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REGULATORY AUTH.

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
SITTING IN NASHVILLE, TENNESSEE

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OFFICE OF THE  
EXECUTIVE SECRETARY

DOCKET NO 98-00600

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

NO INTERVENORS

RESPONSES AND BRIEF  
FOR BEN LOMAND COMMUNICATIONS, INC

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**SUMMARY OF PROCEEDINGS  
AND STATEMENT OF FACTS**

On September 1, 1998, Ben Lomand Communications, Inc. filed an application for a Certificate of Convenience and Necessity as a competing telecommunications service provider with the Tennessee Regulatory Authority.

On September 4, 1998, Ben Lomand Communications, Inc. did mail out an amendment to its original application which had been filed on September 1, 1998, which was received by the Tennessee Regulatory Authority on September 9, 1998.

On September 18, 1998, Ben Lomand Communications, Inc. waived the 60-day requirement for TRA certification and requested that this matter be docketed for hearing by the Authority as soon after November 5, 1998, as conveniently possible.

On October 14, 1998, the TRA requested that BLC respond to six questions by October 28, 1998.

On October 23, 1998, Ben Lomand Communications, Inc. responded to the questions which had been asked by TRA.

On October 23, 1998, Ben Lomand Communications, Inc. supplemented its application of September 1, 1998, to show the local service area to be served and the present local exchange carrier of that area.

The application was set for hearing on December 15, 1998, with the applicant to file written testimony and exhibits in support of its application by December 4, 1998.

Under cover letter of December 3, 1998, the written testimony of Calvin Levoy Knowles, Gail Woodlee, Judy Kelsey, and Rodney Schlimmer was filed with the Tennessee Regulatory Authority.

The matter came up to be heard and was heard by the directors of the Tennessee Regulatory Authority on December 15, 1998. There were no intervenors, and the applicant, Ben Lomand Communications, Inc., did put on the stand in support of its application Calvin Levoy Knowles, the Executive Vice President of Ben Lomand

Communications, Inc , Bobbie Gail Woodlee, Controller of Ben Lomand Rural Telephone Cooperative, Inc , Judy Kelsey, Operations and Marketing Manager of Ben Lomand Communications, Inc , and Rodney Schlimmer, Central Office Supervisor of Ben Lomand Rural Telephone Cooperative, Inc

After all witnesses had given their direct testimony, they were questioned by the directors of Tennessee Regulatory Authority, and after they had concluded their questioning, the directors of TRA had certain legal questions which they desired to be answered by either Mr Levoy Knowles, the Executive Vice President of Ben Lomand Communications, Inc , or James W Dempster, the Attorney for Ben Lomand Communications, Inc The applicant moved that written testimony of the witnesses be made part of the oral testimony of witnesses who testified at the hearing before the Authority The chairman sustained the motion and directed that the written testimony of witnesses be incorporated into their oral testimony and made an exhibit thereto

After the responses, primarily by the Attorney, James W Dempster, and a factual question which was answered by Mr Levoy Knowles, certain questions had been propounded and had been answered which the directors or some of the directors desired to be briefed, and the attorney for Ben Lomand Communications, Inc and the general counsel for the Tennessee Regulatory Authority were instructed to formalize the questions, and the attorney for Ben Lomand Communications, Inc was requested to file a response and brief with regard to matters which some of the directors of TRA had concern

The questions will be separately stated

## FACTS

Ben Lomand Rural Telephone Cooperative, Inc did on the 28th day of July, 1952, file with the State of Tennessee its charter of incorporation for the purpose of furnishing, constructing, improving, and expanding telephone service to its members and to others. The charter states that the corporation shall be a nonprofit cooperative association within the provisions of paragraph 10 of Section 4146 of Williams Code Annotated (1934), which provides that "nonprofit cooperative associations may be incorporated and organized ". It further states that it shall have and may exercise all powers, rights, and privileges granted by law to cooperatives organized for this purpose. The certificate of James H. Cummings, Secretary of State of the State of Tennessee certified that the annexed instrument with certificate of acknowledgment was filed in his office and recorded on the 2nd day of October, 1952, in Corporation Record Book Volume 0-18, Page 115.

