BUTLER | SNOW

January 26, 2018

VIA HAND DELIVERY

Hon. David Jones, Chairman
c/o Sharla Dillon
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243

RE: ***In Re: Application of West Kentucky & Tennessee Telecommunications Cooperative Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide*, TPUC Docket No.** 18-00013

Dear Chairman Jones:

Enclosed please find one (1) original and thirteen (13) copies of the *Application of West Kentucky & Tennessee Telecommunications Cooperative Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* (the "Application"). Also enclosed is a check in the amount of $25.00 for the required filing fee. Please note that Exhibit B to the Application is being submitted **UNDER SEAL** as **CONFIDENTIAL and PROPRIETARY**. Both a public version and a nonpublic, **CONFIDENTIAL** version of Exhibit B are attached.

Finally, one (1) additional copy of the Application is enclosed to be filed-stamped for our records. If you have any questions or require additional information, please let us know.

Very truly yours,

BUTLER SNOW LLP

Melvin J. Malone

clw
Enclosures

The Pinnacle at Symphony Place
150 3rd Avenue South, Suite 1600
Nashville, TN 37201

MELVIN J. MALONE
615.651.6705
melvin.malone@butlersnow.com

T 615.651.6700
F 615.651.6701
www.butlersnow.com

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

IN RE:

APPLICATION OF WEST KENTUCKY & TENNESSEE TELECOMMUNICATIONS COOPERATIVE CORPORATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES STATEWIDE	))))))))	**DOCKET NO. _____**

APPLICATION OF WEST KENTUCKY RURAL TELEPHONE COOPERATIVE CORPORATION, INC. D/B/A/ WEST KENTUCKY & TENNESSEE TELECOMMUNICATIONS COOPERATIVE FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES STATEWIDE

West Kentucky Rural Telephone Cooperative Corporation, Inc. d/b/a West Kentucky and Tennessee Telecommunications Cooperative Corporation ("WK&T" or "Applicant"), by and through its undersigned counsel, and pursuant to Tenn. Code Ann. §§ 65-4-201 through 65-4-204 and Chapter 1220-4-8 of the Rules and Regulations of the Tennessee Public Utility Commission ("TPUC" or "Commission"), as applicable, hereby submits this *Application of WK&T for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* (the "*Application*").

WK&T is a telephone cooperative that was incorporated in Kentucky in 1951 and has its principal offices in Mayfield, Kentucky, and Martin, Tennessee. WK&T acquired Yorkville Telephone Company, a Tennessee telephone cooperative, in 2006. WK&T currently provides a full array of telecommunications and broadband services in six (6) counties in Kentucky and five (5) counties in Tennessee, servicing eight (8) exchanges in Tennessee. On May 2, 2012,

WK&T received a Certificate of Franchise Authority from the Commission to provide cable or video service in several municipalities and communities throughout Tennessee in TPUC Docket No. 12-00023. WK&T currently offers video, broadband, security and telephone services throughout its existing service area.

As provided further below, WK&T seeks to provide a full array of telecommunications services on a statewide basis, as business conditions warrant, including in the following Tennessee counties: Henry, Weakley, Obion, Dyer and Gibson. As set forth herein, and as demonstrated in TPUC Docket No. 12-00023, WK&T has the managerial, financial, and technical fitness to provide the applied-for services in the State of Tennessee. As demonstrated below, the granting of this *Application* will provide significant benefits to Tennessee consumers and thereby serve the public interest. In order to serve the public interest in a timely manner, WK&T requests expedited consideration and approval of this *Application.*

In support of the *Application*, WK&T submits the following.

I. DESCRIPTION OF THE APPLICANT

1. Legal Name and Address of Applicant: Applicant's legal name is West Kentucky Rural Telephone Cooperative Corporation, Inc. d/b/a West Kentucky & Tennessee Telecommunications Cooperative Corporation. WK&T maintains its principal place of business at:

West Kentucky & Tennessee Telecommunications Cooperative Corporation
237 N. 8th Street
Mayfield, KY 420066

and West Kentucky & Tennessee Telecommunications Cooperative Corporation's mailing address is:

P.O. Box 649
237 N. 8th Street
Mayfiled, KY 420066.

2. Contact Persons: Correspondence or communications pertaining to this *Application* should be directed to:

Melvin J. Malone (BPR No. 13874)
BUTLER SNOW LLP
150 Third Avenue South Suite 1600
Nashville, TN 37201
Telephone: (615) 651-6705
melvin.malone@butlersnow.com

Caroline L. Eley (BPR No. 31109)
BUTLER SNOW LLP
150 Third Avenue South Suite 1600
Nashville, TN 37201
Telephone: (615) 651-6743
caroline.eley@butlersnow.com

3. Corporate Liaison: Questions concerning the ongoing operations of WK&T should be directed to:

Trevor Bonnstetter, Chief Executive Officer
West Kentucky & Tennessee Telecommunications Cooperative Corporation
237 N. 8th Street
Mayfiled, KY 420066
Telephone: (270) 856-9980
tbonn@wk.net

4. Corporate Information: As set forth and established by the Applicant, and as recognized by the Commission in TPUC Docket No. 12-00023 ("*the 2012 Order*"), WK&T was formed as a telephone cooperative in 1951 and is authorized by Tennessee state law, particularly, Tenn. Code Ann. § 65-29-102 *et. seq.*, to provide telephone service in selected rural areas. WK&T's Articles of Incorporation are attached hereto in **Exhibit C**. The biographies of the principal corporate officers, members of the Board of Directors, and staff of WK&T are attached hereto in **Exhibit A**.

II. QUALIFICATIONS

Since 1951, WK&T has gained valuable experience as a telecommunications provider. Before issuing the *2012 Order*, the Commission reviewed, among other things, WK&T's managerial, technical, and financial ability to provide cable or video services. With this experience, and as demonstrated below and in the Pre-Filed Testimony of Trevor Bonnstetter (attached as **Exhibit F**), WK&T continues to possess the requisite managerial, technical, and financial ability to provide local telecommunications service throughout the State of Tennessee.

1. Managerial: WK&T has been providing telephone services in Tennessee since 1951, primarily to Tennesseans in the five (5) Tennessee counties serviced, namely Obion, Dyer, Gibson, Weakley and Henry Counties. Before issuing the *2012 Order*, the Commission reviewed, among other things, WK&T's managerial ability. As a telecommunications provider since 1951, WK&T is a seasoned, well-established telecommunications provider. Hence, WK&T has the foundation necessary to provide the proposed telecommunications services and to serve Tennessee's telecommunications consumers throughout the state.

WK&T remains managerially qualified to provide telecommunications services statewide. WK&T is led by Anthony Goodman, President of the Board of Directors, and he is supported by highly qualified and competent directors, officers and staff, including Chief Executive Officer Trevor Bonnstetter. Attached hereto as **Exhibit A** is a list of the names of the Applicant's principal company officers and a description of each officer's background and experience. As shown in **Exhibit A**, these officers of the company have substantial managerial experience in the areas of utility operations, utility customer service and utility marketing.

2. Financial Qualifications: Before issuing the *2012 Order*, the Commission reviewed, among other things, WK&T's financial ability to provide cable or video services.

WK&T is financially qualified to provide a full array of telecommunications services statewide, as it has been providing such services since 1951. WK&T submits as **CONFIDENTIAL Exhibit B** the *2016 and 2015 Audited Financial Statements* of WK&T, which demonstrates that WK&T is financially qualified to provide telecommunications services statewide. **CONFIDENTIAL Exhibit B** is being submitted **UNDER SEAL** as **CONFIDENTIAL AND PROPRIETARY**.

3. Technical Qualifications: Before issuing the *2012 Order*, the Commission reviewed, among other things, WK&T's technical ability to provide cable or video services. Based in part on its experience since 1951 as a telecommunications services provider, coupled with its demonstrated managerial experience, WK&T possesses the necessary technical qualifications to provide a full array of telecommunications services throughout Tennessee. As noted earlier herein, WK&T has successfully serviced its telecommunications customers since 1951. Information concerning the technical expertise of WK&T's senior management team is included in **Exhibit A**. This experience provides WK&T with the foundation necessary to provide the proposed telecommunications services. WK&T will file and maintain tariffs in the manner prescribed by the TPUC and will meet minimum basic local standards, including quality of service and billing standards required of all LEC's regulated by the TPUC. WK&T possesses the requisite level of telecommunications expertise and is technically qualified to offer the proposed services.

III. PROPOSED SERVICES

1. In addition to its current offerings, WK&T intends to offer a full range of telecommunications services via VoIP and other platforms, including, but not limited to, dedicated and switched access services, private line services, local dial tone, 911 and E911

emergency services, enhanced services and all other Commission-required Rule 1220-4-8-.04(3)(b) services. To the extent appropriate and necessary, WK&T may supplement its services by leasing the facilities of third party carriers and/or by reselling the services.

2. WK&T is authorized to provide telecommunications services in certain rural areas in the State of Tennessee, and it desires to expand upon such services, as set forth herein, to offer more consumers increased carrier choices, competitive pricing, increased reliability, responsiveness, and innovation.

3. WK&T understands the importance of effective customer service for local service customers. Upon obtaining the requested expanded certification, WK&T will continue the operation of its toll free customer service number, which will continue to be printed on the customers' monthly billing statements. Additionally, customers may write to WK&T at P.O. Box 649, Mayfield, KY 42066. In the past year, WK&T has had no formal customer service complaints filed.

4. To the extent that any rural incumbent LEC possesses an exemption or suspension under Section 251(f) of the Federal Communications Act (the "Act") that applies to WK&T, WK&T does not seek interconnection under Section 251(c) at this time, nor does WK&T seek at this time to challenge any such exemption from any of the other obligations specified in Section 251(c) of the Act.

IV. REGULATORY MATTERS

1. The Applicant is familiar with and will adhere to all applicable Commission policies, rules, and orders governing the provision of local exchange telecommunications services in the State of Tennessee.

2. The Applicant's Small and Minority Owned Business Plan is attached as **Exhibit D**.

3. Subsequent to the approval of its *Application*, WK&T will file any necessary tariffs prior to providing the proposed service covered by this *Application.*

4. A certificate of service stating that notice of this *Application* has been served on all incumbent local exchange telephone companies in Tennessee is attached hereto.

5. WK&T is aware of its obligation to comply with the requirements of county-wide calling, as set forth in Tenn. Code Ann. § 65-21-114.

6. WK&T does not currently collect deposits from first time customers. To the extent that WK&T requires a deposit for the establishment of service, the same shall be implemented in compliance with the Commission's rules and regulations and as properly provided in and consistent with tariffs.

V. SECTION 253 PREEMPTION

1. As set forth below, and notwithstanding WK&T's entity status as a Tennessee telephone cooperative, Section 253 of the federal Telecommunication Act of 1996 requires approval of this *Application.*

2. As noted earlier in this *Application*, WK&T is a Tennessee telephone cooperative pursuant to Tenn. Code Ann. Section 65-29-102. Under this statute, telephone cooperatives are permitted to furnish telephone service "in rural areas to the widest practical number of users of such services; provided, that there shall be no duplication of service where reasonably adequate service is available." The Commission has interpreted this statute to mean that a telephone

cooperative is not permitted to provide duplicative service in an area where there exists reasonably adequate service.[1]

3. Section 253(a) of the Federal Telecommunications Act of 1996 provides as follows:

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Tenn. Code Ann. Section 65-29-102, as applied by the Commission, has the effect of prohibiting the ability of a Tennessee telephone cooperative to provide telecommunications service throughout the State of Tennessee. The United States Supreme Court, the FCC and TPUC have all recognized that such a prohibition cannot withstand the scrutiny of § 253.[2]

4. Therefore, notwithstanding Tenn. Code Ann. § 65-29-102, the Commission cannot refuse this *Application* based upon any limitations set forth in Tenn. Code Ann. § 65-29-102. Approving the *Application* remains consistent with the long-established policy of the State of Tennessee

> "to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for

---

[1] *In Re: Petition of Frontier Communications of America, Inc. to Amend its Certificate of Convenience and Necessity, Order*, TRA Docket No. 07-00155, pp.10-11 (July 9, 2008) (attached hereto under **Collective Exhibit E**).

[2] *See Nixon v. Missouri Municipal League*, 124 S.Ct. 1555 (2004) (holding that State laws and regulations, excepting those applicable to municipals, are subject to preemption under § 253) (attached under **Collective Exhibit E**); *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 Areas*, Memorandum Opinion and Order, FCC 99-100, 14 F.C.C.R. 11,064 (rel. May 27, 1999), *aff'd* 16 F.C.C.R. 1247 (Jan. 8, 2001) (FCC determining that § 253 preempts Tenn. Code Ann. § 65-4-201(d)) (attached under **Collective Exhibit E**); and *In Re: Petition of Frontier Communications of America, Inc. to Amend its Certificate of Convenience and Necessity, Order*, TRA Docket No. 07-00155, p. 23 (July 9, 2008) (acknowledging the Authority's recognition and deference to the FCC's Hyperion preemption decision). *See also* Office of the Attorney General, Opinion No. 97-154, 1997 Tenn. AG WL 783091 (Nov. 10, 1997) (utility cooperatives are not public, governmental bodies) (attached under **Collective Exhibit E**).

telecommunications services and telecommunications services providers."[3]

VI. PUBLIC INTEREST STATEMENT

1. WK&T is a seasoned telecommunications provider, and the FCC has determined that Tenn. Code. Ann. § 65-4-201(d) is preempted by federal law.[4] Moreover, due to said preemption, the Attorney General for the State of Tennessee has issued an opinion that § 65-4-201(d) is not enforceable.[5]

2. The grant of this *Application* will further the public interest by expanding the availability of telecommunications services throughout the State of Tennessee. Specifically, Tennessee consumers will benefit directly through the use of the competitive local services to be offered by WK&T. WK&T will provide more choices for consumers. Further, the public will benefit indirectly because the competitive presence of WK&T will increase the incentives for telecommunications providers to operate more efficiently, offer more innovative services, reduce prices, improve the quality and coverage of their services, and increase investment in broadband infrastructure.

3. The granting of this *Application* would be consistent with the public policy of the State of Tennessee, as set forth at Tenn. Code Ann. § 65-4-123, "to foster the development of an efficient, technologically advanced statewide system of telecommunications services by permitting competition in all telecommunications services market[.]"

---

[3] Tenn. Code Ann. Section 65-4-124.

[4] *See 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 Areas*, Memorandum Opinion and Order, FCC 99-100, 14 F.C.C.R. 11,064 (rel. May 27, 1999), *aff'd* 16 F.C.C.R. 1247 (Jan. 8, 2001).

[5] *See* Office of the Attorney General, Opinion No. 01-036, 2001 Tenn. AG Lexis 36 (Mar. 19, 2001).

VI. CONCLUSION

For the foregoing reasons, West Kentucky & Tennessee Telecommunications Cooperative Corporation respectfully requests the Commission to grant its Certificate of Public Convenience and Necessity on an expedited basis and authorize it to provide telecommunications services, as requested herein, throughout the State of Tennessee.

Respectfully submitted,

Melvin J. Malone (BPR No. 13874)
Caroline L. Eley (BPR No. 31109)
BUTLER SNOW LLP
150 Third Avenue South, Suite 1600
Nashville, Tennessee 37201
(615) 251-6700 telephone
melvin.malone@butlersnow.com
caroline.eley@butlersnow.com

Attorneys for:

West Kentucky & Tennessee Telecommunications Cooperative Corporation

EXHIBIT A

BIOGRAPHIES OF OFFICERS, BOARD MEMBERS, AND STAFF

West Kentucky & Tennessee Telecommunications Cooperative

Chief Executive Officer

Trevor R. Bonnstetter
304 Canterbury Court, Mayfield, KY 42066

Trevor has been working in telecommunications approximately30 years and throughout his career he has served on many local, state and national telecommunications boards and committees. Throughout his career, he has utilized his telecommunications background to help local communities enhance their industry and job market by utilizing telecommunications, technology and cooperative philosophy.

Trevor's first job in telecommunications was working for Northern Telecom as installation technician and moving on as consultant for international business for Northern Telecom in the Caribbean and Central America. Trevor left Northern Telecom to work with MCI for three years. Trevor then began working for telephone cooperatives and still enjoys using their technology and philosophy of helping communities grow.

Trevor has served as Chief Executive Officer for West Kentucky Rural Telephone Cooperative, Mayfield, Kentucky since February 1998.

West Kentucky & Tennessee Telecommunications Cooperative

Officer Biography

Karen Jackson-Furman
Chief Operating Officer/Chief Financial Officer

Work Location: 237 N. 8th Street, Mayfield, KY 42066

Experience

2016 – present
Ardmore Telephone Company and West Kentucky and Tennessee Telecommunications Cooperative

Responsible for all financial and customer operations business functions. Manage accounting staff responsible for internal financial statement preparation, corporate budgets, tax reporting, and regulatory reporting. Manage customer service staff responsible for billing, reporting, and customer facing processes. Work directly with corporate attorneys, industry consultants, and the board of directors.

1993 – 2015
Egyptian Telephone Cooperative and ComTech Solutions, LLC

Managed all day to day operations of the accounting function, including end user billing and carrier access billing. Prepared and presented the annual operating budget and five year capital budget. Created business plans and evaluated the profit potential of new products, markets, etc. Collected all data for cost study preparation and access rate development

Education

Southeast Missouri State University – Cape Girardeau, MO
Bachelor of Science in Business Administration, Accounting Emphasis, 1993

Southern Illinois University Edwardsville – Edwardsville, IL
Master of Business Administration, 1999

Professional Designation

Certified Public Accountant, 1996

West Kentucky & Tennessee Telecommunications Cooperative

Officer Biography

Carrie Huckeby
Chief Marketing Officer

Work Location: 237 N. 8th Street, Mayfield, KY 42066

Experience

2010 – present
Ardmore Telephone Company and West Kentucky and Tennessee Telecommunications Cooperative

Manage day to day marketing, public relations, local channel, and sales teams for the cooperative and Ardmore. Prepare annual marketing budgets and provide final approval of the local channel and sales budgets. Prepare annual product projections and marketing plans. Duties include evaluating pricing and recommending new services based on customer wants and demands. Responsible for evaluating brand opportunities through public relation events and local channel development. Accountable for company messaging and customer education.

2004-2010
Competitive Services Manager, Ben Lomand Connect

Managed all day to day marketing, public relations, local channel, and outside sales teams for the parent company and CLEC operation. Prepared annual CLEC operational and cooperative marketing budgets. Prepared and monitored annual product projections. Responsible for evaluating branding opportunities through public relation events and local channel development. Responsible for company messaging and customer education.

Education

Motlow State Community College – Tullahoma, TN
Associate of Science, Business Administration and Management – 2009

Mid-Continent University – Mayfield, KY
Bachelor of Science, Business Administration and Management – 2012

Bethel University – McKenzie, TN
Master of Business Administration, 2016

West Kentucky & Tennessee Telecommunications Cooperative

Officer Biography

Stacey Riley
Operations Manager

Work Location: 237 N. 8th Street, Mayfield, KY 42066

Experience

1993 – present
Ardmore Telephone Company and West Kentucky and Tennessee Telecommunications Cooperative

Responsible for day to day operations. Manage OSP, Central office and IT departments. Work directly with Engineering Companies, Vendors and Board of directors.

- Managed the yearly fiber builds and maintain a budget

- **Education**
  Graves County High School

West Kentucky & Tennessee Telecommunications Cooperative

Board Member of the Board

Tony Goodman, President
5553 State Route 131, Hickory, KY 42051

Tony works at a family owned lumber company.

He has been a member of the Board of Directors since 2000, and has actively engaged in the required oversight of WK&T (the "Company").

West Kentucky & Tennessee Telecommunications Cooperative

Board Member of the Board

Ricky Littleton, Vice President
13 Tate Road, Kenton, TN 38233

Ricky is a self-employed farmer.

He has been a member of the Board of Directors since 2006, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member of the Board

Beverly Taylor, Secretary/Treasurer
PO Box 115, Farmington, KY 42040

Beverly is a retired teacher.

She has been a member of the Board of Directors since 1982, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member

Joe Thompson
PO Box 164, Hazel, KY 42049

Joe works for the U.S. Postal Service.

He has been a member of the Board of Directors since 1981, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member

Jerry Holloway
274 State Route 339 E, Mayfield, KY 42066

Jerry is a self-employed farmer.

He has been a member of the Board of Directors since 1997, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member

Bob Barnett
41 Pace Lane, Hardin, KY 42048

Bob is retired.

He has been a member of the Board of Directors since 1997, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member

Jeff Davis
200 County Road 1068, Cunningham, KY 40235

Jeff is a self-employed farmer.

He has been a member of the Board of Directors since 1988, and has actively engaged in the required oversight of the Company.

West Kentucky & Tennessee Telecommunications Cooperative

Board Member

Jerry Stephenson
5400 Highway 140 West, Puryear, TN 38251

Jerry is retired from the U.S. Postal Service.

He has been a member of the Board of Directors since 1993, and has actively engaged in the required oversight of the Company.

PUBLIC EXHIBIT B

2016 AND 2015 AUDITED FINANCIAL STATEMENTS OF WEST KENTUCKY & TENNESSEE TELECOMMUNICATIONS COOPERATIVE CORPORATION

EXHIBIT C

ARTICLES OF INCORPORATION

ARTICLES OF INCORPORATION

of

WEST KENTUCKY RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

We, the undersigned, being natural persons and citizens of the Commonwealth of Kentucky, do hereby execute these articles of incorporation for the purpose of organizing a nonprofit cooperative corporation (herein called the "Cooperative") under the laws of the Commonwealth of Kentucky, pursuant to an Act entitled "AN ACT relating to telephone cooperative, nonprofit corporations, rural telephones and telephone services", approved March 25, 1950, as included in Kentucky Revised Statutes, Chapter 279.

FIRST, the name of the Cooperative is West Kentucky Rural Telephone Cooperative Corporation, Inc.

SECOND, the address of the principal office of the Cooperative is Mayfield, Graves County, Kentucky.

THIRD, the names and addresses of the incorporators of the Cooperative are:

Names	Addresses
Luck Burt	Route #1, Lynn Grove, Kentucky
Loyd Collie	Route #5, Benton, Kentucky
Ralph C. Edrington	Arlington, Kentucky
Roy Lowe	Lowes, Kentucky
L. W. Murdock	Route #1, Farmington, Kentucky

FOURTH, the names and addresses of the persons who shall constitute the first Board of Trustees of the Cooperative are:

Names	Addresses
Luck Burt	Route #1, Lynn Grove, Kentucky
Loyd Collie	Route #5, Benton, Kentucky
Ralph C. Edrington	Arlington, Kentucky
Roy Lowe	Lowes, Kentucky
L. W. Murdock	Route #1, Farmington, Kentucky

FIFTH, The operations of the Cooperative are to be conducted in the Counties of Calloway, Carlisle, Graves, Hickman, and Marshall, and in such other counties as such operations may from time to time become necessary or desirable in the interest of this Cooperative or of its members.

