV. ORDERING CLAUSE

- 24. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the Petition for Preemption and Declaratory Ruling filed by AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P. on May 29, 1998, IS GRANTED to the extent discussed herein, and in all other respects IS DENIED.
- 25. IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, that the enforcement of Tenn. Stat. Ann. § 65-4-201(d) and the Denial Order are preempted.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. In Re: AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P.; Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr.

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

9, 1998) (Denial Order).

FN2. Petition at 23.

FN3. 47 U.S.C. § 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. All citations to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

FN4. 47 U.S.C. § 253(b).

FN5. 47 U.S.C. § 253(d). The Commission placed Hyperion's Petition on public notice on June 12, 1998. Pleading Cycle Established for Comments on Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, Public Notice, CC Docket No. 98-92, DA 987-1115 (rel. June 12, 1998). The Association for Local Telecommunications Services (ALTS), KMC Telecom Inc. (KMC), MCI Telecommunications Corporation (MCI), TDS Telecommunications Corporation (TDS), the Tennessee Authority, and WorldCom, Inc. (WorldCom) filed comments, and Hyperion, MCI, and TDS filed replies.

FN6. Tenn. Code Ann. § 65-4-201(d).

FN7. Petition at 2.

FN8. Id.

FN9. Tennessee Telephone Company serves approximately 45,121 residential and 11,665 business customers in Tennessee. AVR of Tennessee, L.P., d/b/a Hyperion Telecommunications of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Extend its territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Application, Petition Exhibit D at 3.

FN10. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Intrastate Point-to-Point and Telecommunications Access Services Within Davidson, Williamson, Maury, Rutherford, Wilson, and Sumner Counties, Tennessee, Docket No. 94-00661, (TPSC Aug. 24, 1995), Petition Exhibit B.

FN11. The Application of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. for a Certificate of Public Convenience and Necessity to Provide Point-to-Point and Telecommunications Access Service Within the State of Tennessee, Order, Docket No.

94-00661 (TPSC Mar. 8, 1996), Petition Exhibit C, (TPSC Restriction Order).

FN12. TPSC Restriction Order at 5

FN13. Tenn. Code Ann. § 65-4-201; Petition at 4.

FN14 Transcript of the Tennessee Regulatory Authority's March 10, 1998, Hearing Denying Hyperion's Application, Petition Exhibit E (Hearing).

FN15. "I personally believe that the Tennessee Regulatory Authority has a duty to uphold both the vision and the substance of the Federal Communications Act of 1996. This Act provides the framework from which competition in the telecommunications industry can develop Section 253(a) of the Act specifically addresses the prohibition of any State regulation or statute that prohibits the ability of any entity to provide any interstate or intrastate telecommunication service. As I see it, we have a conflict between the federal law and one of our State statutes, and the federal law must prevail." Chairman Greer, Hearing at 7.

FN16. "To be sure, there exists a host of arguments [that] Section 65-4- 201(d) is not competitively neutral as this phrase is defined by the FCC. Nonetheless, given the legislature's rationale for enacting section 65-4- 201(d), the language of section 253(b) as a whole, section 65-4-201(d)'s pronouncement that any such protected interest forfeits its protection if it seeks to compete outside the area, and the requirement that the general assembly review this statute every two years, this statute may be held competitively neutral.... I am persuaded that at a minimum the State of Tennessee should have the opportunity, should it so choose, to argue before the FCC that its statute is, notwithstanding the FCC's prior rulings, competitively neutral." Director Malone, Hearing at 11-12.

FN17 Denial Order at 11.

FN18. Petition at 8.

FN19. 47 U S.C. § 253(a).

FN20. 47 U.S.C. § 253(b).

FN21. 47 U.S.C. § 253(d).

FN22. Petition at 6. Although <u>Tenn. Code Ann. § 65-4-201(d) does permit competition in areas served by incumbent LECs with fewer than 100,000 access lines when the incumbent LEC enters into an interconnection agreement with the competitor</u>

or itself applies for CPCN outside its service area, neither exception applies to this case.

FN23. Petition at 8.

(Cite as: 14 FCC Rcd. 11064)

FN24 Petition at 15-18; The Public Utility Commission of Texas, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3511, ¶ ¶ 106-07 (1997) (Texas Preemption Order); Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-57, ¶ ¶ 38-39 (1997) (Silver Star Preemption Order). ALTS, KMC, MCI, and WorldCom agree with Hyperion that the Tennessee statute is in direct conflict with Section 253(a). ALTS Comments at 2; KMC Comments at 2; MCI at Comments at 1, WorldCom Comments at 1-2; AVR Reply at 3; MCI Reply at 1-2.

