

December 2, 2009

**APPLICATION OF LMK COMMUNICATIONS, LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
AS A COMPETING TELECOMMUNICATIONS CARRIER OF
FACILITIES-BASED AND RESOLD EXCHANGE AND
INTEREXCHANGE TELECOMMUNICATIONS SERVICES IN
TENNESSEE**

DOCKET NO.
09-00117

INITIAL ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the “Authority” or “TRA”) at a Hearing held on November 6, 2009 to consider the *Application of LMK Communications LLC* (the “*Application*”) filed by LMK Communications LLC (“LMK” or “Applicant”) on August 13, 2009. In its *Application*, LMK seeks a Certificate of Public Convenience and Necessity (“CCN”) for authority to provide facilities-based and resold local exchange and interexchange telecommunications services within the State of Tennessee.

Legal Standard for Granting Certificate of Public Convenience and Necessity

LMK's *Application* was made pursuant to and considered in light of the criteria for granting a CCN as set forth in Tenn. Code Ann. § 65-4-201 (Supp. 2009), which provides, in pertinent part:

- (a) 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 authority, 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, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

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

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

* * *

Furthermore, pursuant to Tenn. Code Ann. § 65-5-112 (2004), a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

The November 6, 2009 Hearing

Pursuant to Tenn. Code Ann. § 65-4-204 (2004), public notice of the Hearing in this matter was issued by the Hearing Officer on October 30, 2009. No persons sought intervention prior to or during the Hearing. During the Hearing held on November 6, 2009, Ms. Jennifer Menge, Assistant Secretary and Assistant Treasurer for Clarity Communications Group (parent

company of LMK),¹ participated in the Hearing, adopted and corrected her pre-filed testimony,² and was subject to examination by the Hearing Officer.

During the Hearing, Ms. Menge testified that LMK intends to resell services in Tennessee and currently has no plans to build facilities.³ Additionally, Ms. Menge testified during the hearing that LMK does not provide voice telephone service to residential end-users; rather, it provides point-to-point private line fiber optic circuits to business, governmental, or educational entities.⁴ Thus, Ms. Menge indicated that a practice known within the telecommunications industry as “slamming” is not an issue of concern, as LMK does not engage in “switching” a customer’s service from another underlying carrier to itself.⁵

Further, Ms. Menge testified that LMK expects to generate new business customers through its current contacts.⁶ Ms Menge also affirmed that LMK will comply with all of Tennessee’s public interest obligations and responsibilities as mandated in TRA Rule 1220-4-8-.04(3)(b) and (c). Upon conclusion of LMK’s presentation of proof, the Hearing Officer approved LMK’s *Application* based upon the following findings of fact and conclusions of law:

¹ LMK is a wholly owned subsidiary of Clarity Communications Group, Inc. See, *Testimony of Jennifer Menge*, Exhibit K to the *Application*, pages unnumbered (August 13, 2009).

² Ms. Menge stated that LMK has six employees, not seven employees as is set out in her pre-filed testimony.

³ Pre-filed testimony indicates that LMK plans to build facilities in Tennessee in the future, and will initially resell service. See, *Testimony of Jennifer Menge*, Exhibit K to the *Application* (August 13, 2009).

⁴ Pre-filed testimony states, “LMK intends to offer mainly voice and data communications services, including but not limited to providing basic local telephone service, operator assisted calling services and data services to business customers.” *Testimony of Jennifer Menge*, Exhibit K to the *Application* (August 13, 2009).

⁵ In her pre-filed testimony, Ms. Menge stated that LMK would guard against slamming as follows: “LMK will comply with Tennessee law and the recently revised Federal Communications Commission’s (“FCC’s”) regulations regarding how carriers may change a consumer’s local exchange carrier or Primary Interchange Carrier (“PIC”), pursuant to 47 C.F.R. §64.110 *et seq.* In general, primary local exchange carrier or PIC changes will require the customer’s signature.” *Testimony of Jennifer Menge*, Exhibit K to the *Application* (August 13, 2009).

⁶ Pre-filed testimony additionally indicates that LMK will utilize in-house marketing staff as well as outside salespersons and agents to market its services. See, *Testimony of Jennifer Menge*, Exhibit K to the *Application*, (August 13, 2009).

I. LMK's Qualifications

1. LMK is a corporation organized under the laws of the State of North Carolina, and was licensed to transact business in Tennessee by the Secretary of State on July 27, 2009.

2. The address of the registered agent for LMK, CT Corporation System, is 800 S. Gay Street, Knoxville, Suite 2021, Knoxville, TN 37929. The address of the corporate office of LMK is 9209 Baileywick Road, Suite 203, Raleigh, NC 27615. The telephone number is (919) 270-9833.

3. The *Application* and other supporting information existing in the record indicates that LMK has the requisite technical and managerial ability to provide competitive access services and transport telecommunications services within the State of Tennessee. Specifically, LMK's senior management team possesses sufficient business, technical, and operational experience.

4. LMK has the necessary capital and financial ability to provide the services it proposes to offer.

5. LMK has represented that it will adhere to all applicable statutes, policies, rules, and orders of the Authority.

II. Proposed Services

Initially, LMK intends to provide local exchange service by reselling the facilities of the existing local exchange carriers, primarily in the geographic areas served by BellSouth. Statewide authority is requested in anticipation of future expansion as market conditions warrant. LMK provided the Authority with documentation that reflects that on October 13, 2009, it served notice of its *Application* to provide competing local telecommunications services upon all eighteen Incumbent Local Exchange Carriers in Tennessee.

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon review of the *Application* and the record in this matter, the Hearing Officer finds that approval of LMK's *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

LMK has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-112 (2004) and the Authority's Rules.

IT IS THEREFORE ORDERED THAT:

1. The *Application of LMK Communications LLC* for a Certificate of Public Convenience and Necessity to provide facilities-based and resold local exchange and interexchange telecommunications services within the State of Tennessee filed on August 13, 2009 by LMK Communications LLC is approved.
2. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration within fifteen days from the date of this Order.
3. This Initial Order shall become a Final Order of the Tennessee Regulatory Authority if no petition for reconsideration or appeal of this Order is filed prior to the expiration of the fifteen-day appeal period.


Kelly Cashman-Grams, Hearing Officer