W. L. Parr, Mayfield, is hereby named process agent.

IN WITNESS WHEREOF we have hereunto subscribed our names this 16th day of July, 1951.

Luck Burt

Loyd Collie

Ralph C. Edrington

Roy Lowe

L. W. Murdock

ACKNOWLEDGMENT

STATE OF KENTUCKY

COUNTY OF GRAVES, SS.

I, Farland Robbins, notary public for the State of Kentucky-at-large, do certify that the foregoing Articles of Incorporation were produced to me in said state and acknowledged by Luck Burt, Loyd Collie, Ralph C. Edrington, Roy Lowe, and L. W. Murdock, to be their free act and deed and the free act and deed of each of them as incorporators of West Kentucky Rural Telephone Cooperative Corporation, Inc.

Witness my hand, this the 16th day of July, 1951.

Farland Robbins
Notary Public, State-at-Large, Kentuck
My commission expires Sept. 7, 1954.

Seal

Original copy filed and recorded, July 23, 1951.

George Glenn Hatcher
Secretary of State of Kentucky
Frankfort, Kentucky

By S S S, Deputy

STATE OF KENTUCKY
COUNTY OF GRAVES, Set.

I, R. B. Huie, clerk of the county court in and for the state and county aforesaid do certify that the foregoing Articles of Incorporation was lodged in my office for record on the 25 day of July, 1951, and the same and the foregoing and this certificate have been duly recorded in my office in Articles of Incorporation book 3, page 260, this 26 day of July, 1951.

R. B. Huie, Clerk

By A. Housman, D. C.

STATE OF KENTUCKY,

COUNTY OF GRAVES, SS.

I, Roy Lowe, secretary of West Kentucky Rural Telephone Cooperative Corporation, Inc., certify that the foregoing is an authentic copy of the Articles of Incorporation of said corporation as they appear in the records of said corporation with the addition of the certificate of the Graves County Court Clerk as shown on the record of said Articles filed in his office at Mayfield, Kentucky, and I further certify that there have been no amendments to said Articles of Incorporation to this date.

Given under my hand and seal of office, this January 2, 1954.

Roy M. Lowe

Secretary, West Kentucky Rural Telephone Cooperative Corporation, Inc.

EXHIBIT D

SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN

SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN

Pursuant to T.C.A. §65-5-112, as amended, West Kentucky & Tennessee Telecommunications Cooperative. ("WK&T") submits this small and minority-owned Telecommunications business participation plan (the "Plan") along with its Application for a Certificate of Public Convenience and Necessity to provide competing intrastate and local exchange services in Tennessee.

I. PURPOSE

The purpose of §65-5-112 is to provide opportunities for small and minority-owned businesses to provide goods and services to Telecommunications service providers. WK&T is committed to the goals of §65-5-112 and to taking steps to support the participation of small and minority-owned Telecommunications businesses in the Telecommunications industry. WK&T will endeavor to provide opportunities for small and minority-owned Telecommunications businesses to compete for contracts and subcontracts for goods and services. As part of its procurement process, WK&T will make efforts to identify and inform minority-owned and small businesses that are qualified and capable of providing goods and services to WK&T of such opportunities. WK&T's representatives have already contacted the Department of Economic and Community Development and the administrator of the Small and Minority-Owned Telecommunications Assistance Program, to obtain a list of qualified vendors. Moreover, WK&T will seek to increase awareness of such opportunities so that companies not otherwise identified will have sufficient information to participate in the procurement process.

II. DEFINITIONS

As defined in §65-5-112.

Minority-Owned Business. Minority-owned business shall mean a business which is solely owned, or at lease fifty-one percent (51%) of the assets or outstanding stock of which is owned, by an individual who personally manages and controls daily operations of such business, and who is impeded from normal entry into the economic mainstream because of race, religion, sex or national origin and such business has annual gross receipts of less than four million dollars ($4,000,000).

Small Business. Small Business shall mean a business with annual gross receipts of less than four million dollars ($4,000,000).

III. ADMINISTRATION

WK&T's Plan will be overseen and administered by the individual named below, hereinafter referred to as the Administrator, who will be responsible for carrying out and promoting WK&T's full efforts to provide equal opportunities for small and minority-owned businesses. The Administrator of the Plan will be:

Trevor Bonnstetter, CEO
West Kentucky & Tennessee Telecommunications Cooperative Corporation
237 N. 8th Street
Mayfiled, KY 420066
Telephone: (270) 8674-1000

The Administrator's responsibilities will include:

(1) Maintaining an updated Plan in full compliance with §65-5-112 and the rules and orders of the Tennessee Regulatory Authority.

(2) Establishing and developing policies and procedures necessary for the successful implementation of the Plan.

(3) Preparing and submitting such forms as may be required by the Tennessee Regulatory Authority, including the filing of required annual updates.

(4) Serving as the primary liaison to and cooperating with the Tennessee Regulatory Authority, other agencies of the State of Tennessee, and small and minority-owned businesses to locate and use qualified small and minority-owned businesses as defined in §65-5-112.

(5) Searching for and developing opportunities to use small and minority-owned businesses and encouraging such businesses to participate in and bid on contracts and subcontracts.

(6) Providing records and reports and cooperating in any authorized surveys as required by the Tennessee Regulatory Authority.

(7) Establishing a record-keeping system to track qualified small and minority-owned businesses and efforts to use such businesses.

(8) Providing information and educational activities to persons within WK&T and training such persons to seek out, encourage, and promote the use of small and minority-owned businesses.

In performance of these duties, the Administrator will utilize a number of resources, including:

Chambers of Commerce
The Tennessee Department of Economic and Community Development
The United States Department of Commerce
Small Business Administration
Office of Minority Business
The National Minority Supplier Development Counsel

The National Association of Women Business Owners
The National Association of Minority Contractors
Historically Black Colleges, Universities, and Minority Institutions

The efforts to promote and ensure equal opportunities for small and minority-owned businesses are primarily spelled out in the Administrator's duties above. Additional efforts to provide opportunities to small and minority-owned businesses will include offering, where appropriate and feasible, small and minority-owned businesses assistance with technical, insurance, bonding, licensing, production, and deadline requirements.

IV. RECORDS AND COMPLIANCE REPORTS

WK&T will maintain records of qualified small and minority-owned business and efforts to use the goods and services of such businesses. In addition, WK&T will maintain records of educational and training activities conducted or attended and of the internal procurement procedures adopted to support this plan. WK&T will submit records and reports required by the Tennessee Regulatory Authority concerning the Plan. Moreover, WK&T will cooperate fully with any surveys and studies required by the Tennessee Regulatory Authority.

West Kentucky & Tennessee Telecommunications Cooperative

By: Trevor R. Bonnstetter
Administrator

Dated: 1-26, 2016.

COLLECTIVE EXHIBIT E

2008 WL 3822528 (Tenn.R.A.)
Slip Copy

Re Frontier Communications of America Inc.

Docket No. 07-00155

Tennessee Regulatory Authority

July 9, 2008

Before Roberson, chairman, and Hargett and Jones, directors.

BY THE DEPARTMENT:

ORDER

This matter came before Chairman Eddie Roberson, Director Tre Hargett, and Director Ron Jones of the Tennessee Regulatory Authority ('Authority' or 'TRA '), the voting panel assigned to this docket, at a regularly scheduled Authority Conference on May 5, 2008 for consideration of the *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity ('Petition')* filed on June 20, 2007 which requested an amendment to its existing authority 'to provide telecommunications service ...in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone Cooperative, Inc. ('Ben Lomand').' [1]

BACKGROUND

On June 27, 1996, an Order was entered by the Tennessee Public Service Commission ('TPSC') in Docket No. 96-00779 approving the Initial Order of an Administrative Judge and granting a certificate of public convenience and necessity ('CCN') to Citizens Telecommunications Company d/b/a Citizens Telecom ('Citizens') to operate as a competing telecommunications service provider. The Order of the TPSC specifically adopted the findings and conclusions in the Administrative Judge's Initial Order entered on May 30, 1996. [2] The *Initial Order* stated that the application of Citizens sought a CCN to offer 'a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company' on a statewide basis. Specifically, the *Initial Order* reflected that Citizens agreed to adhere to TPSC policies, rules and orders and stated that 'the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. § 65-4-201 (d).' [3]

On January 10, 2003, the TRA issued an *Order Approving Merger* which approved a merger between Frontier Communications of America, Inc. ('Frontier') and Citizens. As a result of this merger, Citizens' name was changed to Frontier.

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc. ('Petition for Declaratory Ruling')* in Docket No. 04-00379. In its *Petition for Declaratory Ruling*, Frontier identified itself as a competing local exchange carrier ('CLEC') and contended that it had statewide authority from the TRA to provide telecommunications services based on the Order entered in TPSC Docket No. 96-00779. Additionally, Frontier and Ben Lomand Rural Telephone Cooperative, Inc. ('Ben Lomand') petitioned for and obtained TRA approval of an Interconnection Agreement dated August 2, 2004. Through its *Petition for Declaratory Ruling* and its Interconnection Agreement with Ben Lomand, Frontier sought to compete in territory served by Ben Lomand. Ben Lomand responded to the *Petition for Declaratory Ruling* stating that Frontier did not have authority to compete in Ben Lomand's service territory and moving to dismiss the action.

At a regularly scheduled Authority Conference on November 7, 2005, the panel in Docket No. 04-00379 unanimously determined that Frontier does not have statewide authority under its current CCN to permit it to serve customers in Ben Lomand's territory. The panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide a competing service only as allowable by state law at the time. The 1996 TPSC Order did not extend Citizens' authority statewide to enter into territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives. The panel unanimously voted to dismiss the *Petition for Declaratory Ruling* of Frontier on the procedural ground that Frontier was asserting a claim for relief which could not be granted pursuant to the status of Frontier's current CCN. [4] The Authority's dismissal of the declaratory petition did not address the merits of the statutory restriction pertaining to competition within the territory of cooperative telephone service providers.

On December 14, 2005, Frontier filed its *Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling ('Petition for Preemption')* with the Federal Communications Commission ('FCC'). [5] The *Petition for Preemption* seeks an Order from the FCC that would overrule the November 7, 2005 decision of the Authority in TRA Docket No. 04-00379, preempt Tenn. Code Ann. § 65-29-102, and rule that Frontier may compete in the service territory of Ben Lomand. In its *Petition for Preemption*, which was filed with the FCC before the issuance of the Order of the Authority in Docket No. 04-00379, Frontier asserts that Ben Lomand's motion to dismiss in that docket was granted by the TRA 'on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives.' [6]

On February 21, 2006, during the comment period for FCC WC Docket 06-6, the TRA filed its *Opposition of the Tennessee Regulatory Authority to Frontier's Petition for Preemption and Declaratory Ruling ('Opposition to Petition for Preemption')* with the FCC, effectively intervening in that action. In its *Opposition to Petition for Preemption*, the Authority 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 ground that it is not ripe for consideration because Frontier has not exhausted its remedies at the TRA. [7]

To date, the FCC has not rendered a decision on Frontier's *Petition for Preemption.*

TRAVEL OF THIS CASE

On June 20, 2007, Frontier filed its *Petition* requesting amendment to its existing authority 'to provide telecommunications service ...in areas served by telephone cooperatives, including territory served by [Ben Lomand].' [8] On July 9, 2007, the panel voted unanimously to convene a contested case proceeding and to appoint General Counsel or his designee as Hearing Officer for the purpose of preparing this matter for hearing. On July 11, 2007, Ben Lomand filed its *Petition to Intervene* pursuant to Tenn. Code Ann. § 4-5-310.

On November 20, 2007, the Hearing Officer issued a *Notice of Status Conference*. The notice provided that any party desiring to participate in this proceeding should file a petition to intervene not later than November 30, 2007, and that petitions to intervene filed by that date would be considered at the status conference on December 5, 2007. The notice also stated that the establishment of a procedural schedule and any other pre-hearing issues would be matters for discussion during the status conference.

On November 29, 2007, the Authority received petitions for leave to intervene from the following interested parties: Highland Telephone Cooperative, Inc. ('Highland'), Bledsoe Telephone Cooperative Corporation, Inc. ('Bledsoe'), West Kentucky Rural Telephone Cooperative Corporation, Inc. ('West Kentucky'), DTC Communications ('DTC'), North Central Telephone Cooperative, Inc. ('North Central'), and Twin Lakes Telephone Cooperative Corporation ('Twin Lakes ') (collectively, the 'Intervening Cooperatives'). On December 3, 2007, the Intervening Cooperatives filed their *Motion to Hold Case in Abeyance ('Abeyance Motion')*. On December 5, 2007, Frontier filed its *Response in Opposition to the Motion to Hold Case in Abeyance Filed by the Intervenors.*

At the Status Conference convened on December 5, 2007, all parties presented oral argument concerning the merits of the *Abeyance Motion*, after which the Hearing Officer took the matter under advisement. Additionally, the parties agreed that a procedural timeline for resolution of this docket is dependent upon the outcome of the Abeyance *Motion* and suggested that the parties submit an agreed proposed procedural schedule not later than seven days following issuance of the Hearing Officer's Order pertaining to the *Abeyance Motion*, if necessary.

On December 6, 2007, the Hearing Officer issued an *Order Granting Petitions to Intervene, Setting Deadline for Receipt of Proposed Procedural Schedule and Addressing Other Preliminary Matters* memorializing decisions made by the Hearing Officer at the Status Conference. Additionally therein, the Hearing Officer stated that a separate order rendering a decision on the *Abeyance Motion* would be later issued.

On December 20, 2007, the Hearing Officer issued an *Order Declining to Hold Case in Abeyance Subject to Condition Precedent*. In the Order, the Hearing Officer denied the *Abeyance Motion* and advised the parties that the docket would not proceed until a notice of the filing of the *Petition* and Frontier's request that the Authority proceed on its *Petition* was filed with the FCC in FCC Docket WC-06-6. The Hearing Officer further ruled that upon the filing of a copy of such a notice with the TRA, the parties shall submit an agreed procedural schedule proposing a timeline for moving the docket forward to a resolution on the merits.

On January 14, 2008, a copy of a letter notifying the FCC of Frontier's *Petition* and its request to the TRA to proceed with action on the *Petition* was received by the Authority. On February 22, 2008, a *Petition of Comcast Phone of Tennessee, LLC ('Comcast Phone ') for Leave to Intervene* was filed with the Authority. On March 5, 2008, the Hearing Officer received an electronic communication from the parties advising of their agreement regarding a proposed procedural schedule and a request that the docket proceed to resolution before the Authority. Comcast's petition to intervene was granted by Order of the Hearing Officer issued on March 6, 2008. On March 7, 2008, the Hearing Officer issued the *Order Setting Procedural Schedule* in which it was noted that the parties had advised the Hearing Officer that there were no material facts in dispute and that the issues presented in the docket were purely legal in nature. On March 26, 2008, the Intervening Cooperatives filed their notice of withdrawal. On March 27, 2008 initial briefs were filed by Frontier, Ben Lomand, and Comcast. Frontier and Ben Lomand each filed a reply brief on April 10, 2008. Comcast informed the TRA of its election not to file a reply brief on April 10, 2008.

On April 21, 2008, the panel heard oral argument of the parties concerning the following legal questions:

1) Whether the TRA has jurisdiction in this matter; and,

2) Whether the TRA may permit Frontier to amend its existing authority 'to provide telecommunications service ...in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone.' [9]

The parties were advised that the panel would deliberate these issues at the regularly scheduled Authority Conference on May 5, 2008 and, if needed, following the decision of the panel on the threshold issues, hold a public hearing pursuant to

Tenn. Code Ann. § 65-4-201. On April 28, 2008, Frontier filed its pre-filed Direct Testimony in support of its managerial, financial, and technical qualifications to provide service.

DISCUSSION & ANALYSIS

Question 1 — Jurisdiction

Under Tenn. Code Ann. § 65-4-101(6)(E), telephone cooperatives are excluded from the definition of public utilities and therefore are not subject to general regulation by the TRA except as specifically provided in Tennessee statutes. In 1961, the General Assembly determined that the TRA shall have jurisdiction over a telephone cooperative in three specific instances as follows:

T.C.A. § 65-29-130. Jurisdiction

(a) Cooperatives and foreign corporations engaged in rendering telephone service in this state pursuant to this chapter fall within the jurisdiction of the Tennessee regulatory authority for the sole and specific purposes as set out below: (1) The establishment of territorial boundaries; (2) The hearing and determining of disputes arising between one (1) telephone cooperative and other telephone cooperatives, and between telephone cooperatives and any other type of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes; and (3) The approval of sales and purchases of operating telephone properties.

Tenn. Code Ann § 65-4-201 outlines the requirements which must be met by any telecommunications service provider seeking approval of a CCN for the purpose of offering services within the state and the role of the TRA when reviewing any such petition. Under Tenn. Code Ann. § 65-4-201, the TRA has jurisdiction over a petition by a telecommunications service provider requesting a CCN or an amendment thereto, statewide or otherwise. The TRA has previously determined that 'the authority of the TRA 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.' [10]

Finally, Tenn. Code Ann. § 65-5-110 (a) states '[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408 [the Tennessee Telecommunications Act].'

Question 2 — Amendment of CCN to provide telecommunications service in areas served by telephone cooperatives

A. The Telephone Cooperative Act ('Cooperative Act'), Tenn. Code Ann. § 65-29-101, et seq.

In 1961, the General Assembly, through the *Cooperative Act*, provided entities organized under chapter 29 (i.e. telephone cooperatives) with special benefits and responsibilities, unique incentives, and specific corporate powers so as to enable telephone cooperatives to provide the type of service which might otherwise be considered economically unfeasible. The General Assembly enacted the *Cooperative Act* to encourage the provision of telephone service in rural areas, but did not do so without any limitation. Tenn. Code Ann. § 65-29-102 provides:

T.C.A. § 65-29-102. Purpose

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.* Corporations organized under this chapter

and corporations which become subject to this chapter in the manner provided in this chapter are referred to in this chapter as 'cooperatives.' and shall be deemed to be not-for-profit corporations. (Emphasis added).

As an initial matter, the parties dispute the plain language of the statute and each offers a contrasting interpretation. Frontier asserts that the *Cooperative Act* prohibits a telephone cooperative from providing service in an area where reasonably adequate service is available, as construed by the Tennessee Attorney General, but does not nor was it intended to bestow territorial protection upon telephone cooperatives. [11] Ben Lomand contends that the *Cooperative Act* 'prohibits any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory.' [12] Although Ben Lomand insists that its interpretation is proper and in conformity with the plain language of the statute, when asked during oral argument to identify the specific language that grants it protection from competition, it was unable to do so. [13] Ben Lomand has also failed to provide any other authority to support its interpretation of the statute.

The Tennessee Supreme Court reiterated the well-settled law of statutory construction in the case of *Gleaves v. Checker Cab Transit Corp.*: [14]

A 'basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature.'*Carson Creek Vacation Resorts, Inc. v. State Dep't. of Revenue*, 865 S.W.2d 1, 2 (Tenn.1993). In determining legislative intent and purpose, a court must not 'unduly restrict or expand a statute's coverage beyond its intended scope.'*Worley v. Weigels, Inc.*, 919 S.W.2d 589, 593 (Tenn.1996)(quoting *Owens v. State*, 908 S.W.2d 923, 926 (Tenn.1995)). Rather, a court ascertains a statute's purpose from the plain and ordinary meaning of its language, *see Westland West Community Ass'n. v. Knox County*, 948 S.W.2d 281, 283 (Tenn.1997), 'without forced or subtle construction that would limit or extend the meaning of the language.'*Carson Creek Vacation Resorts, Inc.*, 865 S.W.2d at 2. When, however, a statute is without contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from the words of the statute. *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn.1997). Moreover, if 'the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it.''*Id.* (quoting *Miller v. Childress*, 21 Tenn. (2 Hum.) 320, 321-22 (1841)). Therefore, '[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction.'*Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952). Finally, it is not for the courts to alter or amend a statute. *See Town of Mount Carmel v. City of Kingsport*, 217 Tenn. 298, 306, 397 S.W.2d 379, 382 (1965); *see also Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn.1995); *Manahan v. State*, 188 Tenn. 394, 397, 219 S.W.2d 900, 901 (1949). Moreover, a court must not question the 'reasonableness of [a] statute or substitut[e][its] own policy judgments for those of the legislature. '*BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn.Ct.App.1997). Instead, courts must 'presume that the legislature says in a statute what it means and means in a statute what it says there.'*Id.* Accordingly, courts must construe a statute as it is written. *See Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948). [15]

A careful review of Tenn. Code Ann. § 65-29-102 shows that it is clear and unambiguous on its face. The plain language of the statute, without a forced interpretation or an expansion of the ordinary terms it employs, makes clear that it is the telephone cooperative that shall not be permitted to provide duplicative service in an area where there exists reasonably adequate service. The language imposes a restriction upon the cooperative, and does not grant a corresponding territorial protection from outside competition, as asserted by Ben Lomand. When this statute was enacted, it is possible that this language may have been intended to provide a measure of security for then-existing telephone cooperatives providing telephone service in rural areas. Nevertheless, the statute on its face does not purport to grant refuge from competition for cooperatives organizing under the *Cooperative Act*. There is no language found within the statute that purports to grant a telephone cooperative a right to be free from the competition of a service provider or entity not organized under the *Cooperative Act*.