FN25. Tennessee Authority Comments at 3-6; TDS Comments at 5-15. TDS owns four subsidiaries in Tennessee, one of which is the Tennessee Telephone Company. TDS Comments at 1.

FN26. Tennessee Authority Comments at 3-5.

FN27. Tennessee Authority Comments at 6.

FN28. Id.

FN29. TDS Comments at 6-7.

FN30. TDS Comments at 5-7; TDS Reply at 2-3

FN31 TDS Comments at 8-10; TDS Reply at 3-4.

FN32. Id.

FN33 Petition at 10-11; ALTS Comments at 4; KMC Comments at 3-4; MCI at Comments at 3-5; Hyperion Reply at 3; MCI Reply at 2.

FN34. WYO. STAT. ANN. § § 37-15-101, et seq.

FN35. WYO. STAT. ANN. § 37-15-201(c)

1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

FN36. Application of Silver Star Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification, Docket No. 70006-TA-96-24 (Wyoming Commission Dec. 4, 1996)

- FN37. Silver Star Preemption Order, 12 FCC Rcd at 15656-57, ¶ ¶ 38-39.
- FN38. Silver Star Preemption Order, 12 FCC Rcd at 15657-59, ¶ ¶ 41-44
- FN39. Texas Preemption Order, 13 FCC Rcd 3460 (1997).
- FN40. Texas Public Utility Act of 1995 § 3.2531(h).
- FN41. Texas Preemption Order, 13 FCC Rcd at 3511, ¶ 106.
- FN42. Texas Preemption Order, 13 FCC Rcd at 3511, 107.
- FN43. 47 U.S.C. § 253(a) (emphasis added).
- FN44. Tennessee Authority Comments at 6.

FN45. Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, CCBPol 97-1, FCC 98-205, ¶ ¶ 9-10 (rel. Aug. 24, 1998) (Silver Star Reconsideration). See also New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19721-22, ¶ 20 (1996) (holding that legal requirement at issue was not competitively neutral under section 253(b) because "the prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers)"); Recon. denied, Memorandum Opinion and Order, FCC 97-143 (rel. April 18, 1997)

FN46. See, e.g., Telephone Number Portability, Third Report and Order, FCC 98-82, CC Docket No. 95-116, ¶ 53 (rel. May 12, 1998) (a competitively neutral cost recovery mechanism "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return"), Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22132 at ¶ 24 (1997) ("Competitive neutrality would require that separations rules not favor one telecommunications provider over another or one class of providers over another class"); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21443-44 at ¶ 206 (1996) ("If in

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

FN47. TDS Comments at 8-10, TDS Reply at 3-4.

FN48. We agree that in order to qualify for protection under section 253(b), a state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance. As the Commission has previously explained: "'non-discriminatory and competitively neutral' treatment does not necessarily mean 'equal' treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities 'equally."' Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Third Report and Order and Second Order on Reconsideration, <a href="https://linkingline.com/li

FN49. Silver Star Preemption Order, 12 FCC Rcd at 15660, ¶ 45. Accord Texas

Preemption Order, 13 FCC Rcd at 3480, ¶ 41; Classic Telephone, Inc., Petition for

Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082, 13101, ¶

35.

FN50 Specifically, we noted that section 251(f) of the Act affords rural and small LECs certain avenues of relief from the interconnection duties set forth in sections 251(b) and (c), and that sections 253(f) and 214(e)(2) also provide states special latitude in regulating emerging competition in markets served by rural telephone companies Section 253(f) permits a state to require a telecommunications carrier to meet certain universal service requirements as a condition for obtaining permission to compete with a rural telephone company. Section 214(e)(2) permits a state, with respect to an area served by a rural telephone company, to decline to designate more than one common carrier as an "eligible telecommunications carrier" for purposes of receiving universal service support These accommodations to the needs of rural telephone companies indicate that Congress recognized that the special circumstances of rural and small LECs warrant special regulatory treatment. In choosing less competitively restrictive means of protecting rural and small LECs, however, Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition. Silver Star Preemption Order, 12 FCC Rcd at 15658-59, ¶ ¶ 43-44.

