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April 10, 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 reply 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,

A handwritten signature in black ink, appearing to read "Guilford F. Thornton, Jr.", written over the printed name.

Guilford F. Thornton, 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
REPLY BRIEF**

Frontier Communications of America, Inc. ("Frontier") respectfully submits this reply 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.

INTRODUCTION

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).

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). Nevertheless, Ben Lomand seeks to resist relief that is in the public interest.

As stated in Frontier’s initial brief:

(1) - The TRA has jurisdiction to hear this matter.

(2) -T.C.A. § 65-29-102 acts as a limit on the territory of a telephone cooperative but does not preclude a CLEC such as Frontier from competing in the territory of a telephone cooperative.

(3) -T.C.A. § 65-29-102, as interpreted by Ben Lomand, is unenforceable as applied to Frontier’s request because it is preempted by federal law that precludes such limitations against competition.

In response to Frontier’s arguments and the arguments advanced by Intervenor Comcast Phone of Tennessee LLC (“Comcast”), Ben Lomand continues to assert that the TRA lacks jurisdiction; that T.C.A. § 65-29-102 protects it from competition; that the TRA cannot invalidate T.C.A. § 65-29-102; and that T.C.A. § 65-29-102 is not subject to preemption by federal law.

Each of Ben Lomand’s arguments is without merit.

LEGAL ANALYSIS

I. The TRA Has Jurisdiction Over Ben Lomand To Adjudicate This Matter.

As stated in Frontier’s Initial Brief, 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). Ben Lomand never took issue with that ruling.

The TRA also took this position in the related FCC proceeding (*In re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6) (the “FCC Proceeding”). As the hearing officer cites in the TRA’s Order in this docket dated December 20, 2007, the TRA filed an opposition to Frontier’s FCC petition, and stated:

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

(TRA Order dated December 20, 2007, p. 4, citing *Opposition of the [TRA] to Frontier’s Petition for Preemption and Declaratory Ruling* (“*Opposition to Petition for Preemption*”) dated February 21, 2007). It would be inconsistent for the TRA to now rule that its opposition to the FCC Proceeding was misplaced.

Second, the TRA has express jurisdiction to grant and amend CCNs of CLECs in Tennessee. See T.C.A. § 65-4-201(c); 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 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 to Initial Brief as Exhibit A). 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. Ben Lomand’s opposition to Frontier’s request is self serving and not consistent with the pro competitive policies of this State and the United States.

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

Ben Lomand continues to argue that it is 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 to Initial Brief as Exhibit B).

Assuming the validity of the statute, this construction is logical because telephone cooperatives are largely if not wholly unregulated by the TRA. Thus, it appears that the statute provides that if a telephone cooperative wants to compete outside its territory, it should have to either (a) demonstrate a need or (b) become a regulated telephone carrier. Frontier, on the other hand, is regulated by the TRA, so it should not be subject to the same limitations as a telephone cooperative that enjoys significantly less oversight.

Thus, Frontier is free to compete in the State of Tennessee including territories served by rural telephone cooperatives.

III. The TRA Has Jurisdiction To Declare That T.C.A. § 65-29-102 , As Interpreted By Ben Lomand, Is Preempted.

Ben Lomand baldly asserts that the TRA cannot invalidate T.C.A. § 65-29-102 (assuming it bars Frontier from competing in Ben Lomand’s territory). However, “[a]ny affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency.” T.C.A. § 4-5-223(a)(emphasis added).

“The Authority may grant petitions to determine questions as to the constitutional application of a statute to specific circumstances, or as to the constitutionality of a rule promulgated , or order issued by the Authority.” Chapter 1220-1-2-.05 of the TRA Rules and Regulations (emphasis added).

As set forth in Frontier’s Initial Brief and Comcast’s brief, as applied to Frontier’s petition, the application of T.C.A. § 65-29-102 (according to Ben Lomand’s interpretation) is invalid because it is preempted by federal law which favors competition consistent with the laws of this State and the prior ruling of the TRA holding that the interconnection agreement between Ben Lomand and Frontier, if effectuated, would promote competition and serve the public interest.

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 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). The preemption of state law by federal law under the Supremacy Clause of Article IV of the United States Constitution is well settled. *La Pub. Serv. Commission v. FCC*, 476 U.S. 355, 368-369 (1986).

Accordingly, the FCC has ruled that the federal 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 to Initial Brief as collective Exhibit C).

The FCC left no room for Ben Lomand's arguments that T.C.A. § 65-29-102 is not preempted by federal law as applied to this case. The FCC stated that "we would expect to apply a similar analysis to other state statutes . . . We encourage . . . respective regulatory agencies[] to review any similar statutes and regulations and to repeal or otherwise nullify any that in their judgment violate section 253 as applied by this commission." *Hyperion* at 11076. Based on the foregoing, Ben Lomand's arguments are without merit.

CONCLUSION

For the reasons set forth herein and in Frontier's Initial Brief and the briefs of Comcast, the TRA should grant Frontier's Motion to Amend its Certificate of Convenience and Necessity.

Respectfully submitted,



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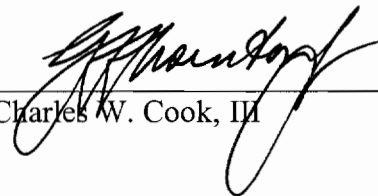
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the ____ day of April 2008.

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