Furthermore, as cited by Frontier, the Tennessee Attorney General has interpreted the conditional language found within the statute to be a prohibition or restriction on the telephone cooperative:
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 § 65- 4-107; *a telephone cooperative is prohibited by § 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 § 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 (emphasis added). [16]

* * * A municipality can only allow a telephone cooperative organized under T.C.A. § 65-29-101, et seq. ...to conduct business in the municipality if it is determined under T.C.A. § 54-29-102 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 company would qualify to be serviced by a telephone cooperative. [17]

In the absence of case law concerning the *Cooperative Act*, the Tennessee Attorney General, in a variety of opinions, has stated the purpose of the *Cooperative Act* by referencing specific statutory language:
Under T.C.A. § 65-29-102, cooperative, nonprofit, membership corporations may be organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there is no duplication of service where reasonably adequate telephone service is available. [18] The purpose of telephone cooperatives organized under Chapter 29 of Title 65 is to 'furnish telephone service in rural areas to the widest practical number of users of such service.' [19] Telephone cooperatives are organized and operated pursuant to the provisions of T.C.A. § 65-29-101, et seq. (the 'Telephone Cooperative Act'). Such cooperatives are organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there shall be no duplication of service where reasonably adequate telephone service is available, pursuant to T.C.A. 65-29-102. [20]

It is apparent that an interpretation of the statute which fosters territorial protection for cooperatives has been perpetuated for many years and has inured to the benefit of cooperative telephone companies. Such a misinterpretation or misconstruction of the statute continues and it is the genesis of the dispute in this docket. Upon a careful review of the *Cooperative Act*, statements in various Attorney General Opinions, and after a review of recordings of the House and Senate discussions of the legislation which passed in 1961, [21] it is clear that the bestowing of territorial protection to the benefit of telephone cooperatives is not supported by the *Cooperative Act*. Undoubtedly, Ben Lomand has enjoyed this 'protection' and would like for it to continue. The Intervening Cooperatives [22] chose to withdraw their intervention prior to the submission of briefs on these important issues.

In several dockets in the past, the TRA has alluded to the widely held belief of a statutorily-sanctioned monopoly position for the telephone cooperatives. In his Concurring Opinion to an order granting a CCN to Ben Lomand Communications, Inc. (an affiliate of Ben Lomand Rural Cooperative) to provide telecommunication services as a CLEC in 1999, former Director Lynn Greer stated 'the certificate granted to Ben Lomand will allow the for-profit subsidiary to compete in the telephone business against other telephone providers while at the same time allowing the not-for-profit cooperative to protect its territory from outside competition .... I realize that the General Assembly made a policy decision in this area ...' [23]

In the predecessor docket to this case, Docket No. 04-00379, 'the panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide competing service as allowable by state law at the time. The 1996 TPSC order did not extend Citizens' authority statewide to enter into territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives.'[24] Additionally, during the deliberations of Frontier's petition concerning whether competition was permitted in the territory of Ben Lomand, former Director Pat Miller made the following comments, 'after reviewing the pleadings and applicable statutory provisions, I do not find specific language contained within existing state law that would permit the TRA to grant authority to CLECs to serve territories served by telephone cooperatives. I am also convinced that prior to the 1995 act this agency did not have authority to allow competitive entry into areas served by cooperatives.'[25]

The Authority is not foreclosed from taking a position on interpreting this statute, which may be contrary to the remarks of Directors in earlier dockets. In addition, none of the Directors assigned to the voting panel of this docket have considered this issue before.

If, however, the *Cooperative Act*, or Tenn. Code Ann. § 65-29-102 specifically, is capable of more than one reasonable interpretation, then the statute is ambiguous. The Court of Appeals in *Consumer Advocate Div. v. Tennessee Regulatory Authority* stated,

The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that 'interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts.[26]

Thus, in the event that a statute logically has more than one meaning, or is capable of conflicting yet wholly reasonable interpretations, the court will customarily defer to the interpretation of the administrative agency. An interpretation that Tenn. Code Ann. § 65-29-102 does not convey or bestow territorial protection from competition by entities not organized thereunder, is supported by a reading of the plain language of the statute itself.

As a part of Title 65 of the Tennessee statutes, it must be addressed how the *Cooperative Act* is integrated into the overall statutory scheme for telecommunications declared by the General Assembly in 1995. Even if the *Cooperative Act* did somehow grant territorial protection to cooperatives, with the enactment of Tennessee's Telecommunications Act in 1995, the General Assembly declared clearly that the fostering of competition in *all* areas of Tennessee is the mandate of this state and the charge of the TRA. Term. Code Ann. § 65-4-123 states:

T.C.A. § 65-4-123. Declaration of telecommunications services policy

The general assembly declares 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*, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. *To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider*; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable. (Emphasis added).

The courts have addressed the overarching implications and sweeping changes made and intended as a result of Tennessee's Telecommunications Act in 1995. In *BellSouth Telecommunications, Inc. v. Greer*,[27] the Tennessee Court of Appeals discussed the dramatic actions taken by the state legislature and Governor in 1995 concerning the regulation of the telecommunications market in Tennessee:

...two competing telecommunications bills were introduced in the first session of the Ninety-Ninth General Assembly that had convened in January 1995. The avowed purpose of both bills was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. Filed concurrently with these bills was a bill to replace the Commission [Public Service Commission] with a new regulatory entity. On May 26, 1995, the Governor signed a bill replacing the Commission with the Tennessee Regulatory Authority effective July 1, 1996.[6] Two weeks later, the Governor signed another bill dramatically altering the regulation of local telephone companies and opening up the local telecommunications market to unprecedented opportunities for competition.[7] FN6. Act of May 24, 1995, ch. 305, 1995 Term. Pub. Acts 450. FN7. Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703, codified at Tenn. Code Ann. §§ 65-4-101, -123 & -124, 65-4-201, -203, -207, and 65-5-208 to-213 (Supp.1996). The expressed goal of the new regulatory structure was to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. *See* Tenn. Code Ann. § 65-4-123 (Supp.1996). In broad terms, the 1995 legislation set out to accomplish this goal in five ways. First, it mandated the universal availability of basic telephone service at affordable rates and froze basic and non-basic telephone rates for four years [footnote omitted]. Second, it required incumbent local telephone companies to make available non-discriminatory interconnection to their public networks to other providers [footnote omitted]. Third, it eased the traditional limitations on the ability of new providers to enter the market.[10] Fourth, it provided a transition procedure to enable existing local telephone companies to take advantage of the newly relaxed regulatory environment [footnote omitted]. Fifth, it established a five-year, $10 million loan guarantee program to induce small and minority businesses to enter the telecommunications market [footnote omitted]. FN10. Prior to 1995, the Commission could not permit new competitors to enter a market already served by another provider unless it found that the current service was 'inadequate to meet the reasonable needs of the public. ' Tenn. Code Ann. § 65-4-203(a) (Supp.1996). The 1995 legislation exempts telecommunications service providers from this requirement. Tenn. Code Ann. § 65-4-203(c). The 1995 legislation also permits new competitors to enter a market if they demonstrate that they will adhere to the applicable legal requirements and that they possess sufficient managerial, financial, and technical abilities to provide the service. Tenn. Code Ann. § 65-4-201(c). *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 666-667 (Tenn. App. 1997).

In the 2003 case of *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*,[28] the Tennessee Court of Appeals discussed the condition of the telecommunications market in Tennessee prior to the widespread and sweeping legislation enacted by the General Assembly:

Before the state legislature made significant changes in the law governing telecommunications services in 1995, local telephone service was provided to consumers in a locality by one company under a regulated monopoly system. The adoption of the Tennessee Telecommunication Act, 1995 Tenn. Pub. Acts 408 (effective June 6, 1995), abolished monopolistic control of local telephone service and opened that market to competition. It also changed the way in which providers of such services, and the rates they charge, were regulated.[29]

The *Greer* and *BellSouth BSE* cases demonstrate that even if the *Cooperative Act* at one time had provided territorial protection to cooperatives, the actions of the General Assembly in 1995 would serve to resolve and override conflicting prior legislation. As stated by the *Greer* Court at footnote 10 quoted above, consideration of whether 'current service was 'inadequate to meet the reasonable needs of the public' Term. Code Ann. § 65-4-203 (a) (Supp.1996),' is not the law following the 1995 Telecommunications Act. The decision whether to allow competition in the telecommunications market has been decided by the General Assembly. The question is no longer when or under what circumstances should competition be allowed, the law in Tennessee mandates that competition will be fostered in 'all telecommunications services markets ...to protect the interests of consumers without unreasonable prejudice or disadvantage to any

telecommunications services provider ...' [30] Further, as articulated in *BellSouth BSE*, the 1995 legislation was intended to 'abolish monopolistic control of local telephone service and open that market to competition.' [31]

Ben Lomand argues that it was not contemplated that telephone cooperatives would be included in the 1995 Telecommunications Act Ben Lomand asserts that only 'public utilities' within the definition of Tenn. Code Ann. § 65-4-101 are contemplated within the 1995 Telecommunications Act. Therefore, because cooperatives are specifically exempted from this definition by Tenn. Code Ann. § 65-4-101(6)(E), [32] they are likewise free from the imposition of mandated competition. Again, Ben Lomand's argument is not consistent with the rules of statutory construction.

Pursuant to the rules of statutory construction, first and foremost, 'courts must presume that the legislature says in a statute what it means and means in a statute what it says there.' [33] The Tennessee Supreme Court, in the case of *Ki v. Slate*, stated:

When construing statutes, we are required to ascertain and effectuate the legislative intent and purpose of the statutes. *State v. Walls*, 62 S.W.3d 119 (Tenn.2001). We should 'assume that the legislature used each word in the statute purposely and that the use of [each] word conveyed some intent. ' *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997). Further, courts must presume that the legislature is aware of prior enactments and of the decisions of the courts when enacting legislation. *Id.* Legislative intent must be derived from the plain and ordinary meaning of the statutory language if the statute is devoid of ambiguity. *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000). [34]

The General Assembly made it clear in Public Chapter 408, the enacted legislation of the 1995 Telecommunications Act, that the overall goal of the Act was to open the 'telecommunications services market' to competition. The preamble to Public Chapter 408 states in pertinent part,

> WHEREAS, It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market; and WHEREAS, Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each; and ... [35]

Therefore, the language of Term. Code Ann. § 65-4-123, '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,' should be construed as meaning exactly what it states — all markets. Further, while Ben Lomand does not fall within the definition of 'telecommunications service provider ' [36] under Tenn. Code Ann. § 65-4-101(8), Frontier does. The additional language of Tenn. Code Ann. § 65-4-123, ' ...the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider ...' means that regulation under the 'new' legislative scheme should not unreasonably prejudice or disadvantage Frontier.

It is a legal assumption that the General Assembly was aware of the *Cooperative Act* and its provisions when it enacted the 1995 Telecommunications Act. Whether one considers the meaning of the *Cooperative Act* on its face (no territorial protection afforded) or the interpretation of the *Cooperative Act* advocated by Ben Lomand, the clear directives of the General Assembly set forth in the 1995 Telecommunications Act must prevail, ultimately resulting in the entry of Frontier and other CLECs into *all* telecommunications services markets in Tennessee. As stated by the Tennessee Attorney General in an opinion concerning the statutory jurisdiction of the TRA over cooperatives, and which is equally applicable to the question presented in this matter, '[t]his interpretation is consistent with the well established rule of statutory construction that statutes relating to the same subject matter must be construed so as to make the legislative scheme operate in a consistent and uniform matter. See, e.g., State v. Hughes, 512 S.W. 2d 552, 552 (Term. 1974).' [37]

A legislative scheme designed to encourage competition in telecommunications service markets for the benefit of consumers cannot operate as intended under the restrictions placed on the 1995 Telecom Act by Ben Lomand. In particular, not permitting Frontier to compete in Ben Lomand's territory would be unfair and inequitable. This is especially true under the circumstances presented in this docket, where Ben Lomand is a 'nonutility' by definition, while its for-profit subsidiary, Ben Lomand Communications, Inc. ('BLC'), is a 'competing telecommunications service provider' [38] ('CLEC') pursuant to Tenn. Code Ann. § 65-4-101(1) and has been operating in the areas served by Frontier. In light of the fact that Ben Lomand intentionally created BLC for the purpose of actively competing with Frontier and other CLECs over nine years ago, a proper implementation of the 1995 Telecommunications Act would serve to avoid the continuation of unreasonable prejudice and disadvantage experienced by Frontier. Again, the preamble to the Public Chapter 408, articulates the intentions of the General Assembly, ' ...Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination ...' [39]

The TRA has jurisdiction over such disputes between cooperatives and non-cooperative telephone service providers pursuant to Tenn. Code Ann. § 65-29-130. Frontier asserts that pursuant to Tenn. Code Ann. § 4-5-223(a) the TRA has jurisdiction and authority to declare Tenn. Code Ann. § 65-29-102, as interpreted by Ben Lomand, preempted. [40] Tenn. Code Ann. § 4-5-223(a) states:

Any 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. [41]

Further, Frontier cites TRA Rule 1220-1-2-.05 in support of the Authority's power to nullify statute. TRA Rule 1220-1-2-.05 provides:

> 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. [42]

Ben Lomand asserts that Tenn. Code Ann. § 65-29-102 is a valid and enforceable statute and that the TRA has no authority to preempt it. 'It is the duty of the Authority to enforce state laws, not throw them out the window. ' [43] Nevertheless, in this instance, the Authority can enforce the statute without supporting Ben Lomand's interpretation thereof. The plain language of the statute does not act as a bar to competition, particularly from entities not organized under the *Cooperative Act* as asserted by Ben Lomand Even if it did, the provisions of the 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123, would supersede such an anticompetitive result. Therefore, it is not necessary that the TRA should rule upon the constitutionality of the statute specifically.

B. Tenn. Code Ann. § 65-4-201 (d) and federal preemption under Hyperion

The General Assembly has been clear in its intention and desire that Tennessee's telecommunications markets should be open. Yet, the legislature provided an exception, Tenn. Code Ann. § 65-4-201(d) in which the General Assembly specifically considered rural communities and the telephone service providers serving them.

As part of the 1995 Telecommunications Act, the General Assembly enacted Tenn. Code Ann. § 65-4-201(d), which purported to insulate incumbent local exchange telephone companies ('ILECs') with fewer than 100,000 access lines from competition unless an ILEC entered into an interconnection agreement voluntarily or it applied for a certificate to compete outside its service area. In a memorandum opinion and order adopted on May 14, 1999, the FCC in *In re*

AVR, L.P. d/b/a Hyperion of Tennessee, L.P.[44] exercised its authority under 47 U.S.C. § 253(d) to preempt enforcement of Tenn. Code Ann. § 65-4-201(d). In so doing, the FCC stated:

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).[45] 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).[46] 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. § 65-4-210(d) and the Denial Order, as directed by section 253(d).[47] 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.[48] 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.[49] 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 judgment violate section 253 as applied by this commission.[50]

Thus, ultimately, the FCC found Tenn. Code Ann. § 65-4-201(d) to be anticompetitive in violation of Section 253 (a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,[51] and outside the scope of authority reserved to the states by Section 253(b). Importantly, although the FCC preempted the enforcement of Tenn. Code Ann. § 65-4-201(d) and TRA's Denial Order, it did not mandate the granting of Hyperion's application for a CCN. Rather, it stated, '[b]ased 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 [CCN] consistent with the Communications Act and this decision.'[52] Hyperion never filed any additional requests with the TRA following the FCC decision. Nevertheless, the TRA has granted similar requests from at least two CLECs post-*Hyperion*, allowing them entry into the previously exempted rural territory.[53]

Ben Lomand contends that Tenn. Code Ann. § 65-4-201 (d) and the FCC decision in *Hyperion* are not relevant to the TRA's consideration in this docket because Ben Lomand is a cooperative, operating under Tenn. Code Ann. § 65-29-102, not a rural ILEC. Tenn. Code Ann. § 65-29-102 has not been specifically preempted by the FCC and Ben Lomand asserts that the FCC would not likely preempt the *Cooperative Act*:

> [t]he mere fact that T.C.A. § 65-29-102 restricts entry into a cooperative's territory is not grounds for preemption. Like the General Assembly with T.C.A. § 65-29-102, the U.S. Congress in the 1996 Federal Communications Act recognizes special exemptions for rural telephone companies. 47 U.S.C. 251(f)(1) .... the statute does not prohibit a state from imposing 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). The General Assembly has done so with T.C.A. § 65-29-102.[54] The FCC has refused to preempt a local law which is not an absolute prohibition. In the Matter of California Payphone Association Petition, Memorandum Opinion and Order, 12 F.C.C. Rec. 14191 (1997). T.C.A. § 65-29-102 is *not* an absolute prohibition — if a rural cooperative is found to not be providing reasonable and adequate service, a competing provider may offer services in such cooperative's territory (emphasis in original).[55]

Frontier asserts that if the interpretation of Tenn. Code Ann. § 65-29-102 as advocated by Ben Lomand were to prevail, and the *Cooperative Act* does in fact prohibit any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory, then applying the analysis of *Hyperion*, the FCC should find it anticompetitive in violation of 47 U.S.C. § 253(a) and preempt its enforcement. [56] Accordingly, considering the final comments of the FCC in *Hyperion* urging states and regulatory agencies to 'review any similar statutes and regulations, and to repeat or otherwise nullify any that in their judgment violate section 253 as applied by this commission,' Frontier contends that Ben Lomand's interpretation of Tenn. Code Ann. § 65-29-102 is therefore (impliedly) preempted. Comcast Phone of Tennessee, who filed a petition to intervene in this docket on February 22, 2008, also asserts that the interpretation of Tenn. Code Ann. § 65-29-102 by Ben Lomand contradicts federal law and would thus be preempted under the Supremacy Clause of Article VI of the United States Constitution. [57]

While Ben Lomand may not be a rural ILEC and is not relying upon Tenn. Code Ann. § 65-4-201(d) to protect it from competitors, the FCC's pronouncement in *Hyperion* is applicable to this case. The FCC has not specifically reviewed Tenn. Code Ann. § 65-29-102, nor the *Cooperative Act* as a whole, and declared it preempted. Nevertheless, the analysis conducted by the FCC in *Hyperion*, combined with the directive to states and regulatory agencies to review and repeal or otherwise nullify anticompetitive statutes, requires that the TRA carefully scrutinize the statute that has been brought to its attention by the application filed by Frontier in this docket.

FINDINGS AND CONCLUSIONS

The panel unanimously voted that the Authority has statutory authority over this docket. Further, the panel unanimously voted that state law encourages telephone competition in all service markets and that it does not prohibit a duly authorized telecommunications service provider from providing telecommunications services in the entire state, including the service territories of the state's rural telephone cooperatives. The prevailing motion set out the following findings as the basis for the panel's unanimous decisions. [58]

Jurisdiction

1. The TRA has statutory authority under Term. Code Ann. §§ 65-29-130, 65-4-201, 65-4-123 and 65-5-110 over the issues in this docket which involve a territorial dispute between Ben Lomand Cooperative and Frontier Communications.

2. Tenn. Code Ann. § 65-29-130 specifically grants the TRA jurisdiction to adjudicate territorial boundary disputes between cooperatives and other telephone companies. The Tennessee Attorney General's opinion, OAG 90-83, supports this interpretation.

3. Tenn. Code Ann. § 65-4-201 delegates to the TRA the duty of reviewing company petitions seeking to offer telecommunications services within the state or to amend existing CCNs to expand service.

4. Tenn. Code Ann. § 65-4-123 which 'declares 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, by permitting competition in all telecommunications service markets ...' vests in the TRA the duty to implement the state policy on telecommunications and the instant petition must be weighed in light of this important legislative directive.

5. Tenn. Code Ann. § 65-5-110 (a) which states '[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995. ch. 408 [the Tennessee Telecommunications Act]' also provides statutory authority to the TRA to hear this matter.

6. TRA precedent provides guidance on the jurisdictional question. In Docket 04-00379.[60] the TRA unanimously determined it has jurisdiction to review and determine request for CCNs that may conflict with cooperatives' territory.

Interpretation of TCA § 65-29-101. et seq.

1. It is not the role of the Authority in interpreting a statute to nullify, strike down, alter or amend state law, but rather to determine the meaning of the 'plain language' of the statute in context to other applicable state law. If ambiguity exists in interpretation, the Court of Appeals in *Consumer Advocate Division v. Tennessee Regulatory Authority* has opined that the courts will give customary respect and deference to administrative agencies in their interpretations of statutes.

2. It is clear that the legislative intent of *The Telephone Cooperative Act* was to provide comparable telephone service to rural areas that existed in urban areas. There is nothing in the legislative history to indicate that the legislature intended to prohibit future competition.

3. The crux of the question is not whether Term. Code Ann. § 65-29-101, et seq. allows competition, but rather whether it allows cooperatives to maintain their monopoly status.

4. In looking at the plain and ordinary meaning of the language contained within the four corners of the statute it is clear that the statute sets conditions for the establishment of cooperatives, i.e., to 'furnish telephone service in rural areas to the widest practical number of users of such services; provided, that there shall be no duplication of service where reasonable adequate telephone service is available.' The intent of this condition was to meet a need that privately owned telephone companies were not meeting. There is nothing in the statutory language that would prohibit the TRA from considering a petition of a telecommunications service provider to offer competitive local telephone service in cooperative areas.

5. The action that changed the status quo and reversed over a century of regulatory certainty was the Telecommunications Act, passed by the General Assembly in 1995. This Act's goal is to promote competition in the local market. Tenn. Code Ann. § 65-4-123 directs the TRA to promote policies that enhance the opportunity of competitive choice for consumers in all telecommunications service markets.

6. This policy had one condition, found in Tenn. Code Ann. § 65-4-201(d), to exempt incumbent local exchange telephone companies with fewer than 100,000 access lines from competition.

7. The TRA faithfully enforced Tenn. Code Ann, § 65-4-201(d) until the Federal, Communications Commission preempted this law due to its conflict with federal law that prohibits anti-competitive barriers to local telephone service competition. The Federal government preempted and nullified this subsection in *Hyperion.*[61] Even if the plain language of Tenn. Code Ann. § 65-29-102 suggested that competition was prohibited in areas served by cooperatives, the FCC has made clear in *Hyperion* that any such anti-competitive affect is preempted by the 1996 Telecom Act.

IT IS THEREFORE ORDERED:

1. The Tennessee Regulatory Authority has jurisdiction in this matter.

2. Frontier Communications of America, Inc. may proceed with its *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity* in which it seeks to expand its authority to provide telecommunications service statewide, including areas served by telephone cooperatives, specifically including territory served by Ben Lomand Rural Telephone Cooperative, Inc.

House Bill 957 was introduced and read by Representative James H. Cummings to the General Assembly on March 13, 1961. The most important topic of debate at the reading of the bill was the potential for conflicting jurisdiction between telephone cooperatives and the Public Service Commission concerning, for example, rate-making power and dispute resolution authority. ...yet it is clear from the House discussion that the primary concern and objective was to provide technological services to rural communities of Tennessee comparable to the level of service enjoyed by constituents in more urban areas. Senate Bill 833 was introduced and read by Senator Gilbert F. Parker. This bill evoked even less discussion on the Senate floor than its House counterpart.