FN51 Silver Star Reconsideration, FCC 98-205, ¶ 19

FN52. TDS at Comments 12 (contrasting Tenn. Code Ann. § 65-5-211 with Wyo. Stat. § § 37-15-101 et seq).

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

FN53. Silver Star Preemption Order, 12 FCC Rcd at 15657, \P 39. We note that the 1996 Act contains numerous deadlines requiring the Commission and State commissions to complete with dispatch various tasks implementing the 1996 Act. See, e.g., $\frac{47}{U.S.C.}$ § \$ 251(d)(1), 251(f)(1)(B); 252(e)(4); 254(a), 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight that Tennessee's statutory delay of competition conflicts with Congressional intent.

FN54. TDS Comments at 14; TDS Reply at 2-3.

FN55. Accord Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 8800, ¶ 47 (1997) ("competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another"). See generally Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, 267 ¶ 345 (1996) ("We recommend that any competitive bidding system be competitively neutral and not favor either the incumbent or new entrants").

FN56. Silver Star Preemption Order, 12 FCC Rcd at 15656, ¶ 38.

FN57. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16118, 1262 (1996) ("We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service.") What the Commission said in the Universal Service Order regarding the "false choice" between competition and universal service also bears reiteration:

Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.

Universal Service Order, 12 FCC Rcd at 8802-03, ¶ 50

FN58. TDS at Comments at 15-18.

FN59. TDS Comments at 15, 17

FN60. TDS states that § 65-4-201(d) allows the Tennessee Authority to obtain

14 F C C R 11064 1999 WL 335803 (F C C), 14 FCC Rcd 11,064, 15 Communications Reg (P&F) 1172 (Cite as: 14 FCC Rcd. 11064)

useful information through closer scrutiny of applications to serve rural areas. TDS Comments at 18.

FN61. TDS Comments at 15.

FN62. See Texas Preemption Order, 13 FCC Rcd at 3464-3466, ¶ ¶ 7-11

FN63. Id. See also, e.g., Ginsburg v. New York, 390 U.S 629, 643-44 (1968).

FN64. TPSC Restriction Order at 4 ("Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider"), see also Denial Order at 8.

FN65. Petition at 23.

FN66. Given our disposition of the Petition on the bases discussed in the text, we need not and do not address the merits of other arguments raised by the parties.

FN67. Hyperion Petition at 21; See Letter from Kecia Boney, MCI Telecommunications Corp., to Magalie R. Salas, Secretary, FCC, Jan. 6, 1999. See also Louisiana, In re Regulations for Competition in the Local Telecommunications Market, General Order, app. B, sec. 201 (LPSC, rel. Apr. 1, 1997) ("TSPs are permitted to provide telecommunications services in all historically designated ILEC services areas . . with the exception of service areas served by ILECs with 100,000 access lines or less statewide."); New Mexico, N.M. STAT. ANN § 63-9A-6 D (1997) ("[A] ny telecommunications company with less than one hundred thousand access lines ... shall have the exclusive right to provide local exchange service within its certificate service territory"); North Carolina, N.C. GEN. STAT. § 62-110 f(2) (1997) ("[The Commission shall not be authorized to issue a certificate] applicable to franchised areas ... served by local exchange companies with 200,000 access lines or less ... "); Utah, UTAH CODE ANN. § 54-8b- 2.1(2)(c) (1953) ("An intervening incumbent telephone corporation serving fewer than 30,000 access lines in the state may petition the Commission to exclude from an application [filed by a competing LEC] any local exchange with fewer than 5,000 access lines .. "); and Oregon, OR. REV. STAT. § 759 020 (1989), Admin. Rules Chapter 860, Div. 32, 860-32-005(8)(a) (providing for certification of competing LECs if the ILEC "consents or does not protest").

FN68. Hyperion Petition at 21.

14 F.C.C.R. 11,064, 1999 WL 335803 (F C.C.), 14 FCC Rcd. 11,064, 15 Communications Reg (P&F) 1172

END OF DOCUMENT

Н

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P. PETITION FOR PREEMPTION OF TENNESSEE CODE ANNOTATED SECTION 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 No. 98-92

FCC 01-3

Adopted: January 3, 2001 Released: January 8, 2001

*1247 By the Commission:

I. INTRODUCTION

1. On June 28, 1999, the Tennessee Regulatory Authority (Tennessee Authority) and TDS Telecommunications Corporation (TDS Telecom) filed petitions for reconsideration of the Hyperion Preemption Order. [FN1] In that Order, the Commission granted in part a petition for preemption filed by AVR, L.P. d/b/a / Hyperion of Tennessee, L.P. (Hyperion) in May 1998. In this order we deny those petitions for reconsideration along with a related motion filed by the Tennessee Authority for a stay of enforcement of the Hyperion Preemption Order.