Footnotes

1 *Petition*, p. 1 (June 20, 2007).

2 *Initial Order, Application of Citizens Telecommunications Company, dlbla Citizens Telecom for a Certificate of Public Convenience and Necessity as Competing Telecommunications Service Provider*, TPSC Docket No. 96-00779, p. 1 (May 30, 1996) ('*Initial Order*').

FN3 *Id.* at 3.

4 The *Order Denying Petition of Frontier Communications, Inc.*, reflecting the decision of the Authority in Docket No. 04-00379, was issued on March 8, 2006.

5 *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6 (December 14, 2005).

6 *Petition for Preemption*, p. 3 (December 14, 2005).

7 *Opposition to Petition for Preemption*, p. 1 (February 21, 2007).

8 *Petition*, p. 1 (June 20, 2007).

9 *Petition*, p. 1.

10 *Order Denying Petition of Frontier Communications, Inc.*, Docket No. 04-00379. p. 9 (March 8, 2006).

11 *Frontier Communications of America, Inc's Initial Brief*, p. 7 (March 27, 2008); see also, *Frontier Communications of America, Inc's Reply Brief*, p. 4-5 (April 10, 2008).

12 *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p.2 (March 27, 2008); see also, *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 2 (April 10, 2008).

13 Transcript of April 21, 2008 Authority Conference, p. 120

14 *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802-803 (Tenn. 2000).

15 *Id.*

FN16 Tenn. Op. Atty. Gen. No. 90-83, 1990 WL 513064 (Tenn. A.G.).

17 *Id.*

FN18 Tenn. Op. Atty. Gen. No. 92-44, 1992 WL 545017 (Tenn. A.G.).

FN19 Tenn. Op. Atty. Gen. No. 92-65, 1992 WL 545032 (Tenn. A.G.).

FN20 Tenn. Op. Atty. Gen. No. 88-140, 1988 WL 410216 (Tenn. A.G.).

21 There was no discussion by legislators which would either directly or impliedly give entities organized under the *Cooperative Act* exclusive rights to service territory. In Tenn. Op. Atty. Gen. No. 92-65, the Tennessee Attorney General characterized legislative discussions concerning the *Cooperative Act* as follows:

22 The following telephone cooperatives are collectively referred to herein as the 'intervening Cooperatives:' Highland Telephone Cooperative, Inc., Bledsoe Telephone Cooperative Corporation, Inc., West Kentucky Rural Telephone Cooperative Corporation, Inc., DTC Communications, North Central Telephone Cooperative, Inc., and Twin Lakes Telephone Cooperative Corporation.

23 *See In Re: Application of Ben Lomand Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services as a Competing Telecommunications Service Provider*, Docket No. 98-00600, *Concurring Opinion of H. Lynn Greer* attached to the *Order Granting Certificate of Convenience and Necessity* (April 28, 1999).

24 *See In Re: Petition of Frontier Communications, Inc, for a Declaratory Ruling*, Docket No. 04-00379, *Order Denying Petition of Frontier Communications, Inc.*, p. 11 (March 8, 2006).

FN25 *Id.* p. 11, footnote 23.

26 *Consumer Advocate Div. v. Tennessee Regulatory Authority*, 2002 WL 1579700, 3 (Tenn. Ct. App. 2002) *citing Collins v. McCanless*, 169 S.W.2d 850 (Tenn. 1943) and *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997).

27 *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. App. 1997).

28 *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, 2003 WL 354466 (Tenn. Ct. App. 2003).

29 *Id.*

30 Tenn. Code Ann. § 65-4-123.

31 *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, 2003 WL 354466, p. 1 (Tenn. Ct. App. 2003).

32 Tenn. Code Ann. § 65-4-101(6) states, '...'Public utility' as defined in this section shall not be construed to include the following nonutilities: ...(E) Any cooperative organization, association or corporation not organized or doing business for profit;'

33 *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. App. 1997).

34 *Kiv. State*, 78 S.W.3d 876, 879 (Tenn. 2002).

35 1995 Tenn. Pub. Ch. 408.

36 Tenn. Code Ann. § 65-4-101(8) states, "Telecommunications service provider' means any incumbent local exchange telephone company or certificated individual or entity or individual or entity operating pursuant to the approval by the former public service commission of a franchise within § 65-4-207(b), authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law [citations omitted].'

37 Tenn. Op. Atty, Gen. No. 88-06, 1988 WL 410167 (Tenn. A.G.).

38 Tenn. Code Ann. § 65-4-101(1) states, "Competing telecommunications service provider' means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after June 6, 1995 unless otherwise exempted from this definition by state or federal law.

39 1995 Tenn. Pub. Ch. 408. (Preamble).

40 *Frontier Communications, Inc.'s Reply Brief*, p. 5-6 (April 10, 2008).

41 Tenn. Code Ann. § 4-5-223(a).

42 TRA Rule 1220-1-2-.05.

43 *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 4 (March 27, 2008).

44 *AVR, LP. dlbla Hyperion of Tennessee, LP, 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 98-92, Memorandum Opinion and Order, 14 F.C.C. Red. 11064 (1999) ('*Hyperion Memorandum Opinion and Order*').

45 47 U.S.C. § 253(a) states 'No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.'

46 47 U.S.C § 253(b) states 'Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, 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 47 U.S.C. 253(d) states 'If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.'*See, Hyperion Memorandum Opinion and Order* at 11070.

48 *Hyper ion Memorandum Opinion and Order* at 11072

FN49 *Id.* at 11072.

FN50 *Id.* at 11076.

51 47 U.S.C. § 253(a). Section 253 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*

52 *Hyperion Memorandum Opinion and Order* at 11075.

53 See, *In re: Application of Level 3 Communications, LLC for a CCN to Provide Facilities-Based and Resold Local Exchange and Interexchange Telecommunications Services throughout the State of Tennessee*, Docket No. 98-00610, *Order Granting Certificate of Public Convenience and Necessity* (November 24, 1998) and *In re: Petition of XO Tennessee, Inc. to Amend Its CCN*, Docket No. 03-00567, *Initial Order Granting Amendment to Certificate of Public Convenience and Necessity* (February 23, 2004).

54 *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 4 (April 10, 2008).

FN55 *Id.* at 4-5.

56 *Frontier Communications, Inc.'s Initial Brief*, p. 8-9 (March 27, 2008).

57 *Brief of Comcast Phone of Tennessee, LLC*, p. 4-5 (March 27, 2008).

58 Director Jones voted yes with regard only to the results of the prevailing motion. Director Jones explained that the threshold issue here is the proper interpretation of Tenn. Code Ann. § 65-29-102. He concluded that a careful review of Tenn. Code Ann. § 65-29-102 shows that the statute is clear and unambiguous. The language provides that it is the telephone cooperative that shall not be permitted to provide duplicative service in an area where there exists reasonably adequate service and does not grant cooperatives territorial protection from outside competition. Based on these findings, Director Jones concluded that Tenn. Code Ann. § 65-29-102 is inapplicable to the facts of this docket and there is no need to address the remaining legal issues, including the application of Tenn. Code Ann. § 65-4-201(d).

FN, [59]

59 Director Hargett found that the Authority must examine and interpret Tenn. Code Ann. § 65-29-102 to determine whether that statute prohibits telecommunications service providers from providing service in Ben Lomand Rural Telephone Cooperative's territory. The Tennessee Supreme Court has held that when statutory language is clear, the plain meaning of the language must be applied without the statute's application being limited or expanded through a forced interpretation. Director Hargett determined that Tenn. Code Ann. § 65-29-102 is not ambiguous and that the plain language of the Telephone Cooperative Act, Tenn. Code Ann. § 65-29-101, et seq., generally, and Tenn. Code Ann. § 65-29-102 specifically, does not bestow territorial protection upon telephone cooperatives. However, he noted that where the language of the statute did not yield a clean interpretation, the Supreme Court has held that statutes which relate to the same subject or have a common purpose should be construed together and the construction of one statute can help resolve any ambiguity in another statute. Using this rule of construction, he found that even if there is some ambiguity in the Cooperative Act regarding whether telephone cooperatives enjoy a protected status, Tennessee's 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123 which fosters competition in telecommunications markets, is useful in construing the Cooperative Act and supports an interpretation that the telephone cooperatives are not shielded from other telecommunications carriers seeking to provide service in their territories.

60 See Footnote 11 above.

61 See Footnote 44 above.

End of Document

124 S.Ct. 1555
Supreme Court of the United States

Jeremiah W. (Jay) NIXON, Attorney General of Missouri, Petitioner,
v.
MISSOURI MUNICIPAL LEAGUE, et al.
Federal Communications Commission and United States, Petitioners,
v.
Missouri Municipal League, et al.
Southwestern Bell Telephone, L.P., fka Southwestern Bell Telephone Company, Petitioner,
v.
Missouri Municipal League, et al.

Nos. 02–1238, 02–1386, 02–1405.
|
Argued Jan. 12, 2004.
|
Decided March 24, 2004.

Synopsis
Background: Municipalities and public utilities petitioned for review of the Federal Communication Commission's (FCC) order, 2001 WL 28068, denying their petition to preempt a Missouri statute that prevented municipalities and public utilities from providing telecommunications services or facilities. The United States Court of Appeals for the Eighth Circuit, 299 F.3d 949, reversed, and certiorari was granted.

[Holding:] The Supreme Court, Justice Souter, held that Telecommunications Act provision authorizing preemption of state and local laws expressly or effectively prohibiting the ability of "any entity" to provide telecommunications services did not preempt state statute barring political subdivisions from providing telecommunications services.

Reversed.

Justice Scalia filed opinion concurring in the judgment in which Justice Thomas joined.

Justice Stevens filed dissenting opinion.

West Codenotes

Negative Treatment Reconsidered
V.A.M.S. § 392.410(7)

****1556 *125** *Syllabus*[*]

After Missouri enacted a statute forbidding its "political subdivision[s to] provide or offer for sale ... a telecommunications service or ... facility," the municipal respondents, including municipally owned utilities, petitioned the Federal Communications Commission (FCC) for an order declaring the statute unlawful under 47 U.S.C. § 253, which authorizes preemption of state and local laws and regulations "that prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Relying on its earlier order resolving a challenge to a comparable Texas law and the affirming opinion of the District of Columbia Circuit, the FCC refused to declare the Missouri statute preempted, concluding that "any entity" in § 253(a) does not include state political subdivisions, but applies only to independent entities subject to state regulation. The FCC also adverted to the principle of *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410, that Congress needs to be clear before it constrains traditional state authority to order its government. The Eighth Circuit panel unanimously reversed, explaining that § 253(a)'s word "entity," especially when modified by "any," manifested sufficiently clear congressional attention to governmental entities to get past *Gregory.*

Held: The class of entities contemplated by § 253 does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services. Pp. 1560–1566.

(a) Two considerations fall short of supporting the municipal respondents. First, they argue that fencing governmental entities out of the telecommunications business flouts the public interest in promoting competition. It does not follow, however, that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business, and in any event the issue here does not turn on the merits of municipal telecommunications services. ***126** Second, concentrating on the undefined statutory phrase "any entity" does not produce a persuasive answer here. While an "entity" can be either ****1557** public or private, there is no convention of omitting the modifiers "public and private" when both are meant to be covered. Nor is coverage of public entities reliably signaled by speaking of "any" entity; "any" can and does mean different things depending upon the

setting. To get at Congress's understanding requires a broader frame of reference, and in this litigation it helps to ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging. See, *e.g., New Jersey Realty Title Ins. Co. v. Division of Tax Appeals of N.J.*, 338 U.S. 665, 673, 70 S.Ct. 413, 94 L.Ed. 439. The strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity. Pp. 1560–1561.

(b) The municipal respondents' position holds sufficient promise of futility and uncertainty to keep this Court from accepting it. Pp. 1561–1565.

(1) In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation of economic conduct by a private party simply leaves that party free to do anything it chooses consistent with the prevailing federal law. See, *e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 540–553, 121 S.Ct. 2404, 150 L.Ed.2d 532. But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. Such a government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of state or local governments to support entry into the market. Preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what the government itself (including its subdivisions) may do will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. Thus, preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that it is highly unlikely that Congress intended to set off on such uncertain adventures. Pp. 1561–1562.

***127** 2) Several hypothetical examples illustrate the implausibility of the municipal respondents' reading that Congress intended § 253 to preempt state or local governmental self-regulation. Whether a law prohibiting an entity's "ability" to provide telecommunications under § 253 means denying the entity a capacity or authority to act in the first place, or whether it means limiting or cutting back on some preexisting authority to go into the telecommunications business (under a different law), the hypotheticals demonstrate that § 253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. That Congress meant § 253 to start down such a road in the absence of any clearer signal than the ****1558** phrase "ability of any entity" is farfetched. See, *e.g., United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345. Pp. 1562–1564.

(3) The practical implication of the dissent's reading of § 253 to forbid States to withdraw municipalities' preexisting authority expressly to enter the telecommunications business, but not withdrawals of authority that are competitively neutral in the sense of being couched in general terms that do not expressly target telecommunications, is to read out of § 253 the words "or has the effect of prohibiting." Those words signal Congress's willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. The dissent's reading therefore disregards § 253's plain language and entails a policy consequence that Congress could not possibly have intended. Pp. 1564–1565.

(c) A complementary principle would bring the Court to the same conclusion even on the assumption that preemption might operate straightforwardly to provide local choice. Section 253(a) is hardly forthright enough to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading. Pp. 1565–1566.

299 F.3d 949, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 1566. STEVENS, J., filed a dissenting opinion, *post,* p. 1566.

Attorneys and Law Firms

John A. Rogovin, General Counsel, John E. Ingle, Richard K. Welch, Counsel Federal Communications Commission, Washington, D.C., Theodore B. Olson, Solicitor General, Counsel of Record, R. Hewitt Pate, Assistant Attorney General, Thomas G. Hungar, Deputy Solicitor General, James A. Feldman, Assistant to the Solicitor General, Catherine G. O'Sullivan, Andrea Limmer, Attorneys, Department of Justice, Washington, D.C., for the Federal Petitioners.

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, James R. Layton, State Solicitor, Ronald Molteni, Assistant Attorney General, Counsel of Record, Jefferson City, MO, for Petitioner Jeremiah W. (Jay) Nixon Attorney General, Missouri.

James D. Ellis, Paul K. Mancini, SBC Communications Inc., San Antonio, Texas, Paul G. Lane, Southwestern Bell Telephone, L.P., St. Louis, Missouri, Michael K. Kellogg, Counsel of Record, Geoffrey M. Klineberg, Sean A. Lev, Dan Markel, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, D.C., for Petitioner Southwestern Bell Telephone, L.P.

Richard B. Geltman, American Public Power Association, Washington, D.C., William Andrew Dalton, General Counsel, City Utilities of Springfield, MO, Springfield, MO, David A. Strauss, Chicago, IL, James Baller, Counsel of Record, ****1559** Sean A. Stokes, E. Casey Lide, The Baller Herbst Law Group, PC, Washington, D.C., for the Respondents.

Opinion

Justice SOUTER delivered the opinion of the Court.

[1] ***128** Section 101(a) of the Telecommunications Act of 1996, 110 Stat. 70, 47 U.S.C. § 253, authorizes preemption of state and local laws and regulations expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services. The question is whether the class of entities includes ***129** the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of such services. We hold it does not.

I

In 1997, the General Assembly of Missouri enacted the statute codified as § 392.410(7) of the State's Revised Statutes:

> "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section."[1]

On July 8, 1998, the municipal respondents, including municipalities, municipal organizations, and municipally owned utilities, petitioned the Federal Communications Commission (FCC or Commission) for an order declaring the state statute unlawful and preempted under 47 U.S. C § 253:

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." § 253(a).
>
> "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to ***130** the extent necessary to correct such violation or inconsistency." § 253(d).

After notice and comment, the FCC refused to declare the Missouri statute preempted, *In re Missouri Municipal League,* 16 FCC Rcd. 1157, 2001 WL 28068 (2001), relying on its own earlier order resolving a challenge to a comparable Texas law, *In re Public Utility Com'n of Texas,* 13 FCC Rcd. 3460, 1997 WL 603179 (1997), as well as the affirming opinion of the United States Court of Appeals for the District of Columbia Circuit, *Abilene v. FCC,* 164 F.3d 49 (1999). The agency concluded that "the term 'any entity' in section 253(a) ... was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation." ****1560** [2] 16 FCC Rcd., at 1162. Like the District of Columbia Circuit in *Abilene,* the FCC also adverted to the principle of *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), that Congress needs to be clear before it constrains traditional state authority to order its government. 16 FCC Rcd., at 1169. But at the same time the Commission rejected preemption, it also denounced the policy behind the Missouri statute, *id.,* at 1162–1163, and the Commission's order carried two appended statements (one by Chairman William E.

Kennard and Commissioner Gloria Tristani, *id.*, at 1172, and one by Commissioner Susan Ness, *id.*, at 1173) to the effect that barring municipalities ***131** from providing telecommunications substantially disserved the policy behind the Telecommunications Act.

The municipal respondents appealed to the Eighth Circuit, where a panel unanimously reversed the agency disposition, 299 F.3d 949 (2002), with the explanation that the plain-vanilla "entity," especially when modified by "any," manifested sufficiently clear congressional attention to governmental entities to get past *Gregory*. 299 F.3d, at 953–955. The decision put the Eighth Circuit at odds with the District of Columbia Circuit's *Abilene* opinion, and we granted certiorari to resolve the conflict. 539 U.S. 941, 123 S.Ct. 2605, 2606, 2607, 156 L.Ed.2d 626 (2003). We now reverse.

II

[2] At the outset, it is well to put aside two considerations that appear in this litigation but fall short of supporting the municipal respondents' hopes for prevailing on their generous conception of preemption under § 253. The first is public policy, on which the respondents have at the least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest. There are, of course, arguments on the other side, against government participation: in a business substantially regulated at the state level, regulation can turn into a public provider's weapon against private competitors, see, *e.g.*, Brief for Petitioner Southwestern Bell Telephone, L.P., in No. 02–1405 et al., pp. 17–18; and (if things turn out bad) government utilities that fail leave the taxpayers with the bills. Still, the Chairman of the FCC and Commissioner Tristani minced no words in saying that participation of municipally owned entities in the telecommunications business would "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." 16 FCC Rcd., at 1172. Commissioner Ness said much the same, and a number of *amicus* briefs in this litigation argue the competitive ***132** advantages of letting municipalities furnish telecommunications services, drawing on the role of government operators in extending the electric power lines early in the last century. Brief for City of Abilene, Texas, et al. as *Amici Curiae* 14–18; Brief for Consumer Federation of America as *Amicus Curiae* 7. As we will try to explain, however, ****1561** *infra*, at 1561–1564, it does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business, and in any event the issue here does not turn on the merits of municipal telecommunications services.

The second consideration that fails to answer the question posed in this litigation is the portion of the text that has received great emphasis. The Eighth Circuit trained its analysis on the words "any entity," left undefined by the statute, with much weight being placed on the modifier "any." But concentration on the writing on the page does not produce a persuasive answer here. While an "entity" can be either public or private, compare, *e.g.*, 42 U.S.C. § 9604(k)(1) (2000 ed., Supp. I) (defining "eligible entity" as a state or local government body or its agent) with 26 U.S.C. § 269B(c)(1) (defining "entity" as "any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity"), there is no convention of omitting the modifiers "public and private" when both are meant to be covered. See, *e.g.*, 42 U.S.C. § 2000d–7(a)(2) (exposing States to remedies in antidiscrimination suits comparable to those available "against any public or private entity other than a State"). Nor is coverage of public entities reliably signaled by speaking of "any" entity; "any" can and does mean different things depending upon the setting. Compare, *e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (suggesting an expansive meaning of the term " 'any other term of imprisonment' " to include state as well as federal sentences), with *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542–546, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002) (implying a narrow interpretation ***133** of the phrase " 'any claim asserted' " so as to exclude certain claims dismissed on Eleventh Amendment grounds). To get at Congress's understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging. See, *e.g.*, *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals of N. J.*, 338 U.S. 665, 673, 70 S.Ct. 413, 94 L.Ed. 439 (1950) (enquiring into "the practical operation and effect" of a state tax on federal bonds). We think that the strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity when it cast the preemption net.

III

A

In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law. If federal law, say, preempts state regulation of cigarette advertising, a cigarette seller is left free from advertising restrictions imposed by a State, which is left without the power to control on that matter. See, *e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 540–553, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). On the subject covered, state law just drops out.

But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. The trouble is that a local government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation ****1562** below the national level (including outright bans), but on the authority and potential will of governments at the state or local ***134** level to support entry into the market. Preemption of the state advertising restriction freed a seller who otherwise had the legal authority to advertise and the money to do it if that made economic sense. But preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. That is why preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures. A few hypotheticals may bring the point home.

B

Hypotheticals have to rest on some understanding of what § 253 means when it describes subjects of its preemption as laws or regulations that prohibit, expressly or in effect, "the ability of any entity" to provide telecommunications. The reference to "ability" complicates things. In customary usage, we speak simply of prohibiting a natural or legal person from doing something. To speak in terms of prohibiting their ability to provide a service may mean something different: it may mean denying the entity a capacity or authority to act in the first place. But this is not clear, and it is possible that a law prohibiting the ability to provide telecommunications means a law that limits or cuts back on some preexisting ***135** authority (under a different law) to go into the telecommunications business.

If the scope of law subject to preemption under § 253 has the former, broader, meaning, consider how preemption would apply to a state statute authorizing municipalities to operate specified utilities, to provide water and electricity but nothing else.[3] The enumeration would certainly have the effect of prohibiting a municipally owned and operated electric utility from entering the telecommunications business (as Congress clearly meant private electric companies to be able to do, see S.Rep. No. 103–367, p. 55 (1994)), and its implicit prohibition would thus be open to FCC preemption. But what if the FCC did preempt the restriction? The municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business. There is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.

Now assume that § 253 has the narrower construction (preempting only laws that ****1563** restrict authority derived from a different legal source). Consider a State with plenary authority itself, under its constitution, to operate any variety of utility.[4] Assume that its statutes authorized a state-run ***136** utility to deliver electric and water services, but drew the line at telecommunications. The restrictive element of that limited authorization would run afoul of § 253 as respondents would construe it. But if, owing to preemption, the state operating utility authority were suddenly free to provide telecommunications and its administrators were raring to enter this new field, where would the necessary capital come from? Surely there is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury, or to the exercise of state bonding authority.

Or take the application of § 253 preemption to

municipalities empowered by state law to furnish services generally, but forbidden by a special statute to exercise that power for the purpose of providing telecommunications services. If the special statute were preempted, a municipality in that State would have a real option to enter the telecommunications business if its own legislative arm so chose and funded the venture. But in a State next door where municipalities lacked such general authority, a local authority would not be able to, and the result would be a national crazy quilt. We will presumably get a crazy quilt, of course, as a consequence of state and local political choices arrived at in the absence of any preemption under § 253, but the crazy quilt of this hypothetical would result not from free political choices but from the fortuitous interaction of a federal preemption law with the forms of municipal authorization law.

Finally, consider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization. Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of § 253 narrowed the authorization so as to leave municipalities authorized to enter only the water business. The repealing statute would have a prohibitory effect on the prior ability ***137** to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later. Private counterparts could come and go from the market at will, for after any federal preemption they would have a free choice to compete or not to compete in telecommunications; governmental providers could never leave (or, at least, could not leave by a forthright choice to change policy), for the law expressing the government's decision to get out would be preempted.

The municipal respondents' answer to the one-way ratchet, and indeed to a host of the incongruities that would follow from ****1564** preempting governmental restriction on the exercise of its own power, is to rely on § 253(b), which insulates certain state actions taken "on a competitively neutral basis." Respondents contend that a State or municipality would be able to make a competitively neutral change of mind to leave the telecommunications market after deciding earlier to enter it or authorize entry. Tr. of Oral Arg. 32–33.

But we think this is not much of an answer. The FCC has understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion, as a law removing only governmental entities from telecommunications could not be. See, *e.g., In re Federal–State Joint Board on Universal Service,* 15 FCC Rcd. 15168, 15175–15178, ¶¶ 19–24, 2000 WL 1801992 (2000) (declaratory ruling). An even more fundamental weakness in respondents' answer is shown in briefs filed by *amici* City of Abilene and Consumer Federation of America. We have no reason to doubt them when they explain how highly unlikely it is that a state decision to ***138** withdraw would be "neutral" in any sense of the word. There is every reason to expect just the contrary, that legislative choices in this arena would reflect the intent behind the intense lobbying directed to those choices, manifestly intended to impede, not enhance, competition. See, *e.g.,* Chen, Legal Process and Political Economy of Telecommunications Reform, 97 Colum. L.Rev. 835, 866–868 (1997). After all, the notion that the legislative process addressing governmental utility authority is susceptible to capture by competition-averse private utilities is fully consistent with (and one reason for) the FCC's position that statutes like Missouri's disserve the policy objects of the Telecommunications Act of 1996. Given the unlikely application of § 253(b) to state or local choices driven by policy, not business failure, the fair conclusion is that § 253(a), if read respondents' way, would allow governments to move solely toward authorizing telecommunications operation, with no alternative to reverse course deliberately later on.

In sum, § 253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. We think it farfetched that Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase "ability of any entity." See, *e.g., United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940) (Court will not construe a statute in a manner that leads to absurd or futile results).

C

Justice STEVENS contends that in our use of the hypothetical examples to illustrate the implausibility of

the municipal respondents' reading of § 253, we read the statute in a way that produces anomalous results unnecessarily, whereas a simpler interpretation carrying fewer unhappy ***139** consequences is available. The dissent emphasizes the word "ability" in the phrase "prohibits or has the effect of prohibiting the ability of any entity" to furnish telecommunications. With its focus on this word, the dissent concludes that " § 253 prohibits States from withdrawing municipalities' pre-existing authority to enter the telecommunications business, but does not command that States affirmatively grant either that authority or the means with which to carry it out." *Post,* at 1568. Thus, if a State leaves an earlier grant of authority on the books while limiting it ****1565** with a legislative ban on telecommunications, the new statute would be preempted, and presumably preemption would also defeat a State's attempted withdrawal of municipalities' authority by repealing the preexisting authorization itself.

But on the very next page, Justice STEVENS allows (in the course of disagreeing about the one-way ratchet) that "[a] State may withdraw comprehensive authorization in favor of enumerating specific municipal powers ...." *Post,* at 1569. It turns out, in other words, that withdrawals of preexisting authority are not (or not inevitably, at any rate) subject to preemption. The dissent goes on to clarify that it means to distinguish between withdrawals of authority that are competitively neutral in the sense of being couched in general terms (and therefore not properly the subject of preemption), and those in which the repealing law expressly targets telecommunications (and therefore properly preempted). "[T]he one thing a State may not do," the dissent explains, "is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services." But the practical implication of that interpretation is to read out of § 253 the words "or ha[s] the effect of prohibiting," by which Congress signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. Even if § 253 permitted such a formalistic distinction between implicit and explicit repeals of ***140** authority, the result would be incoherence of policy; whether the issue is viewed through the lens of preventing anticompetitive action or the lens of state autonomy from federal interference, there is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services. In short, instead of supplying a more straightforward interpretation of § 253, the dissent ends up reading it in a way that disregards its plain language and entails a policy consequence that Congress could not possibly have intended.

IV

[3] [4] The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it, but a complementary principle would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might. Preemption would, for example, leave a municipality with a genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort. But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 607–608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.,* 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. What we have said already ***141** is enough to show that § 253(a) is hardly forthright enough ****1566** to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading.

The judgment of the Court of Appeals for the Eighth Circuit is, accordingly, reversed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

I agree with much of the Court's analysis in Parts II and

III of its opinion, which demonstrates that reading "any entity" in 47 U.S.C. § 253(a) to include political subdivisions of States would have several unhappy consequences. I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text. Cf. *ante,* at 1565 ("The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it"). I would instead reverse the Court of Appeals on the ground discussed in Part IV of the Court's opinion: Section 253(a) simply does not provide the clear statement which would be required by *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), for a statute to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.

I would not address the additional question whether the statute affects the "power of ... *localities* to restrict their own (or their political inferiors') delivery" of telecommunications services, *ante,* at 1559 (emphasis added), an issue considered and apparently answered negatively by the Court. That question is neither presented by this litigation nor contained within the question on which we granted certiorari.

Justice STEVENS, dissenting.

***142** In the Telecommunications Act of 1996 (1996 Act), Congress created "a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 638, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). Reasonable minds have differed as to whether municipalities' participation in telecommunications markets serves or disserves the statute's procompetitive goals. On the one hand, some have argued that municipally owned utilities enjoy unfair competitive advantages that will deter entry by private firms and impair the normal development of healthy, competitive markets.[1] On the other hand, members of the Federal Communications Commission (FCC), the regulatory agency charged with implementation of the 1996 Act, have taken the view that municipal entry "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential."[2] The ****1567** answer to the question presented in these cases does not, of course, turn on which side has the better view in this policy debate. It turns on whether Congress itself intended to take sides when it passed the 1996 Act.

In § 253 of the Communications Act of 1934, as added by § 101 of the 1996 Act, Congress provided that "[n]o State or ***143** 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," unless the State or local law is "competitively neutral" and "necessary to ... protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. §§ 253(a), (b). It is common ground among the parties that Congress intended to include utilities in the category of "entities" protected by § 253. See, *e.g.,* Reply Brief for Federal Petitioners in No. 02–1238 et al., p. 16 ("Congress clearly did intend to preempt state laws that closed the telecommunications market, including those that closed the market to electric or other utilities"). The legislative history of § 253 confirms the point: Congress clearly meant for § 253 to pre-empt "explicit prohibitions on entry by a utility into telecommunications." S.Rep. No. 104–230, p. 127 (1996).

But while petitioners acknowledge the unmistakable clarity of Congress' intent to protect utilities' ability to enter local telephone markets, they contend that Congress' intent to protect the subset of utilities that are owned and operated by municipalities is somehow less than clear. The assertion that Congress could have used the term "any entity" to include utilities generally, but not *municipally owned* utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting § 253. Both propositions are manifestly implausible, given the sheer number of public utilities in the United States.[3] Indeed, elsewhere in the 1996 Act, Congress narrowed the definition of the word "utility," as used in the Pole Attachments Act, 47 U.S.C. § 224, to ***144** exclude utilities "owned by ... any State," including its political subdivisions—a clear indication that Congress was aware that many utilities are in fact owned by States and their political subdivisions. §§ 224(a)(1), (a)(3). Moreover, the question of municipal participation in local telephone markets was clearly brought to Congress' attention. In hearings on a predecessor bill, Congress heard from a representative of the American Public Power Association who described public utilities' unique potential to promote competition, particularly in small cities, towns, and rural communities underserved by private companies. Hearings on S. 1822 before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess., 351–360 (1994) (statement of William J. Ray, General Manager, Glasgow Electric Plant

Board).[4] **1568 In short, there is every reason to suppose that Congress meant precisely what it said: No State or local law shall prohibit or have the effect of prohibiting the ability of *any* entity, public or private, from entering the telecommunications market.

The question that remains is whether reading the statute to give effect to Congress' intent necessarily will produce the absurd results that the Court suggests. *Ante,* at 1562–1564. "As in all cases[,] our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 608, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.

*145 The Court begins its analysis by asking us to imagine how § 253 might apply to "a state statute authorizing municipalities to operate specified utilities, to provide water and electricity but nothing else," or to a State's failure to provide the necessary capital to a state-run utility "raring" to enter the telecommunications market. *Ante,* at 1562–1563. Certainly one might plausibly interpret § 253, as the Court does, to forbid States' refusals to provide broader authorization or to provide necessary capital as impermissible prohibitions on entry. And as the Court observes, such an interpretation would undeniably produce absurd results; it would leave covered entities in a kind of legal limbo, armed with a federal-law freedom to enter the market but lacking the state-law power to do so. But we need not—and in my opinion, should not—interpret § 253 in this fashion. We should instead read the statute's reference to state and local laws that "prohibit or have the effect of prohibiting the *ability* of any entity," § 253(a), to enter the telecommunications business to embody an implicit understanding that the only "entities" covered by § 253 are entities otherwise able to enter the business—*i.e.,* entities both authorized to provide telecommunications services and capable of providing such services without the State's direct assistance. In other words, § 253 prohibits States from withdrawing municipalities' pre-existing authority to enter the telecommunications business, but does not command that States affirmatively grant either that authority or the means with which to carry it out.

Of course, the Court asserts that still other absurd results would follow from application of § 253 pre-emption to state laws that withdraw a municipality's pre-existing authority to enter the telecommunications business. But these results are, on closer examination, perhaps not so absurd after all. The Court first contends that reading § 253 in this manner will produce a "national crazy quilt" of public telecommunications authority, where the possibility of municipal participation in the telecommunications market turns on the scope of *146 the authority each State has already granted to its subdivisions. *Ante,* at 1563. But as the Court acknowledges, permitting States such as Missouri to prohibit municipalities from providing telecommunications services hardly will help the cause of national consistency. *Ibid.* That the "crazy quilt" the Court describes is the product of political choices made by Congress rather than state legislatures, see *ibid.,* renders it no more absurd than the "crazy quilt" that will result from leaving **1569 the matter of municipal entry entirely to individual States' discretion.

The Court also contends that applying § 253 pre-emption to bar withdrawal of authority to enter the telecommunications market will result in "the federal creation of a one-way ratchet": "A State or municipality could give the power, but it could not take it away later." *Ante,* at 1563. But nothing in § 253 prohibits States from scaling back municipalities' authority in a general way. A State may withdraw comprehensive authorization in favor of enumerating specific municipal powers, or even abolish municipalities altogether. Such general withdrawals of authority may very well "have the effect of prohibiting" municipalities' ability to enter the telecommunications market, see *ante,* at 1565, just as enforcement of corporate governance and tax laws might "have the effect of prohibiting" other entities' ability to enter. § 253(a). But § 253 clearly does not pre-empt every state law that "has the effect" of restraining entry. It pre-empts only those that constitute *nonneutral* restraints on entry. § 253(b). A general redefinition of municipal authority no more constitutes a prohibited nonneutral restraint on entry than enforcement of other laws of general applicability that, practically speaking, may make it more difficult for certain entities to enter the telecommunications business.

As I read the statute, the one thing a State may not do is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services. This prohibition would certainly apply to *147 a law like Missouri's, which "advertise[s][its] prohibitory agenda on [its] fac[e]." *Ante,* at 1565. But it would also apply to a law that accomplished a similar result by other means—for example, a law that permitted only private telecommunications carriers to receive federal universal service support or access to unbundled network elements.[5]

As the Court notes, there is little reason to think that legislation that targets municipalities' ability to provide telecommunications services is " 'neutral' in any sense of the word," or that it is designed to do anything other than impede competition, rather than enhance it. *Ante,* at 1564. To the extent that reading § 253 to forbid such protectionist legislation creates a "one-way ratchet," it is one perfectly consistent with the goal of promoting competition in the telecommunications market, while otherwise preserving States' ability to define the scope of authority held by their political subdivisions.[6]

The Court's concern about hypothetical absurd results is particularly inappropriate ****1570** because the pre-emptive effect of § 253 is not automatic, but requires the FCC's intervention. § 253(d). Rather than assume that the FCC will apply the ***148** statute improperly, and rather than stretch our imaginations to identify possible problems in cases not before the Court, we should confront the problem presented by the cases at hand and endorse the most reasonable interpretation of the statute that both fulfills Congress' purpose and avoids unnecessary infringement on state prerogatives. I would accordingly affirm the judgment of the Court of Appeals.

All Citations

541 U.S. 125, 124 S.Ct. 1555, 158 L.Ed.2d 291, 195 A.L.R. Fed. 699, 72 USLW 4256, 04 Cal. Daily Op. Serv. 2475, 2004 Daily Journal D.A.R. 3621, 32 Communications Reg. (P&F) 71, 17 Fla. L. Weekly Fed. S 201

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The provision is subject to some exceptions not pertinent here, and as originally enacted the law was set to expire in 2002. The assembly later pushed the expiration date ahead to 2007. Mo.Rev.Stat. § 392.410(7) (Supp.2003).

2 The line between "political subdivision" and "independent entity" the FCC located by reference to state law. By its terms, the FCC order declined to preempt the statute as it applied to municipally owned utilities not chartered as independent corporations, on the theory that under controlling Missouri law, they were subdivisions of the State. 16 FCC Rcd., at 1158. The Commission implied an opposite view, however, regarding the status, under § 253, of municipal utilities that had been separately chartered. *Ibid.* The question whether § 253 preempts state and municipal regulation of these types of entities is not before us, and we express no view as to its proper resolution.

3 The hypothetical city, in other words, is "general law" rather than "home rule." See *City of Lockhart v. United States,* 460 U.S. 125, 127, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (In contrast to a general law city, a home rule city has state constitutional authority to do whatever is not specifically prohibited by state legislation).

4 The Court granted certiorari solely to consider whether municipalities are subsumed under the rubric "any entity," and our holding reaches only that question. There is, nevertheless, a logical affinity between the question presented and the hypothetical situation in which a State were to decide, directly or effectively, against its own delivery of telecommunications services.

1 See, *e.g.,* Note, Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers, 95 Nw. U.L.Rev. 1099 (2001).

2 *In re Missouri Municipal League,* 16 FCC Rcd. 1157, 1172, 2001 WL 28068 (2001). Three Commissioners wrote separately to underscore this point. *Ibid.* (statement of Chairman Kennard and Commissioner Tristani) (describing municipally owned utilities as a "promising class of local telecommunications competitors"); *id.,* at 1173 (statement of Commissioner Ness) (noting that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas").

3 For example, as of 2001, there were more than 2,000 publicly owned electric utilities in the United States, compared to just over 230 investor-owned utilities. Am. Public Power Assn., 2003 Annual Directory & Statistical Report 13.

4 This testimony prompted the Senate manager of the bill to remark: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications

area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." Hearings, at 379 (statement of Sen. Lott).

5 The operative distinction for § 253 purposes is thus not between implicit and explicit repeals of authority. See *ante,* at 1565. It is, rather, the distinction between laws that generally redefine the scope of municipal authority and laws that specifically target municipal authority to enter the telecommunications business, whether by direct prohibition or indirect barriers to entry.

6 The goal of striking a balance between promoting competition and preserving States' general regulatory authority surely supplies a sufficient justification for "preempting only those laws that self-consciously interfere with the delivery of telecommunications services," rather than all generally applicable laws that might have the practical effect of restraining entry. *Ante,* at 1565. But even if, as the Court asserts, there were "no justification" for drawing the line at laws that "self-consciously" interfere with entities' ability to provide telecommunications services, *ibid.,* that surely would not be a valid reason for refusing to allow the FCC to pre-empt those that do create such an interference. We generally do not refuse to give effect to a statute simply because it "might have gone farther than it did." *Roschen v. Ward,* 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722 (1929).

End of Document

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

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).[1] Hyperion also asks the Commission to direct the Tennessee Authority to grant Hyperion's application for a CPCN.[2] 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,[3] ***11065** fall outside the scope of authority reserved to the states by section 253(b) of the Act,[4] and thus satisfy the requirements for preemption by the Commission pursuant to section 253(d) of the Act.[5]

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),[6] 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.[7] 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).[8] Tennessee Telephone serves fewer than 100,000 residential and business customers in Tennessee.[9]

4. On August 24, 1995, the Tennessee Public Service Commission (TPSC, the 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.[10] 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.[11] 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.'"[12]

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. Code Ann. § 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.[13]

***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.[14] 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.[15] 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.[16] 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 therefore section 253(b) operates as a limitation on Hyperion's challenge under 253(a).[17] Hyperion contends that Tenn. Code Ann. § 65-4-201(d) is inconsistent with section 253 and with Commission precedent, and on that basis petitions us to preempt Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority's *Denial Order*.[18]

7. In assessing whether to preempt enforcement of the *Denial Order* and Tenn. Code Ann. § 65-4-201(d) 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.[19]

8. If we find that the *Denial Order* and Tenn. Code Ann. § 65-4-201(d) 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.[20]

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.[21]

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.[22] 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.[23] 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.[24]

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).[25] Specifically, the Tennessee Authority argues that Tenn. Code Ann. § 65-4-201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals,[26] and because the provision applies in a competitively neutral manner to all non-incumbent LECs.[27] 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.[28] 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,[29] is necessary to protect consumer interests,[30] and is competitively neutral.[31] 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.[32] 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).[33]

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[34] 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.[35] 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.[36] 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.[37] 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).[38]

***11071** 14. Similarly, in the *Texas Preemption Order*,[39] the Commission preempted a section of the Texas Public Utility Act of 1995 that prohibited the 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.[40] The Commission found that the moratorium on

competition violated the terms of section 253(a) of the Act.[41] 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).[42]

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."[43] 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.[44] 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 vice-versa).[45] 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.[46] 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.[47] 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.[48] 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.

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.[49] 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.[50] 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).[51]

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.[52] 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.[53]

***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.[54] 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.[55] Section 253 is itself evidence that Congress intended primarily for competitive markets to determine which entrants should provide the telecommunications services demanded by consumers.[56] We continue to believe that Congress intended new competitors to bring the benefits of competition to rural as well as populous markets.[57]

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.[58] 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.[59] TDS suggests that Tenn. Code Ann. § 65-4-201(d) might therefore be applied in way that would not offend section 253,[60] 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."[61]

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.[62] 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.[63] 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.[64] 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.[65] 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.[66]

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*.[67] Hyperion urges us to clarify generally the ***11076** scope of section 253 as it might apply in such cases.[68] 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

Footnotes

1 *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*).

[2] Petition at 23.

[3] 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.

[4] 47 U.S.C. § 253(b).

[5] 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.

[6] TENN. CODE ANN. § 65-4-201(d).

[7] Petition at 2.

[8] *Id.*

[9] 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.

[10] *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.

[11] *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*).

[12] TPSC Restriction Order at 5.

[13] TENN. CODE ANN. § 65-4-201; Petition at 4.

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

[15] "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.

[16] "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.

[17] *Denial Order* at 11.

[18] Petition at 8.

19 47 U.S.C. § 253(a).

20 47 U.S.C. § 253(b).

21 47 U.S.C. § 253(d).

22 Petition at 6. Although 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 or itself applies for CPCN outside its service area, neither exception applies to this case.

23 Petition at 8.

24 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.

25 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.

26 Tennessee Authority Comments at 3-5.

27 Tennessee Authority Comments at 6.

28 *Id.*

29 TDS Comments at 6-7.

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

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

32 *Id.*

33 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.

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

35 WYO. STAT. ANN. § 37-15-201(c).

36 *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).

37 *Silver Star Preemption Order*, 12 FCC Rcd at 15656-57, ¶¶ 38-39.

38 *Silver Star Preemption Order*, 12 FCC Rcd at 15657-59, ¶¶ 41-44.

39 *Texas Preemption Order*, 13 FCC Rcd 3460 (1997).

40 Texas Public Utility Act of 1995 § 3.2531(h).

41 *Texas Preemption Order*, 13 FCC Rcd at 3511, ¶ 106.

42 *Texas Preemption Order*, 13 FCC Rcd at 3511, ¶ 107.

43 47 U.S.C. § 253(a) (emphasis added).

44 Tennessee Authority Comments at 6.

45 *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).

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

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

48 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, 11 FCC Rcd 20227, 20310 at ¶ 195 (1996). *See Separations NPRM*, 12 FCC Rcd at 22132, ¶ 24 ("Competitive neutrality ... would not, however, preclude carriers in dissimilar situations from being treated differently").

49 *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.

50 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.

51 *Silver Star Reconsideration*, FCC 98-205, ¶ 19.

52 TDS at Comments 12 (contrasting TENN. CODE ANN. § 65-5-211 with WYO. STAT. §§ 37-15-101 *et seq.*).

53 *Silver Star Preemption Order*, 12 FCC Rcd at 15657, ¶ 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.*, 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.

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

55 *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").

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

57 *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.

58 TDS at Comments at 15-18.

59 TDS Comments at 15, 17.

60 TDS states that § 65-4-201(d) allows the Tennessee Authority to obtain useful information through closer scrutiny of applications to serve rural areas. TDS Comments at 18.

61 TDS Comments at 15.

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

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

64 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.

65 Petition at 23.

66 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.

67 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").

68 Hyperion Petition at 21.

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

End of Document

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

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

**1 *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*.[1] 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.[2] 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.[3] 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.[4] 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.[5]

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 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.[6] In a related argument, TDS argues that competitive imbalances will result from preemption of the statute.[7] The Commission rejected these arguments in the *Hyperion Preemption Order*.

**2 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.[8] 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.[9] TDS has failed to identify any redeemable portion of the preempted law.[10] 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;[11] (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;[12] 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).[13] 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).[14] 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.[15]

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.

****3** 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

Magalie Roman Salas
Secretary

Footnotes

1 *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*).