*1248 II DISCUSSION

- 2. Hyperion originally sought preemption of Tennessee Code section 65-4- 201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in Tennessee that serve fewer than 100,000 access lines. In addition, Hyperion asked that this Commission preempt enforcement of an April 1998 order of the Tennessee Authority to the extent that it denied Hyperion's application to provide service in the service area of the Tennessee Telephone Company. [FN2] The Tennessee Authority and TDS Telecom now seek reconsideration of the Commission's determination that the Tennessee Authority's Denial Order and Tennessee Code section 65-4-201(d) do not fall within the protection of section 253(b) of the Communications Act of 1934, as amended. [FN3] In addition, on July 9, 1999, the Tennessee Authority filed a motion for stay of enforcement of our Hyperion Preemption Order until appropriate universal service mechanisms are implemented by the Commission and the Tennessee Regulatory Authority. [FN4] Hyperion filed an opposition to the Tennessee Regulatory Authority's motion for stay of enforcement, dated July 20, 1999, arguing that the Tennessee Regulatory Authority failed to establish any of the four conditions necessary to justify a stay of the Commission's Order. [FN5]
- 3. We deny TDS's and the **Tennessee** Authority's petitions for the following reasons. TDS's petition essentially repeats the same arguments it relied upon in

2001 WL 12939 (F C C), 16 FCC Rcd 1247 (Cite as: 16 F.C.C.R. 1247)

the comments and reply comments it filed in opposition to the **Hyperion** preemption petition. First, TDS argues that, because the incumbent LEC is regulated differently from competitive LECs, the "competitive neutrality" requirement under section 253(b) of the Communications Act is satisfied even if the *1249 incumbent has special protections as long as all competitive carriers are treated alike. [FN6] In a related argument, TDS argues that competitive imbalances will result from preemption of the statute. [FN7] The Commission rejected these arguments in the **Hyperion** Preemption Order.

- 4. TDS also argues that, because the **Hyperion** Preemption Order did not allow the **Tennessee** Authority to implement section 65-4-201(d) "to the extent permissible by law," the Commission's blanket preemption of section 65-4-201(d) was needlessly broad. [FN8] The Commission previously considered and rejected this argument, concluding that the **Tennessee** Authority's own interpretation of **Tennessee** Code section 65-4-201(d), which the Commission regards as dispositive, made section 65-4-201(d) inconsistent with federal law in every circumstance. [FN9] TDS has failed to identify any redeemable portion of the preempted law [FN10] Accordingly, we conclude that the Commission's preemption was in fact limited to the extent necessary to correct the violation of federal law in accordance with section 253(d) of the Communications Act. TDS's petition fails to raise new arguments or facts that would warrant reconsideration of that order
- 5. The Tennessee Authority also repeats in its petition for reconsideration the arguments it made regarding the Hyperion preemption petition. Those arguments include: (1) that preemption of Tennessee Code section 65-4-201(d) is not competitively neutral to Tennessee rural incumbent carriers because these carriers have obligations under state and federal laws that are not imposed on new entrants, [FN11] (2) that Tennessee Code section 65-4-201(d) is necessary to *1250 preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers within the state of Tennessee; [FN12] and (3) that the Commission did not fully consider the unity of purpose behind the 1996 Act and Tennessee Code section 65-4-201(d) [FN13] That both the 1996 Act and section 65-4-201(d) address similar concerns about the effect of competitive entry on rural incumbent carriers does not insulate the Tennessee statute from section 253 preemption. Instead, Congress appears to have entirely occupied the field of regulating rural competitive entry when it addressed the issue comprehensively in sections 251(f) and 153(37). [FN14] Just as TDS Telecom and the Tennessee Authority raise no new arguments or facts that warrant reconsideration of the Hyperion Preemption Order, the Tennessee Authority raises no new arguments or facts that warrant a stay of enforcement. [FN15]
- 6. Accordingly, IT IS ORDERED, pursuant to section 1.106 of the Commission's rules, 47 C F.R. § 1.106, that the petition for reconsideration filed by TDS Telecommunications Corporation and the petition for reconsideration filed by the Tennessee Regulatory Authority, both dated June 28, 1999, ARE DENIED.
- 7. IT IS FURTHER ORDERED, that the Tennessee Regulatory Authority's motion for stay of enforcement, filed on July 9, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

2001 WL 12939 (F C C), 16 FCC Rcd 1247 (Cite as: 16 F.C.C.R. 1247)

Magalie Roman Salas

Secretary

FN1. AVR, L.P., d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064 (1999) (Hyperion Preemption Order).