2 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.

3 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).

4 Tennessee Regulatory Authority Motion for Stay at 1.

[5] 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.

[6] 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, ¶¶ 15-16

[7] 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.

[8] 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.

[9] *Hyperion Preemption Order*, 14 FCC Rcd 11075, ¶ 22.

[10] 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."

[11] 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).

[12] Tennessee Authority Petition for Reconsideration at 8-11. The Commission rejected this argument at *Hyperion Preemption Order*, 14 FCC Rcd at 11074, ¶¶ 18, 20.

[13] Tennessee Authority Petition for Reconsideration at 11-13; *Hyperion Preemption Order*, 14 FCC Rcd at 11074, ¶¶ 18, 20.

[14] *See* 47 U.S.C. § 153(37); 47 U.S.C. § 251(f). *See also* 47 U.S.C. § 253(f).

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

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

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 9, 2008

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

ORDER

This matter came before Chairman Eddie Roberson, Director Tre Hargett, and Director Ron Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference on May 5, 2008 for consideration of the *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity ("Petition")* filed on June 20, 2007 which requested an amendment to its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand")."[1]

BACKGROUND

On June 27, 1996, an Order was entered by the Tennessee Public Service Commission ("TPSC") in Docket No. 96-00779 approving the Initial Order of an Administrative Judge and granting a certificate of public convenience and necessity ("CCN") to Citizens Telecommunications Company d/b/a Citizens Telecom ("Citizens") to operate as a competing telecommunications service provider. The Order of the TPSC specifically adopted the findings

[1] *Petition*, p. 1 (June 20, 2007).

and conclusions in the Administrative Judge's Initial Order entered on May 30, 1996.[2] The *Initial Order* stated that the application of Citizens sought a CCN to offer "a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company" on a statewide basis. Specifically, the *Initial Order* reflected that Citizens agreed to adhere to TPSC policies, rules and orders and stated that "the two Citizens incumbent local exchange carriers do not claim entitlement to the exemptions from competition contained in T.C.A. § 65-4-201(d)."[3]

On January 10, 2003, the TRA issued an *Order Approving Merger* which approved a merger between Frontier Communications of America, Inc. ("Frontier") and Citizens. As a result of this merger, Citizens' name was changed to Frontier.

On October 26, 2004, Frontier filed a *Petition of Frontier Communications, Inc. for Declaratory Ruling That It Can Provide Competing Services in Territory Currently Served by Ben Lomand Rural Telephone Cooperative, Inc.* ("*Petition for Declaratory Ruling*") in Docket No. 04-00379. In its *Petition for Declaratory Ruling,* Frontier identified itself as a competing local exchange carrier ("CLEC") and contended that it had statewide authority from the TRA to provide telecommunications services based on the Order entered in TPSC Docket No. 96-00779. Additionally, Frontier and Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand") petitioned for and obtained TRA approval of an Interconnection Agreement dated August 2, 2004. Through its *Petition for Declaratory Ruling* and its Interconnection Agreement with Ben Lomand, Frontier sought to compete in territory served by Ben Lomand. Ben Lomand

---

[2] *Initial Order, Application of Citizens Telecommunications Company, d/b/a Citizens Telecom for a Certificate of Public Convenience and Necessity as Competing Telecommunications Service Provider,* TPSC Docket No. 96-00779, p. 1 (May 30, 1996) ("*Initial Order*").
[3] *Id.* at 3.

responded to the *Petition for Declaratory Ruling* stating that Frontier did not have authority to compete in Ben Lomand's service territory and moving to dismiss the action.

At a regularly scheduled Authority Conference on November 7, 2005, the panel in Docket No. 04-00379 unanimously determined that Frontier does not have statewide authority under its current CCN to permit it to serve customers in Ben Lomand's territory. The panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide a competing service only as allowable by state law at the time. The 1996 TPSC Order did not extend Citizens' authority statewide to enter into territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives. The panel unanimously voted to dismiss the *Petition for Declaratory Ruling* of Frontier on the procedural ground that Frontier was asserting a claim for relief which could not be granted pursuant to the status of Frontier's current CCN.[4] The Authority's dismissal of the declaratory petition did not address the merits of the statutory restriction pertaining to competition within the territory of cooperative telephone service providers.

On December 14, 2005, Frontier filed its *Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling* ("*Petition for Preemption*") with the Federal Communications Commission ("FCC").[5] The *Petition for Preemption* seeks an Order from the FCC that would overrule the November 7, 2005 decision of the Authority in TRA Docket No. 04-00379, preempt Tenn. Code Ann. § 65-29-102, and rule that Frontier may compete in the service territory of Ben Lomand. In its *Petition for Preemption*, which was filed with the FCC before the issuance of the Order of the Authority in Docket No. 04-00379, Frontier

[4] The *Order Denying Petition of Frontier Communications, Inc.*, reflecting the decision of the Authority in Docket No. 04-00379, was issued on March 8, 2006.

[5] *In Re: Petition of Frontier Communications of America, Inc. for Preemption and Declaratory Ruling*, FCC WC Docket No. 06-6 (December 14, 2005).

asserts that Ben Lomand's motion to dismiss in that docket was granted by the TRA "on the ground that state law does not permit the TRA to grant authority for CLECs to serve territories served by telephone cooperatives."[6]

On February 21, 2006, during the comment period for FCC WC Docket 06-6, the TRA filed its *Opposition of the Tennessee Regulatory Authority to Frontier's Petition for Preemption and Declaratory Ruling ("Opposition to Petition for Preemption")* with the FCC, effectively intervening in that action. In its *Opposition to Petition for Preemption,* the Authority 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 ground that it is not ripe for consideration because Frontier has not exhausted its remedies at the TRA.[7]

To date, the FCC has not rendered a decision on Frontier's *Petition for Preemption.*

TRAVEL OF THIS CASE

On June 20, 2007, Frontier filed its *Petition* requesting amendment to its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by [Ben Lomand]."[8] On July 9, 2007, the panel voted unanimously to convene a contested case proceeding and to appoint General Counsel or his designee as Hearing Officer for the purpose of preparing this matter for hearing. On July 11, 2007, Ben Lomand filed its *Petition to Intervene* pursuant to Tenn. Code Ann. §4-5-310.

On November 20, 2007, the Hearing Officer issued a *Notice of Status Conference.* The notice provided that any party desiring to participate in this proceeding should file a petition to intervene not later than November 30, 2007, and that petitions to intervene filed by that date

---

[6] *Petition for Preemption*, p. 3 (December 14, 2005).
[7] *Opposition to Petition for Preemption,* p. 1 (February 21, 2007).
[8] *Petition,* p. 1 (June 20, 2007).

would be considered at the status conference on December 5, 2007. The notice also stated that the establishment of a procedural schedule and any other pre-hearing issues would be matters for discussion during the status conference.

On November 29, 2007, the Authority received petitions for leave to intervene from the following interested parties: Highland Telephone Cooperative, Inc. ("Highland"), Bledsoe Telephone Cooperative Corporation, Inc. ("Bledsoe"), West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky"), DTC Communications ("DTC"), North Central Telephone Cooperative, Inc. ("North Central"), and Twin Lakes Telephone Cooperative Corporation ("Twin Lakes") (collectively, the "Intervening Cooperatives"). On December 3, 2007, the Intervening Cooperatives filed their *Motion to Hold Case in Abeyance ("Abeyance Motion").* On December 5, 2007, Frontier filed its *Response in Opposition to the Motion to Hold Case in Abeyance Filed by the Intervenors.*

At the Status Conference convened on December 5, 2007, all parties presented oral argument concerning the merits of the *Abeyance Motion,* after which the Hearing Officer took the matter under advisement. Additionally, the parties agreed that a procedural timeline for resolution of this docket is dependent upon the outcome of the Abeyance *Motion* and suggested that the parties submit an agreed proposed procedural schedule not later than seven days following issuance of the Hearing Officer's Order pertaining to the *Abeyance Motion,* if necessary.

On December 6, 2007, the Hearing Officer issued an *Order Granting Petitions to Intervene, Setting Deadline for Receipt of Proposed Procedural Schedule and Addressing Other Preliminary Matters* memorializing decisions made by the Hearing Officer at the Status Conference. Additionally therein, the Hearing Officer stated that a separate order rendering a

decision on the *Abeyance Motion* would be later issued.

On December 20, 2007, the Hearing Officer issued an *Order Declining to Hold Case in Abeyance Subject to Condition Precedent.* In the Order, the Hearing Officer denied the *Abeyance Motion* and advised the parties that the docket would not proceed until a notice of the filing of the *Petition* and Frontier's request that the Authority proceed on its *Petition* was filed with the FCC in FCC Docket WC-06-6. The Hearing Officer further ruled that upon the filing of a copy of such a notice with the TRA, the parties shall submit an agreed procedural schedule proposing a timeline for moving the docket forward to a resolution on the merits.

On January 14, 2008, a copy of a letter notifying the FCC of Frontier's *Petition* and its request to the TRA to proceed with action on the *Petition* was received by the Authority. On February 22, 2008, a *Petition of Comcast Phone of Tennessee, LLC ("Comcast Phone") for Leave to Intervene* was filed with the Authority. On March 5, 2008, the Hearing Officer received an electronic communication from the parties advising of their agreement regarding a proposed procedural schedule and a request that the docket proceed to resolution before the Authority. Comcast's petition to intervene was granted by Order of the Hearing Officer issued on March 6, 2008. On March 7, 2008, the Hearing Officer issued the *Order Setting Procedural Schedule* in which it was noted that the parties had advised the Hearing Officer that there were no material facts in dispute and that the issues presented in the docket were purely legal in nature. On March 26, 2008, the Intervening Cooperatives filed their notice of withdrawal. On March 27, 2008 initial briefs were filed by Frontier, Ben Lomand, and Comcast. Frontier and Ben Lomand each filed a reply brief on April 10, 2008. Comcast informed the TRA of its election not to file a reply brief on April 10, 2008.

On April 21, 2008, the panel heard oral argument of the parties concerning the following legal questions:

1) Whether the TRA has jurisdiction in this matter; and,

2) Whether the TRA may permit Frontier to amend its existing authority "to provide telecommunications service . . . in areas served by telephone cooperatives, including territory served by Ben Lomand Rural Telephone."[9]

The parties were advised that the panel would deliberate these issues at the regularly scheduled Authority Conference on May 5, 2008 and, if needed, following the decision of the panel on the threshold issues, hold a public hearing pursuant to Tenn. Code Ann. § 65-4-201. On April 28, 2008, Frontier filed its pre-filed Direct Testimony in support of its managerial, financial, and technical qualifications to provide service.

DISCUSSION & ANALYSIS

Question 1 - Jurisdiction

Under Tenn. Code Ann. § 65-4-101(6)(E), telephone cooperatives are excluded from the definition of public utilities and therefore are not subject to general regulation by the TRA except as specifically provided in Tennessee statutes. In 1961, the General Assembly determined that the TRA shall have jurisdiction over a telephone cooperative in three specific instances as follows:

> T.C.A. § 65-29-130. Jurisdiction
>
> (a) Cooperatives and foreign corporations engaged in rendering telephone service in this state pursuant to this chapter fall within the jurisdiction of the Tennessee regulatory authority for the sole and specific purposes as set out below:
>
> (1) The establishment of territorial boundaries;
>
> (2) The hearing and determining of disputes arising between one (1) telephone cooperative and other telephone cooperatives, and between telephone cooperatives and any other type of person, corporation, association, or

[9] *Petition*, p. 1.

partnership rendering telephone service, relative to and concerning territorial disputes; and

(3) The approval of sales and purchases of operating telephone properties.

Tenn. Code Ann § 65-4-201 outlines the requirements which must be met by any telecommunications service provider seeking approval of a CCN for the purpose of offering services within the state and the role of the TRA when reviewing any such petition. Under Tenn. Code Ann. § 65-4-201, the TRA has jurisdiction over a petition by a telecommunications service provider requesting a CCN or an amendment thereto, statewide or otherwise. The TRA has previously determined that "the authority of the TRA 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."[10]

Finally, Tenn. Code Ann. § 65-5-110 (a) states "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408 [the Tennessee Telecommunications Act]."

Question 2 – Amendment of CCN to provide telecommunications service in areas served by telephone cooperatives

A. The *Telephone Cooperative Act ("Cooperative Act")*, Tenn. Code Ann. § 65-29-101, et seq.

In 1961, the General Assembly, through the *Cooperative Act,* provided entities organized under chapter 29 (i.e. telephone cooperatives) with special benefits and responsibilities, unique incentives, and specific corporate powers so as to enable telephone cooperatives to provide the type of service which might otherwise be considered economically unfeasible. The General

[10] *Order Denying Petition of Frontier Communications, Inc.*, Docket No. 04-00379, p. 9 (March 8, 2006).

Assembly enacted the *Cooperative Act* to encourage the provision of telephone service in rural areas, but did not do so without any limitation. Tenn. Code Ann. § 65-29-102 provides:

> T.C.A. § 65-29-102. Purpose
>
> 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.* Corporations organized under this chapter and corporations which become subject to this chapter in the manner provided in this chapter are referred to in this chapter as "cooperatives," and shall be deemed to be not-for-profit corporations. (Emphasis added).

As an initial matter, the parties dispute the plain language of the statute and each offers a contrasting interpretation. Frontier asserts that the *Cooperative Act* prohibits a telephone cooperative from providing service in an area where reasonably adequate service is available, as construed by the Tennessee Attorney General, but does not nor was it intended to bestow territorial protection upon telephone cooperatives.[11] Ben Lomand contends that the *Cooperative Act* "prohibits any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory."[12] Although Ben Lomand insists that its interpretation is proper and in conformity with the plain language of the statute, when asked during oral argument to identify the specific language that grants it protection from competition, it was unable to do so.[13] Ben Lomand has also failed to provide any other authority to support its interpretation of the statute.

---

[11] *Frontier Communications of America, Inc's Initial Brief,* p. 7 (March 27, 2008); see also, *Frontier Communications of America, Inc's Reply Brief,* p. 4-5 (April 10, 2008).
[12] *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.,* p.2 (March 27, 2008); see also, *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.,* p. 2 (April 10, 2008).
[13] Transcript of April 21, 2008 Authority Conference, p. 120

The Tennessee Supreme Court reiterated the well-settled law of statutory construction in the case of *Gleaves v. Checker Cab Transit Corp.*:[14]

> A "basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. State Dep't. of Revenue,* 865 S.W.2d 1, 2 (Tenn.1993). In determining legislative intent and purpose, a court must not "unduly restrict[ ] or expand[ ] a statute's coverage beyond its intended scope." *Worley v. Weigels, Inc.,* 919 S.W.2d 589, 593 (Tenn.1996)(quoting *Owens v. State,* 908 S.W.2d 923, 926 (Tenn.1995)). Rather, a court ascertains a statute's purpose from the plain and ordinary meaning of its language, *see Westland West Community Ass'n. v. Knox County,* 948 S.W.2d 281, 283 (Tenn.1997), "without forced or subtle construction that would limit or extend the meaning of the language." *Carson Creek Vacation Resorts, Inc.,* 865 S.W.2d at 2.
>
> When, however, a statute is without contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from the words of the statute. *Hawks v. City of Westmoreland,* 960 S.W.2d 10, 16 (Tenn.1997). Moreover, if "the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, 'to say sic lex scripta, and obey it.' " *Id.* (quoting *Miller v. Childress,* 21 Tenn. (2 Hum.) 320, 321-22 (1841)). Therefore, "[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction." *Henry v. White,* 194 Tenn. 192, 198, 250 S.W.2d 70,72 (1952).
>
> Finally, it is not for the courts to alter or amend a statute. *See Town of Mount Carmel v. City of Kingsport,* 217 Tenn. 298, 306, 397 S.W.2d 379, 382 (1965); *see also Richardson v. Tennessee Bd. of Dentistry,* 913 S.W.2d 446, 453 (Tenn.1995); *Manahan v. State,* 188 Tenn. 394, 397, 219 S.W.2d 900, 901 (1949). Moreover, a court must not question the "reasonableness of [a] statute or substitut[e][its] own policy judgments for those of the legislature." *BellSouth Telecomms., Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn.Ct.App.1997). Instead, courts must "presume that the legislature says in a statute what it means and means in a statute what it says there." *Id.* Accordingly, courts must construe a statute as it is written. *See Jackson v. Jackson,* 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948).[15]

A careful review of Tenn. Code Ann. § 65-29-102 shows that it is clear and unambiguous on its face. The plain language of the statute, without a forced interpretation or an expansion of the ordinary terms it employs, makes clear that it is the telephone cooperative that shall not be

---

[14] *Gleaves v. Checker Cab Transit Corp., Inc.,* 15 S.W.3d 799, 802-803 (Tenn. 2000).
[15] *Id.*

permitted to provide duplicative service in an area where there exists reasonably adequate service. The language imposes a restriction upon the cooperative, and does not grant a corresponding territorial protection from outside competition, as asserted by Ben Lomand. When this statute was enacted, it is possible that this language may have been intended to provide a measure of security for then-existing telephone cooperatives providing telephone service in rural areas. Nevertheless, the statute on its face does not purport to grant refuge from competition for cooperatives organizing under the *Cooperative Act*. There is no language found within the statute that purports to grant a telephone cooperative a right to be free from the competition of a service provider or entity not organized under the *Cooperative Act*.

Furthermore, as cited by Frontier, the Tennessee Attorney General has interpreted the conditional language found within the statute to be a prohibition or restriction on the telephone cooperative:

> 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 § 65- 4-107; ***a telephone cooperative is prohibited by § 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 § 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 (emphasis added).[16]
>
> * * *
>
> A municipality can only allow a telephone cooperative organized under T.C.A. §65-29-101, et seq. . . .to conduct business in the municipality if it is determined under T.C.A. §54-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be

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

> shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative.[17]

In the absence of case law concerning the *Cooperative Act*, the Tennessee Attorney General, in a variety of opinions, has stated the purpose of the *Cooperative Act* by referencing specific statutory language:

> Under T.C.A. §65-29-102, cooperative, nonprofit, membership corporations may be organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there is no duplication of service where reasonably adequate telephone service is available.[18]

> The purpose of telephone cooperatives organized under Chapter 29 of Title 65 is to "furnish telephone service in rural areas to the widest practical number of users of such service."[19]

> Telephone cooperatives are organized and operated pursuant to the provisions of T.C.A. §65-29-101, et seq. (the 'Telephone Cooperative Act'). Such cooperatives are organized for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided there shall be no duplication of service where reasonably adequate telephone service is available, pursuant to T.C.A. 65-29-102.[20]

It is apparent that an interpretation of the statute which fosters territorial protection for cooperatives has been perpetuated for many years and has inured to the benefit of cooperative telephone companies. Such a misinterpretation or misconstruction of the statute continues and it is the genesis of the dispute in this docket. Upon a careful review of the *Cooperative Act*, statements in various Attorney General Opinions, and after a review of recordings of the House and Senate discussions of the legislation which passed in 1961,[21] it is clear that the bestowing of

---

[17] *Id.*

[18] Tenn. Op. Atty. Gen. No. 92-44, 1992 WL 545017 (Tenn. A.G.).

[19] Tenn. Op. Atty. Gen. No. 92-65, 1992 WL 545032 (Tenn. A.G.).

[20] Tenn. Op. Atty. Gen. No. 88-140, 1988 WL 410216 (Tenn. A.G.).

[21] There was no discussion by legislators which would either directly or impliedly give entities organized under the *Cooperative Act* exclusive rights to service territory. In Tenn. Op. Atty. Gen. No. 92-65, the Tennessee Attorney General characterized legislative discussions concerning the *Cooperative Act* as follows:

> House Bill 957 was introduced and read by Representative James H. Cummings to the General Assembly on March 13, 1961. The most important topic of debate at the reading of the bill was

territorial protection to the benefit of telephone cooperatives is not supported by the *Cooperative Act*. Undoubtedly, Ben Lomand has enjoyed this "protection" and would like for it to continue. The Intervening Cooperatives[22] chose to withdraw their intervention prior to the submission of briefs on these important issues.

In several dockets in the past, the TRA has alluded to the widely held belief of a statutorily-sanctioned monopoly position for the telephone cooperatives. In his Concurring Opinion to an order granting a CCN to Ben Lomand Communications, Inc. (an affiliate of Ben Lomand Rural Cooperative) to provide telecommunication services as a CLEC in 1999, former Director Lynn Greer stated "the certificate granted to Ben Lomand will allow the for-profit subsidiary to compete in the telephone business against other telephone providers while at the same time allowing the not-for-profit cooperative to protect its territory from outside competition. . . . I realize that the General Assembly made a policy decision in this area. . ."[23]

In the predecessor docket to this case, Docket No. 04-00379, "the panel found that Frontier, then known as Citizens, when requesting authority to provide competing telephone service was granted statewide approval to provide competing service as allowable by state law at the time. The 1996 TPSC order did not extend Citizens' authority statewide to enter into

---

> the potential for conflicting jurisdiction between telephone cooperatives and the Public Service Commission concerning, for example, rate-making power and dispute resolution authority.
>
> . . . yet it is clear from the House discussion that the primary concern and objective was to provide technological services to rural communities of Tennessee comparable to the level of service enjoyed by constituents in more urban areas.
>
> Senate Bill 833 was introduced and read by Senator Gilbert F. Parker. This bill evoked even less discussion on the Senate floor than its House counterpart.

[22] The following telephone cooperatives are collectively referred to herein as the "Intervening Cooperatives:" Highland Telephone Cooperative, Inc., Bledsoe Telephone Cooperative Corporation, Inc., West Kentucky Rural Telephone Cooperative Corporation, Inc., DTC Communications, North Central Telephone Cooperative, Inc., and Twin Lakes Telephone Cooperative Corporation.

[23] *See In Re: Application of Ben Lomand Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services as a Competing Telecommunications Service Provider,* Docket No. 98-00600, *Concurring Opinion of H. Lynn Greer* attached to the *Order Granting Certificate of Convenience and Necessity* (April 28, 1999).

territories of small rural telephone carriers (less than 100,000 total access lines) or cooperatives."[24] Additionally, during the deliberations of Frontier's petition concerning whether competition was permitted in the territory of Ben Lomand, former Director Pat Miller made the following comments, "after reviewing the pleadings and applicable statutory provisions, I do not find specific language contained within existing state law that would permit the TRA to grant authority to CLECs to serve territories served by telephone cooperatives. I am also convinced that prior to the 1995 act this agency did not have authority to allow competitive entry into areas served by cooperatives."[25]

The Authority is not foreclosed from taking a position on interpreting this statute, which may be contrary to the remarks of Directors in earlier dockets. In addition, none of the Directors assigned to the voting panel of this docket have considered this issue before.