FN2. In Re: AVR of Tennessee, L P d/b/a Hyperion of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Order Denying Hyperion's Application for a Certificate of Public Convenience and Necessity to Extend Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company, Docket No. 98-0001 (Tennessee Authority Apr. 9, 1998) (Denial Order). The Tennessee Telephone Company is a wholly-owned subsidiary of TDS Telecom.

FN3. 47 U.S.C. § 253(b). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. All citations to the 1996 Act in this order are to the 1996 Act as codified in Title 47 of the United States Code. Section 253(a) provides that "[n]o 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." 47 U.S.C. § 253(a). Section 253(b) states that "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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. 47 U.S.C. § 253(b).

FN4. Tennessee Regulatory Authority Motion for Stay at 1.

FN5. The Commission applies a four-part test in consideration of motions for stay. See Virginia Petroleum Jobbers Ass'n, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). To justify a stay, the Tennessee Regulatory Authority must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the absence of any substantial harm to other interested parties if the stay is granted, and (4) that public interest favors the stay.

FN6. TDS Petition for Reconsideration at 5-6, 10 TDS made this argument in its comments at 5-7 and its reply comments at 2 The Commission rejected the argument in the **Hyperion** Preemption Order, 14 FCC Rcd at 11071-72, \P 15-16

FN7. TDS Petition for Reconsideration at 6-8. TDS made this argument in its comments at 8-11 and its reply comments at 3-4. The Commission rejected the argument in the **Hyperion** Preemption Order, 14 FCC Rcd at 11072, ¶ 17.

FN8 TDS Petition for Reconsideration at 12 TDS appears to be referring to section 253(d) of the Communications Act instead of section 253(b). TDS made this argument in its comments at 15-18.

FN9. Hyperion Preemption Order, 14 FCC Rcd 11075, ¶ 22.

FN10. We note that the scope of section 65-4-201(d) is extremely limited and that its preemption does not impinge on any of the Tennessee Authority's general safeguards. Tenn. Code. Ann. 65-4-201(d) states, in its entirety. ""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 the June 6, 1995."

FN11. Tennessee Authority Petition for Reconsideration at 4 - 7. The Tennessee Authority made this same argument in its comments regarding the Hyperion Preemption Petition. Comments in Response to Hyperion Petition for Preemption, filed July 13, 1998, at 6, ¶ 8. The Commission previously considered and rejected this argument in the Hyperion Preemption Order, stating that ""[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market - new entrants - and not to the market as a whole, including the incumbent LEC." Hyperion Preemption Order, 14 FCC Rcd at 11071-72, ¶ 16, citing Silver Star Reconsideration Order, 13 FCC Rcd 16359 (1998). The United States Court of Appeal for the Tenth Circuit recently affirmed the Commission's Silver Star Reconsideration Order in RT Communications, Inc. v. FCC, 201 F.3d 1264 (10th Cir. 2000)

FN12. Tennessee Authority Petition for Reconsideration at 8-11. The Commission rejected this argument at <u>Hyperion Preemption Order, 14 FCC Rcd at 11074, \P 18, 20.</u>

FN13. Tennessee Authority Petition for Reconsideration at 11-13; <u>Hyperion</u> Preemption Order, 14 FCC Rcd at 11074, ¶ ¶ 18, 20.

FN14. See 47 U.S.C. § 153(37); 47 U.S.C. § 251(f). See also 47 U.S.C. § 253(f).

FN15. The **Tennessee** Authority recognizes that a party seeking a stay must demonstrate, among other criteria, that it is likely to prevail on the merits.

¹ 2001 WL 12939 (F C C), 16 FCC Rcd 1247 (Cite as: 16 F.C.C.R. 1247)

Tennessee Authority Motion at 1. Therefore, in as much as we decide against the Tennessee Authority on the merits, the Tennessee Authority's motion for a stay of enforcement is denied.

2001 WL 12939 (F.C.C.), 16 F.C.C.R. 1247, 16 FCC Rcd. 1247

END OF DOCUMENT