If, however, the *Cooperative Act*, or Tenn. Code Ann. § 65-29-102 specifically, is capable of more than one reasonable interpretation, then the statute is ambiguous. The Court of Appeals in *Consumer Advocate Div. v. Tennessee Regulatory Authority* stated,

> The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts.[26]

Thus, in the event that a statute logically has more than one meaning, or is capable of conflicting yet wholly reasonable interpretations, the court will customarily defer to the interpretation of the administrative agency. An interpretation that Tenn. Code Ann. § 65-29-102 does not convey or bestow territorial protection from competition by entities not organized thereunder, is supported by a reading of the plain language of the statute itself.

---

[24] *See In Re: Petition of Frontier Communications, Inc. for a Declaratory Ruling,* Docket No. 04-00379, *Order Denying Petition of Frontier Communications, Inc.*, p. 11 (March 8, 2006).
[25] *Id.* p. 11, footnote 23.
[26] *Consumer Advocate Div. v. Tennessee Regulatory Authority,* 2002 WL 1579700, 3 (Tenn. Ct. App. 2002) *citing Collins v. McCanless,* 169 S .W.2d 850 (Tenn. 1943) and *Riggs v. Burson,* 941 S.W.2d 44 (Tenn. 1997).

As a part of Title 65 of the Tennessee statutes, it must be addressed how the *Cooperative Act* is integrated into the overall statutory scheme for telecommunications declared by the General Assembly in 1995. Even if the *Cooperative Act* did somehow grant territorial protection to cooperatives, with the enactment of Tennessee's Telecommunications Act in 1995, the General Assembly declared clearly that the fostering of competition in *all* areas of Tennessee is the mandate of this state and the charge of the TRA. Tenn. Code Ann. §65-4-123 states:

> T.C.A. § 65-4-123. Declaration of telecommunications services policy
>
> The general assembly declares 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,*** and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. *To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider;* universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable. (Emphasis added).

The courts have addressed the overarching implications and sweeping changes made and intended as a result of Tennessee's Telecommunications Act in 1995. In *BellSouth Telecommunications, Inc. v. Greer,*[27] the Tennessee Court of Appeals discussed the dramatic actions taken by the state legislature and Governor in 1995 concerning the regulation of the telecommunications market in Tennessee:

> . . . two competing telecommunications bills were introduced in the first session of the Ninety-Ninth General Assembly that had convened in January 1995. The avowed purpose of both bills was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. Filed concurrently with these bills was a bill to replace the Commission [Public Service Commission] with a new regulatory entity. On May 26, 1995, the Governor signed a bill replacing the Commission with the Tennessee Regulatory Authority effective July 1, 1996.[FN6] Two weeks later, the Governor signed another bill dramatically altering the regulation of local

[27] *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663 (Tenn. App. 1997).

telephone companies and opening up the local telecommunications market to unprecedented opportunities for competition.[FN7]

> FN6. Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.
> FN7. Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703, codified at Tenn. Code Ann. §§ 65-4-101, -123 & -124, 65-4-201, -203, -207, and 65-5-208 to -213 (Supp.1996).

The expressed goal of the new regulatory structure was to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers.

See Tenn. Code Ann. § 65-4-123 (Supp.1996). In broad terms, the 1995 legislation set out to accomplish this goal in five ways. First, it mandated the universal availability of basic telephone service at affordable rates and froze basic and non-basic telephone rates for four years [footnote omitted]. Second, it required incumbent local telephone companies to make available non-discriminatory interconnection to their public networks to other providers [footnote omitted]. Third, it eased the traditional limitations on the ability of new providers to enter the market.[FN10] Fourth, it provided a transition procedure to enable existing local telephone companies to take advantage of the newly relaxed regulatory environment [footnote omitted]. Fifth, it established a five-year, $10 million loan guarantee program to induce small and minority businesses to enter the telecommunications market [footnote omitted].

> FN10. Prior to 1995, the Commission could not permit new competitors to enter a market already served by another provider unless it found that the current service was "inadequate to meet the reasonable needs of the public." Tenn. Code Ann. § 65-4-203(a) (Supp.1996). The 1995 legislation exempts telecommunications service providers from this requirement. Tenn. Code Ann. § 65-4-203(c). The 1995 legislation also permits new competitors to enter a market if they demonstrate that they will adhere to the applicable legal requirements and that they possess sufficient managerial, financial, and technical abilities to provide the service. Tenn. Code Ann. § 65-4-201(c).

BellSouth Telecommunications, Inc. v. Greer, 972 S.W.2d 663, 666-667 (Tenn. App. 1997).

In the 2003 case of *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,*[28] the Tennessee Court of Appeals discussed the condition of the telecommunications market in Tennessee prior to the widespread and sweeping legislation enacted by the General Assembly:

> Before the state legislature made significant changes in the law governing telecommunications services in 1995, local telephone service was provided to consumers in a locality by one company under a regulated monopoly system. The adoption of the Tennessee Telecommunication Act, 1995 Tenn. Pub. Acts 408 (effective June 6, 1995), abolished monopolistic control of local telephone service and opened that market to competition. It also changed the way in which providers of such services, and the rates they charge, were regulated.[29]

The *Greer* and *BellSouth BSE* cases demonstrate that even if the *Cooperative Act* at one time had provided territorial protection to cooperatives, the actions of the General Assembly in 1995 would serve to resolve and override conflicting prior legislation. As stated by the *Greer* Court at footnote 10 quoted above, consideration of whether "current service was 'inadequate to meet the reasonable needs of the public[]' Tenn. Code Ann. § 65-4-203(a) (Supp.1996)," is not the law following the 1995 Telecommunications Act. The decision whether to allow competition in the telecommunications market has been decided by the General Assembly. The question is no longer when or under what circumstances should competition be allowed, the law in Tennessee mandates that competition will be fostered in "all telecommunications services markets . . . to protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider . . ."[30] Further, as articulated in *BellSouth BSE,* the 1995 legislation was intended to "abolish[] monopolistic control of local telephone service and open[] that market to competition."[31]

---

[28] *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,* 2003 WL 354466 (Tenn. Ct. App. 2003).
[29] *Id.*
[30] Tenn. Code Ann. §65-4-123.
[31] *BellSouth BSE, Inc. v. Tennessee Regulatory Authority,* 2003 WL 354466, p. 1 (Tenn. Ct. App. 2003).

Ben Lomand argues that it was not contemplated that telephone cooperatives would be included in the 1995 Telecommunications Act. Ben Lomand asserts that only "public utilities" within the definition of Tenn. Code Ann. § 65-4-101 are contemplated within the 1995 Telecommunications Act. Therefore, because cooperatives are specifically exempted from this definition by Tenn. Code Ann. § 65-4-101(6)(E),[32] they are likewise free from the imposition of mandated competition. Again, Ben Lomand's argument is not consistent with the rules of statutory construction.

Pursuant to the rules of statutory construction, first and foremost, "courts must presume that the legislature says in a statute what it means and means in a statute what it says there.'"[33] The Tennessee Supreme Court, in the case of *Ki v. State,* stated:

> When construing statutes, we are required to ascertain and effectuate the legislative intent and purpose of the statutes. *State v. Walls,* 62 S.W.3d 119 (Tenn.2001). We should "assume that the legislature used each word in the statute purposely and that the use of [each] word[ ] conveyed some intent." *State v. Levandowski,* 955 S.W.2d 603, 604 (Tenn.1997). Further, courts must presume that the legislature is aware of prior enactments and of the decisions of the courts when enacting legislation. *Id.* Legislative intent must be derived from the plain and ordinary meaning of the statutory language if the statute is devoid of ambiguity. *Mooney v. Sneed,* 30 S.W.3d 304, 306 (Tenn. 2000).[34]

The General Assembly made it clear in Public Chapter 408, the enacted legislation of the 1995 Telecommunications Act, that the overall goal of the Act was to open the "telecommunications services market" to competition. The preamble to Public Chapter 408 states in pertinent part,

> WHEREAS, It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market; and

---

[32] Tenn. Code Ann. §65-4-101(6) states, " . . . 'Public utility' as defined in this section shall not be construed to include the following nonutilities: . . . (E) Any cooperative organization, association or corporation not organized or doing business for profit;"

[33] *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn. App. 1997).

[34] *Ki v. State,* 78 S.W.3d 876, 879 (Tenn. 2002).

> WHEREAS, Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each; and . . . [35]

Therefore, the language of Tenn. Code Ann. § 65-4-123, "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," should be construed as meaning exactly what it states – all markets. Further, while Ben Lomand does not fall within the definition of "telecommunications service provider"[36] under Tenn. Code Ann. § 65-4-101(8), Frontier does. The additional language of Tenn. Code Ann. § 65-4-123, ". . . the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider. . ." means that regulation under the "new" legislative scheme should not unreasonably prejudice or disadvantage Frontier.

It is a legal assumption that the General Assembly was aware of the *Cooperative Act* and its provisions when it enacted the 1995 Telecommunications Act. Whether one considers the meaning of the *Cooperative Act* on its face (no territorial protection afforded) or the interpretation of the *Cooperative Act* advocated by Ben Lomand, the clear directives of the General Assembly set forth in the 1995 Telecommunications Act must prevail, ultimately resulting in the entry of Frontier and other CLECs into *all* telecommunications services markets in Tennessee. As stated by the Tennessee Attorney General in an opinion concerning the statutory jurisdiction of the TRA over cooperatives, and which is equally applicable to the question presented in this matter, "[t]his interpretation is consistent with the well established rule

[35] 1995 Tenn. Pub. Ch. 408.

[36] Tenn. Code Ann. §65-4-101(8) states, "'Telecommunications service provider' means any incumbent local exchange telephone company or certificated individual or entity or individual or entity operating pursuant to the approval by the former public service commission of a franchise within §65-4-207(b), authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law [citations omitted]."

of statutory construction that statutes relating to the same subject matter must be construed so as to make the legislative scheme operate in a consistent and uniform matter. See, e.g., State v. Hughes, 512 S.W. 2d 552, 552 (Tenn. 1974)."[37]

A legislative scheme designed to encourage competition in telecommunications service markets for the benefit of consumers cannot operate as intended under the restrictions placed on the 1995 Telecom Act by Ben Lomand. In particular, not permitting Frontier to compete in Ben Lomand's territory would be unfair and inequitable. This is especially true under the circumstances presented in this docket, where Ben Lomand is a "nonutility" by definition, while its for-profit subsidiary, Ben Lomand Communications, Inc. ("BLC"), is a "competing telecommunications service provider"[38] ("CLEC') pursuant to Tenn. Code Ann. §65-4-101(1) and has been operating in the areas served by Frontier. In light of the fact that Ben Lomand intentionally created BLC for the purpose of actively competing with Frontier and other CLECs over nine years ago, a proper implementation of the 1995 Telecommunications Act would serve to avoid the continuation of unreasonable prejudice and disadvantage experienced by Frontier. Again, the preamble to the Public Chapter 408, articulates the intentions of the General Assembly, ". . . Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination. . ."[39]

The TRA has jurisdiction over such disputes between cooperatives and non-cooperative telephone service providers pursuant to Tenn. Code Ann. § 65-29-130. Frontier asserts that pursuant to Tenn. Code Ann. § 4-5-223(a) the TRA has jurisdiction and authority to declare

[37] Tenn. Op. Atty. Gen. No. 88-06, 1988 WL 410167 (Tenn. A.G.).
[38] Tenn. Code Ann. §65-4-101(1) states, "'Competing telecommunications service provider' means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after June 6, 1995 unless otherwise exempted from this definition by state or federal law.
[39] 1995 Tenn. Pub. Ch. 408. (Preamble).

Tenn. Code Ann. § 65-29-102, as interpreted by Ben Lomand, preempted.[40] Tenn. Code Ann. § 4-5-223(a) states:

> Any 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.[41]

Further, Frontier cites TRA Rule 1220-1-2-.05 in support of the Authority's power to nullify statute. TRA Rule 1220-1-2-.05 provides:

> 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.[42]

Ben Lomand asserts that Tenn. Code Ann. § 65-29-102 is a valid and enforceable statute and that the TRA has no authority to preempt it. "It is the duty of the Authority to enforce state laws, not throw them out the window."[43] Nevertheless, in this instance, the Authority can enforce the statute without supporting Ben Lomand's interpretation thereof. The plain language of the statute does not act as a bar to competition, particularly from entities not organized under the *Cooperative Act* as asserted by Ben Lomand. Even if it did, the provisions of the 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123, would supersede such an anticompetitive result. Therefore, it is not necessary that the TRA should rule upon the constitutionality of the statute specifically.

B. Tenn. Code Ann. § 65-4-201(d) and federal preemption under *Hyperion*

The General Assembly has been clear in its intention and desire that Tennessee's telecommunications markets should be open. Yet, the legislature provided an exception, Tenn.

---

[40] *Frontier Communications, Inc.'s Reply Brief*, p. 5-6 (April 10, 2008).
[41] Tenn. Code Ann. §4-5-223(a).
[42] TRA Rule 1220-1-2-.05.
[43] *Initial Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 4 (March 27, 2008).

Code Ann. § 65-4-201(d) in which the General Assembly specifically considered rural communities and the telephone service providers serving them.

As part of the 1995 Telecommunications Act, the General Assembly enacted Tenn. Code Ann. § 65-4-201(d), which purported to insulate incumbent local exchange telephone companies ("ILECs") with fewer than 100,000 access lines from competition unless an ILEC entered into an interconnection agreement voluntarily or it applied for a certificate to compete outside its service area. In a memorandum opinion and order adopted on May 14, 1999, the FCC in *In re AVR, L.P. d/b/a Hyperion of Tennessee, L.P.*[44] exercised its authority under 47 U.S.C. § 253(d) to preempt enforcement of Tenn. Code Ann. § 65-4-201(d). In so doing, the FCC stated:

> 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).[45] 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).[46] 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. § 65-4-210(d) and the Denial Order, as directed by section 253(d).[47]

---

[44] *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 98-92, Memorandum Opinion and Order, 14 F.C.C. Rcd. 11064 (1999) ("*Hyperion Memorandum Opinion and Order*").

[45] 47 U.S.C. §253(a) states "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[46] 47 U.S.C §253(b) states "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, 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] 47 U.S.C. 253(d) states "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *See, Hyperion Memorandum Opinion and Order* at 11070.

> 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.[48]
>
> 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.[49]
>
> 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 judgment violate section 253 as applied by this commission.[50]

Thus, ultimately, the FCC found Tenn. Code Ann. § 65-4-201(d) to be anticompetitive in violation of Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,[51] and outside the scope of authority reserved to the states by Section 253(b). Importantly, although the FCC preempted the enforcement of Tenn. Code Ann. § 65-4-201(d) and TRA's Denial Order, it did not mandate the granting of Hyperion's application for a CCN. Rather, it stated, "[b]ased 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 [CCN] consistent with the Communications Act and this decision."[52] Hyperion never filed any additional requests with the TRA following the FCC decision. Nevertheless, the TRA has granted similar requests from at least two CLECs post-*Hyperion,* allowing them entry into the previously exempted rural territory.[53]

---

[48] *Hyperion Memorandum Opinion and Order* at 11072
[49] *Id.* at 11072.
[50] *Id.* at 11076.
[51] 47 U.S.C. § 253(a). Section 253 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*
[52] *Hyperion Memorandum Opinion and Order* at 11075.
[53] See, *In re: Application of Level 3 Communications, LLC for a CCN to Provide Facilities-Based and Resold Local Exchange and Interexchange Telecommunications Services throughout the State of Tennessee,* Docket No. 98-00610, *Order Granting Certificate of Public Convenience and Necessity* (November 24, 1998) and *In re: Petition of*

Ben Lomand contends that Tenn. Code Ann. § 65-4-201(d) and the FCC decision in *Hyperion* are not relevant to the TRA's consideration in this docket because Ben Lomand is a cooperative, operating under Tenn. Code Ann. § 65-29-102, not a rural ILEC. Tenn. Code Ann. § 65-29-102 has not been specifically preempted by the FCC and Ben Lomand asserts that the FCC would not likely preempt the *Cooperative Act*:

> [t]he mere fact that T.C.A. § 65-29-102 restricts entry into a cooperative's territory is not grounds for preemption. Like the General Assembly with T.C.A. § 65-29-102, the U.S. Congress in the 1996 Federal Communications Act recognizes special exemptions for rural telephone companies. 47 U.S.C. 251(f)(1). . . . the statute does not prohibit a state from imposing 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). The General Assembly has done so with T.C.A. § 65-29-102.[54]
>
> The FCC has refused to preempt a local law which is not an absolute prohibition. In the Matter of California Payphone Association Petition, Memorandum Opinion and Order, 12 F.C.C. Rec. 14191 (1997). T.C.A. § 65-29-102 is **not** an absolute prohibition – if a rural cooperative is found to not be providing reasonable and adequate service, a competing provider may offer services in such cooperative's territory (emphasis in original).[55]

Frontier asserts that if the interpretation of Tenn. Code Ann. § 65-29-102 as advocated by Ben Lomand were to prevail, and the *Cooperative Act* does in fact prohibit any telecommunications service provider other than the rural telephone cooperative serving its territory from providing service in such cooperative's territory, then applying the analysis of *Hyperion*, the FCC should find it anticompetitive in violation of 47 U.S.C. § 253(a) and preempt its enforcement.[56] Accordingly, considering the final comments of the FCC in *Hyperion* urging states and regulatory agencies to "review any similar statutes and regulations, and to repeal or

---

XO Tennessee, Inc. to Amend Its CCN, Docket No. 03-00567, *Initial Order Granting Amendment to Certificate of Public Convenience and Necessity* (February 23, 2004).

[54] *Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc.*, p. 4 (April 10, 2008).

[55] *Id.* at 4-5.

[56] *Frontier Communications, Inc.'s Initial Brief,* p. 8-9 (March 27, 2008).

otherwise nullify any that in their judgment violate section 253 as applied by this commission," Frontier contends that Ben Lomand's interpretation of Tenn. Code Ann. § 65-29-102 is therefore (impliedly) preempted. Comcast Phone of Tennessee, who filed a petition to intervene in this docket on February 22, 2008, also asserts that the interpretation of Tenn. Code Ann. § 65-29-102 by Ben Lomand contradicts federal law and would thus be preempted under the Supremacy Clause of Article VI of the United States Constitution.[57]

While Ben Lomand may not be a rural ILEC and is not relying upon Tenn. Code Ann. § 65-4-201(d) to protect it from competitors, the FCC's pronouncement in *Hyperion* is applicable to this case. The FCC has not specifically reviewed Tenn. Code Ann. § 65-29-102, nor the *Cooperative Act* as a whole, and declared it preempted. Nevertheless, the analysis conducted by the FCC in *Hyperion,* combined with the directive to states and regulatory agencies to review and repeal or otherwise nullify anticompetitive statutes, requires that the TRA carefully scrutinize the statute that has been brought to its attention by the application filed by Frontier in this docket.

FINDINGS AND CONCLUSIONS

The panel unanimously voted that the Authority has statutory authority over this docket. Further, the panel unanimously voted that state law encourages telephone competition in all service markets and that it does not prohibit a duly authorized telecommunications service provider from providing telecommunications services in the entire state, including the service territories of the state's rural telephone cooperatives. The prevailing motion set out the following findings as the basis for the panel's unanimous decisions.[58, 59]

---

[57] *Brief of Comcast Phone of Tennessee, LLC,* p.4-5 (March 27, 2008).

[58] Director Jones voted yes with regard only to the results of the prevailing motion. Director Jones explained that the threshold issue here is the proper interpretation of Tenn. Code Ann. § 65-29-102. He concluded that a careful review of Tenn. Code Ann. § 65-29-102 shows that the statute is clear and unambiguous. The language provides

Jurisdiction

1. The TRA has statutory authority under Tenn. Code Ann. §§ 65-29-130, 65-4-201, 65-4-123 and 65-5-110 over the issues in this docket which involve a territorial dispute between Ben Lomand Cooperative and Frontier Communications.

2. Tenn. Code Ann. § 65-29-130 specifically grants the TRA jurisdiction to adjudicate territorial boundary disputes between cooperatives and other telephone companies. The Tennessee Attorney General's opinion, OAG 90-83, supports this interpretation.

3. Tenn. Code Ann. § 65-4-201 delegates to the TRA the duty of reviewing company petitions seeking to offer telecommunications services within the state or to amend existing CCNs to expand service.

4. Tenn. Code Ann. § 65-4-123 which "declares 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, by permitting competition in all telecommunications service markets..." vests in the TRA the duty to implement the state policy on telecommunications and the instant petition must be weighed in light of this important legislative directive.

5. Tenn. Code Ann. § 65-5-110 (a) which states "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995. ch. 408 [the Tennessee Telecommunications Act]" also provides statutory authority to the

---

that it is the telephone cooperative that shall not be permitted to provide duplicative service in an area where there exists reasonably adequate service and does not grant cooperatives territorial protection from outside competition. Based on these findings, Director Jones concluded that Tenn. Code Ann. § 65-29-102 is inapplicable to the facts of this docket and there is no need to address the remaining legal issues, including the application of Tenn. Code Ann. § 65-4-201(d).

[59] Director Hargett found that the Authority must examine and interpret Tenn. Code Ann. § 65-29-102 to determine whether that statute prohibits telecommunications service providers from providing service in Ben Lomand Rural Telephone Cooperative's territory. The Tennessee Supreme Court has held that when statutory language is clear, the plain meaning of the language must be applied without the statute's application being limited or expanded through a forced interpretation. Director Hargett determined that Tenn. Code Ann. § 65-29-102 is not ambiguous and that the plain language of the Telephone Cooperative Act, Tenn. Code Ann. § 65-29-101, et seq., generally, and Tenn. Code Ann. § 65-29-102 specifically, does not bestow territorial protection upon telephone cooperatives. However, he noted that where the language of the statute did not yield a clean interpretation, the Supreme Court has held that statutes which relate to the same subject or have a common purpose should be construed together and the construction of one statute can help resolve any ambiguity in another statute. Using this rule of construction, he found that even if there is some ambiguity in the Cooperative Act regarding whether telephone cooperatives enjoy a protected status, Tennessee's 1995 Telecommunications Act, specifically Tenn. Code Ann. § 65-4-123 which fosters competition in telecommunications markets, is useful in construing the Cooperative Act and supports an interpretation that the telephone cooperatives are not shielded from other telecommunications carriers seeking to provide service in their territories.

TRA to hear this matter.

6. TRA precedent provides guidance on the jurisdictional question. In Docket 04-00379,[60] the TRA unanimously determined it has jurisdiction to review and determine request for CCNs that may conflict with cooperatives' territory.

Interpretation of TCA § 65-29-101, et seq.

1. It is not the role of the Authority in interpreting a statute to nullify, strike down, alter or amend state law, but rather to determine the meaning of the "plain language" of the statute in context to other applicable state law. If ambiguity exists in interpretation, the Court of Appeals in *Consumer Advocate Division v. Tennessee Regulatory Authority* has opined that the courts will give customary respect and deference to administrative agencies in their interpretations of statutes.

2. It is clear that the legislative intent of *The Telephone Cooperative Act* was to provide comparable telephone service to rural areas that existed in urban areas. There is nothing in the legislative history to indicate that the legislature intended to prohibit future competition.

3. The crux of the question is not whether Tenn. Code Ann. § 65-29-101, et seq. allows competition, but rather whether it allows cooperatives to maintain their monopoly status.

4. In looking at the plain and ordinary meaning of the language contained within the four corners of the statute it is clear that the statute sets conditions for the establishment of cooperatives, i.e., to "furnish telephone service in rural areas to the widest practical number of users of such services; provided, that there shall be no duplication of service where reasonable adequate telephone service is available." The intent of this condition was to meet a need that privately owned telephone companies were not meeting. There is nothing in the statutory language that would prohibit the TRA from considering a petition of a telecommunications service provider to offer competitive local telephone service in cooperative areas.

5. The action that changed the status quo and reversed over a century of regulatory certainty was the Telecommunications Act, passed by the General Assembly in 1995. This Act's goal is to promote competition in the local market. Tenn. Code Ann. § 65-4-123 directs the TRA to promote policies that enhance the opportunity of competitive choice for consumers in all telecommunications service markets.

6. This policy had one condition, found in Tenn. Code Ann. § 65-4-201(d), to exempt incumbent local exchange telephone companies with fewer than

[60] See Footnote 11 above.

100,000 access lines from competition.

7. The TRA faithfully enforced Tenn. Code Ann. § 65-4-201(d) until the Federal Communications Commission preempted this law due to its conflict with federal law that prohibits anti-competitive barriers to local telephone service competition. The Federal government preempted and nullified this subsection in *Hyperion*.[61] Even if the plain language of Tenn. Code Ann. § 65-29-102 suggested that competition was prohibited in areas served by cooperatives, the FCC has made clear in *Hyperion* that any such anti-competitive affect is pre-empted by the 1996 Telecom Act.

IT IS THEREFORE ORDERED:

1. The Tennessee Regulatory Authority has jurisdiction in this matter.

2. Frontier Communications of America, Inc. may proceed with its *Petition of Frontier Communications of America, Inc. to Amend Its Certificate of Convenience and Necessity* in which it seeks to expand its authority to provide telecommunications service statewide, including areas served by telephone cooperatives, specifically including territory served by Ben Lomand Rural Telephone Cooperative, Inc.

Eddie Roberson, Chairman

Tre Hargett, Director

Ron Jones, Director 6-30-08

[61] See Footnote 44 above.

Tenn. Op. Atty. Gen. No. 97-154 (Tenn.A.G.), 1997 WL 783091

Office of the Attorney General

State of Tennessee
Opinion No. 97-154
November 10, 1997

Rural Electric Cooperative under Open Meetings Act

***1** Tom Leatherwood
State Senator
Suite 317 War Memorial Building
Nashville, TN 37243-0232

QUESTION

Are meetings of the board or members of a rural electric cooperative subject to the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.*?

OPINION

Meetings of the board or members of a rural electric cooperative operating under Tenn. Code Ann. §§ 65-25-201, *et seq.*, are not subject to the Open Meetings Act. Whether the Act applies to meetings of the board or members of a rural electric cooperative organized and operating under a different statute or a private act would require an analysis of the statutes governing such cooperative.

ANALYSIS

This opinion addresses whether meetings of the board or members of a rural electric cooperative are subject to the requirements of the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.* This opinion will be limited to rural electric cooperatives operating under Tenn. Code Ann. §§ 65-25-201, *et seq.* Whether the Open Meetings Act would apply to meetings of the board or members of a rural electric cooperative operating under a different statute, such as a private act, would require an analysis of that particular statute.

It is the policy of the State that the formation of public policy and decisions is public business and shall not be conducted in secret. Tenn. Code Ann. § 8-44-101. Under the Open Meetings Act, all meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution. Tenn. Code Ann. § 8-44-102(a)(Supp. 1997). The statute provides notice and other requirements regarding the meetings of a governing body.

The key issue in this inquiry is whether a rural electric cooperative is a "governing body" as defined under the Open Meetings Act. The Act defines "governing body" as follows:

(b)(1) "Governing body" means:
(A) The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration and also means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790 [repealed]. Any governing body so defined by this section shall remain so defined, notwithstanding the fact that such governing body may have designated itself as a negotiation committee for collective bargaining purposes, and strategy sessions of a governing body under such circumstances shall be open to the public at all times;

(B) The board of directors of any nonprofit corporation which contracts with a state agency to receive community grant funds

in consideration for rendering specified services to the public; provided, that community grant funds comprise at least thirty percent (30%) of the total annual income of such corporation. Except such meetings of the board of directors of such nonprofit corporation that are called solely to discuss matters involving confidential doctor-patient relationships, personnel matters or matters required to be kept confidential by federal or state law or by federal or state regulation shall not be covered under the provisions of this chapter, and no other matter shall be discussed at such meetings;

***2** (C) The board of directors of any not-for-profit corporation authorized by the laws of Tennessee to act for the benefit or on behalf of any one (1) or more of counties, cities, towns and local governments pursuant to the provisions of title 7, chapter 54 or 58. The provisions of this subdivision (b)(1)(C) shall not apply to any county with a metropolitan form of government and having a population of four hundred thousand (400,000) or more according to the 1980 federal census or any subsequent federal census;

(D) The board of directors of any nonprofit corporation which through contract or otherwise provides a metropolitan form of government having a population in excess of five hundred thousand (500,000) according to the 1990 federal census or any subsequent federal census with heat, steam or incineration of refuse;

Tenn. Code Ann. § 8-44-102(b)(1)(Supp. 1997). An examination of the statutes governing a rural electric cooperative indicates that these organizations do not meet the definitions in (B), (C), or (D) of this statute. The question remains, then, whether an electric cooperative operating under Tenn. Code Ann. §§ 65-25-201, *et seq,*. is a "public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration" under subsection (A). The term "public body" is not defined in the Open Meetings Act; however, the Tennessee Supreme Court has noted with respect to the term that:
It is clear that for the purpose of this Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976), *rehearing denied* 540 S.W.2d 658 (Tenn. 1976).

This Office concluded in 1979 that an electric cooperative operating under Tenn. Code Ann. §§ 65-25-101, *et seq.*, was not a public body under this definition. Op.Tenn.Atty.Gen. 79-109 (June 5, 1979). That conclusion was based on the character of these organizations as described in the statutes that governed them. Under those statutes, since repealed, rural electric cooperatives were required to be non-profit-membership corporations with the purpose of supplying electric energy to their customers. The statutes authorized these cooperatives to adopt articles of incorporation and bylaws regarding supply of electrical energy and described the manner in which the leadership of the cooperatives was selected. The 1979 opinion concluded:
While legislation sets up requirements for Electric Cooperative Boards to follow, the Cooperative traces its origin actually to its membership, and not any action by a legislative body. Furthermore these boards do not make recommendations on policy or administration that effect [sic] the conduct of the business of the people in the governmental sector as required in *Dorrier v. Dark, supra.* As a result Electric Cooperative Boards are not public bodies and do not fall within the provisions of the Tennessee Open Meetings Act.

***3** Op.Tenn.Atty.Gen. 79-109 (June 4, 1979).

In 1988, the Tennessee General Assembly repealed the statutes governing electric cooperatives and enacted the Rural Electric and Community Services Cooperative Act, Tenn. Code Ann. §§ 65-25-201, *et seq.* The act was intended to update statutes governing these organizations to make them more compatible with changed conditions and to reconcile the statutes with revised statutes governing nonprofit corporations. Tenn. Code Ann. § 65-25-201(b)(3). The new statutory scheme does not change the character of rural electric cooperatives. For example, an electric cooperative remains a nonprofit cooperative membership corporation. Tenn. Code Ann. § 65-25-202(4). Directors are elected by the members of the cooperative. Tenn. Code Ann. § 65-25-207; Tenn. Code Ann. § 65-25-209.

The new statutory scheme expands the purposes of a cooperative to include the secondary purposes of providing other rural community utility services besides electric power and energy services; providing management and operating services to any other entity providing electric or utility services; and "[p]romoting economic and industrial development through participation as both a borrower and a lender in various programs established by the rural electrification administration or other federal programs." Tenn. Code Ann. § 65-25-204(a)(2). These secondary purposes were not expressly included under the previous statute. We do not think, however, that this change converts a rural electric cooperative to a public body as contemplated under the Open Meetings Act. Like the previous statutory scheme, the Rural Electric and Community Services Cooperative Act generally reflects the legislative intent that the activities of such cooperatives are largely confined to their members. We note, for example, that Tenn. Code Ann. § 65-25-205 (a) sets forth the powers of a cooperative. Subsection (b) of this statute provides:

All of the powers herein conferred are to be exercised by a cooperative for rendering one (1) or more services to persons who or which are its members and to other persons, not to exceed fifteen percent (15%) of the number of persons who or which are its members; provided, that whenever in the sole judgment of its board such is necessary to acquire or to protect and preserve a cooperative's exemption from federal income taxation relative to a primary or secondary purpose, a cooperative may require new nonmember patron applicants or existing nonmember patrons to become members as a condition of initially receiving or of continuing to receive such service.

Tenn. Code Ann. §65-25-205(b)(1993). For these reasons, this Office concludes that neither the directors nor the members of a rural electric cooperative operating under Tenn. Code Ann. §§ 65-25-201, *et seq.*, are a "governing body" within the meaning of the Open Meetings Act.

John Knox Walkup
Attorney General and Reporter
Michael E. Moore
***4** Solicitor General
Ann Louise Vix
Senior Counsel

Honorable Tommie F. Brown

State Representative

113 War Memorial Building

Nashville, Tennessee 37243-0128

Tenn. Op. Atty. Gen. No. 97-154 (Tenn.A.G.), 1997 WL 783091

End of Document

40226754.v1

EXHIBIT F

WEST KENTUCKY & TENNESSEE TELECOMMUNICATIONS COOPERATIVE CORPORATION'S PRE-FILED TESTIMONY

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

IN RE:

APPLICATION OF WEST KENTUCKY &	)	
TENNESSEE TELECOMMUNICATIONS	)	
COOPERATIVE CORPORATION FOR A	)	
CERTIFICATE OF PUBLIC	)	
CONVENIENCE AND NECESSITY TO	)	**DOCKET NO. _____**
PROVIDE INTRASTATE	)	
TELECOMMUNICATIONS SERVICES	)	
STATEWIDE	)	
	)	

PRE-FILED TESTIMONY OF

TREVOR BONNSTETTER ON BEHALF OF

WEST KENTUCKY RURAL TELEPHONE COOPERATIVE CORPORATION, INC. D/B/A/ WEST KENTUCKY & TENNESSEE TELECOMMUNICATIONS COOPERATIVE CORPORATION

JANUARY 25, 2018

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Trevor Bonnstetter, and my business address is 237 North 8th Street, Mayfield, KY 42066.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am the Chief Executive Officer of West Kentucky and Tennessee Telecommunications Cooperative Corporation ("WK&T").

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND BUSINESS EXPERIENCE.

A. I have been involved in the telecommunications industry for over 30 years. Over the course of my professional career, I have served in several roles, including General Manager of River Valley Telephone Cooperative in Graettinger, IA, past President of the Tennessee Telecommunications Association Board, current National Exchange Carrier Association board member, and current board member of IRIS Networks in Nashville, TN. I joined WK&T in 1998. I graduated from the Walden University – Minneapolis, Minnesota in 2011 with a PhD, from William Woods University, Fulton, MO, in 2006, cum laude with a MBA, and from Mid Continent University, Mayfield, KY, in 2001, cum laude with a B.S. in Organization Leadership.

Q. FOR WHOM ARE YOU TESTIFYING IN THIS PROCEEDING?

A. I am testifying on behalf of West Kentucky and Tennessee Telecommunications Cooperative Corporation.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to support the *Application of West Kentucky Rural Telephone Cooperative Corporation, Inc. d/b/a/ West Kentucky & Tennessee*

Telecommunications Cooperative Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide (the "Application").

Q. PLEASE DESCRIBE THE CORPORATE STRUCTURE OF WK&T.

A. WK&T is a Tennessee telecommunications company incorporated in Kentucky in 1951. WK&T acquired Yorkville Telephone Company, a Tennessee telephone cooperative, in 2006.

WK&T is currently authorized to provide a full array of telecommunications services in certain areas in the State of Tennessee, primarily Henry, Weakley, Gibson, Obion and Dyer counties. WK&T is also authorized to provide a full array of telecommunications in the State of Kentucky, primarily Calloway, Graves, Hickman, Benton, Carlisle, and McCracken Counties. A copy of WK&T's charter is attached as **Exhibit C** to the *Application*.

Q. PLEASE DESCRIBE WK&T'S OPERATIONS IN THE STATE OF TENNESSEE.

A. Since 1951, WK&T has provided telecommunications services in Kentucky and Tennessee. WK&T currently offers broadband, telephone, video, and security services throughout its existing service area.

Q. DOES WK&T PROVIDE SERVICES IN ANY STATES OTHER THAN TENNESSEE?

A. Yes. As I noted earlier, WK&T is authorized to operate in the State of Kentucky as well.

Q. WHAT IS WK&T SEEKING IN ITS APPLICATION IN THIS DOCKET?

A. WK&T is currently seeking authority to provide intrastate telecommunications services throughout the State of Tennessee as a Competitive Local Exchange Carrier ("CLEC"). WK&T is aware of all the requirements necessary in order to expand its offerings statewide as a CLEC. At this time, WK&T only intends to expand its offerings from time to time as business conditions warrant. To the extent that any rural incumbent local exchange carrier possesses an exemption or suspension under Section 251(f) of the Federal Communications Act (the "Act") that would apply to WK&T's proposed expanded operations, WK&T does not seek interconnection under Section 251(c) at this time, nor does WK&T seek at this time to challenge any such exemption from any of the other obligations specified in Section 251(c) of the Act.

WK&T will offer directory services and E911 in the proposed service area.

Q. WHY IS WK&T SEEKING EXPANDED AUTHORITY?

A. WK&T desires to expand its offerings of telecommunications services throughout the State of Tennessee in order to provide more consumers with increased carrier choices, competitive pricing, increased reliability, responsiveness, and innovation. The granting of this *Application* will provide significant benefits to Tennessee consumers and thereby serve the public interest.

Q. DOES WK&T MEET THE STATUTORY REQUIREMENTS SET FORTH IN TENN. CODE ANN. § 65-4-201(c)?

A. Yes. As set forth in the Application, WK&T is a seasoned, experienced telecommunications provider in the State of Tennessee and certainly has the managerial, financial and technical abilities required under Tennessee law. Our Application evidences

that we have gained valuable experience as a telecommunications provider over the many decades of exceptional services. This experience provides WK&T with the foundation necessary to provide the proposed telecommunications services and to further serve Tennessee's telecommunications consumers. As supported by **Exhibit A** to the Application, WK&T is managerially and technically qualified to provide telecommunications services statewide. As shown in this exhibit, WK&T's principal corporate offices, board members and staff have substantial managerial and technical experience in the relevant areas, including utility operations, utility customer service and utility marketing. This experience provides WK&T with the foundation necessary to provide the proposed telecommunications services and to serve Tennessee's telecommunications consumers. Therefore, WK&T is managerially and technically qualified to offer the proposed services.

Moreover, WK&T is financially qualified to provide the proposed telecommunications services statewide. As a provider of telecommunications services in Tennessee, WK&T operates profitably. Attached as **PROPRIETARY AND CONFIDENTIAL UNDER SEAL Exhibit B** to the *Application* is WK&T's 2015 and 2016 Audited Financial Statements, which confirm that WK&T is financially qualified to provide telecommunications services statewide. **CONFIDENTIAL Exhibit B** is being submitted **UNDER SEAL** as **CONFIDENTIAL AND PROPRIETARY**.

Q. WILL WK&T COMPLY WITH THE TPUC'S POLICIES, RULES, AND ORDERS?

Yes. And, subsequent to the approval of its *Application*, WK&T will file any necessary tariffs or tariff revisions prior to expanding its service offerings beyond those

already permitted. Further, a certificate of service stating that notice of this *Application* has been served on all thirty-three (33) incumbent local exchange telephone companies in Tennessee is evidenced by the Certificate of Service attached to the *Application.* WK&T's Small and Minority-Owned Telecommunications Business Participation Plan is provided as **Exhibit D** of the *Application.*

Q. WILL WK&T COMPLY WITH STATE LAW IN RELATION TO ITS REQUEST FOR AUTHORITY?

A. Yes.

Q. WILL THE GRANTING OF THE *APPLICATION* SERVE THE PUBLIC INTEREST?

A. Yes. The granting of the *Application* will further the public interest by expanding the availability of telecommunications services, consistent with state law. Specifically, Tennessee consumers will continue to benefit directly through the use of the competitive services offered by WK&T. Further, the public will benefit through the continued and expanded competitive presence of WK&T, which will increase the incentives for telecommunications providers to operate more efficiently, offer more innovative services, reduce prices, and improve the quality and coverage of their services. The granting of the *Application* would be consistent with the public policy of the State of Tennessee, as set forth at Tenn. Code Ann. § 65-4-123, "to foster the development of an efficient, technologically advanced statewide system of telecommunications services by permitting competition in all telecommunications services market[.]"

Q. IS THE *APPLICATION* TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE, INFORMATION AND BELIEF?

A. Yes.

Q. DOES THIS CONCLUDE YOUR PRE-FILED TESTIMONY?

A. Yes, it does. Thank you.

VERIFICATION

STATE OF Kentucky)
COUNTY OF Graves)

I, Trevor R. Bonnstetter, being first duly sworn, make oath that I am the Chief Executive Officer of West Kentucky & Tennessee Telecommunications Cooperative Corporation ("WK&T") that I am authorized to make this oath on behalf of West Kentucky & Tennessee Telecommunications Cooperative Corporation and that the *Application of West Kentucky & Tennessee Telecommunications Cooperative Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services Statewide* submitted to the Tennessee Public Utility Commission, and the statements contained therein, are true, accurate and correct to the best of my knowledge, information and belief.

Trevor R. Bonnstetter
Chief Executive Officer
West Kentucky & Tennessee Telecommunications
Cooperative Corporation

Sworn to and subscribed before me this 26 day of January, 2018.

Notary Public

My Commission Expires: 04-14-18
506681

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been forwarded via U.S. Mail to the following on this the 26th day of January 2018.

AT&T
333 Commerce Street
Nashville, TN 37201-3300

Ardmore Telephone Company, Inc.
P.O. Box 649
Mayfield, KY 42066

Ben Lomand Connect
P.O. Box 670
311 North Chancery Street
McMinnville, TN 37111

Bledsoe Telephone Cooperative
P.O. Box 609
338 Cumberland Avenue
Pikeville, TN 37367

Century Telephone of Adamsville
P.O. Box 405
116 N. Oak Street
Adamsville, TN 38310

Century Telephone of Claiborne
P.O. Box 100
507 Main Street
New Tazewell, TN 37825

Century Telephone of Ooltewah-Collegedale, Inc.
P.O. Box 782
5616 Main Street
Ooltewah, TN 37363

Frontier Communications Company of Tennessee
P.O. Box 770
300 Bland Street
Bluefield, WV 24701

Frontier Communications Company
of the Volunteer State
P.O. Box 770
300 Bland Street
Bluefield, WV 24701

Concord Telephone Exchange, Inc.
10025 Investment Drive, Suite 200
Knoxville, TN 37932

DTC Communications
P.O. Box 247
111 High Street
Alexandria, TN 37012-0247

Highland Telephone Cooperative, Inc.
P.O. Box 119
7840 Morgan County Hwy.
Sunbright, TN 37872-0119

Humphreys County Telephone Company
10025 Investment Drive, Suite 200
Knoxville, TN 37932

Loretto Telecom
136 S Main Street
Loretto, TN 38469

Loretto Telephone Company, Inc.
P.O. Box 130
Loretto, TN 38469

North Central Telephone Cooperative, Inc.
P.O. Box 70
872 Highway 52 By-pass East
Lafayette, TN 37083

Ritter Communications
4880 Navy Road
Millington, TN 38053

Scott County Telephone Cooperative
P.O. Box 487
Gate City, VA 24251-0487

SkyLine Membership Corporation
P.O. Box 759
West Jefferson, NC 28694-0759

TDS Telecom
10025 Investment Drive, Suite 200
Knoxville, TN 37932-0995

TDS Telecom-Concord Telephone Exchange, Inc.
P.O. Box 22610
701 Concord Road
Knoxville, TN 37933-0610

TDS Telecom-Humphreys County
Telephone Company
P.O. Box 552
203 Long Street
New Johnsonville, TN 37134-0552

TDS Telecom-Tellico Telephone Company, Inc.
P.O. Box 9
102 Spence Street
Tellico Plains, TN 37385-0009

TDS Telecom-Tennessee Telephone Company
P.O. Box 22995
Knoxville, TN 37933-0995

TEC/Bradford
224 East Main Street
P.O. Box 10
Bradford, TN 38316

TEC/Erin
P.O. Box 310
4587 West Main Street
Erin, TN 37061

TEC/Friendship Division
563 Main Street
P.O. Box 7
Friendship, TN 38034

Tellico Telephone Company
10025 Investment Drive, Suite 200
Knoxville, TN 37932

Tennessee Telephone Company
10025 Investment Drive, Suite 200
Knoxville, TN 37932

Twin Lakes Telephone Cooperative Corporation
P.O. Box 67
200 Telephone Lane
Gainesboro, TN 38562-0067

United Communications
120 Taylor Street
Box 38
Chapel Hill, TN 37034

United Telephone Company
P.O. Box 38
120 Taylor Street
Chapel Hill, TN 37034

United Telephone – Southeast
112 6th Street
Bristol, TN 37620-2267

Melvin J. Malone