Articles of conversion of Ben Lomand Rural Telephone Cooperative, Inc. were executed pursuant to articles of conversion of Ben Lomand Rural Telephone Cooperative, Inc. the Telephone Cooperative Act, Public Acts of Tennessee, 1961, Chapter 330. These articles of conversion were filed with the Secretary of State of the State of Tennessee on October 5, 1972, and were recorded in Book P-54, Pages 3859 through 3862 of said Secretary of State's office.

Both the article of incorporation of 1952 and the articles of conversion of 1972 were duly filed in the Register's Office of the county in which the principal office of the corporation was located, namely, Warren County, Tennessee, Register of Deeds.

A copy of the original charter of incorporation is filed herewith as Exhibit 1, and a copy of the articles of conversion is filed herewith as Exhibit 2.

Ben Lomand Rural Telephone Cooperative, Inc. was organized as a nonprofit corporation, being a general welfare corporation and has continued to be one and is a

nonprofit corporation now existing under the Telephone Cooperative Act, Chapter 330, Public Acts of Tennessee, 1961

Ben Lomand Communications, Inc is a for profit corporation, is organized and exists under the Tennessee Business Corporation Act, Tenn Code Ann § 48-11-101 et seq The application to be a for profit corporation is dated July 27, 1993, and was received by the Secretary of State on July 29, 1993, and has been incorporated and is of record in the Secretary of State's office of the State of Tennessee and also of record in Miscellaneous Book 8, Page 553 of the Register's Office of Warren County, Tennessee A copy of the charter of Ben Lomand Communications, Inc is attached hereto and is designated as Exhibit 3 hereto

**STATEMENT OF QUESTIONS PROPOUNDED  
BY DIRECTORS OF TRA**

1       (a) Is Ben Lomand Communications, Inc a cooperative or a public utility?

         (b) Under the facts as presented in this case, should Ben Lomand Communications, Inc be treated as a cooperative under the law?

         (c) If Ben Lomand Rural Telephone Cooperative, Inc is the sole stockholder of Ben Lomand Communications, Inc , then is Ben Lomand Communications, Inc merely an extension of Ben Lomand Rural Telephone Cooperative, Inc ? If that is the case, would Ben Lomand Communications, Inc (as an extension of the cooperative) be prohibited by TCA Section 65-29-102 from duplicating service where reasonably adequate telephone service is available?

         (d) Is Ben Lomand Rural Telephone Cooperative's status as a cooperative jeopardized if Ben Lomand Communications, Inc obtains a certificate of public convenience and necessity?

2       (a) Does Ben Lomand Communications propose to compete for customers in the service area of Citizens Telecom?

         (b) If so, will Citizens Telecom be able to legally compete for customers in the service area of Ben Lomand Rural Telephone Cooperative? Why or why not? Does TCA Section 65-29-102 prohibit competitors from providing service in areas served by telephone cooperatives?

         (c) How is the public interest served by allowing cooperatives to establish subsidiaries to enter the territories of other telecommunications carriers while the territory of the cooperative is exempt from competition?

         (d) Does TCA Section 65-4-201(d) provide cooperatives with an exemption to competition?

**SHORT ANSWERS OF BEN LOMAND COMMUNICATIONS, INC.**

1 (a) Answer Ben Lomand Communications, Inc is not a cooperative

1 (b) Answer Ben Lomand Communications, Inc should not be treated as a cooperative under the law

1 (c) Answer Ben Lomand Communications, Inc is not merely an extension of Ben Lomand Rural Telephone Cooperative, Inc

1 (d) Answer Ben Lomand Rural Telephone Cooperative, Inc's status as a cooperative is not jeopardized if Ben Lomand Communications, Inc obtains a certificate of public convenience and necessity

2 (a) Answer Yes Ben Lomand Communications, Inc does propose to compete for customers in certain areas now being served by Citizens Telecom or one of its subsidiaries but only in the specific areas set out in the application

2 (b) Answer Citizens Telecom will not be able to legally compete for customers in the service area of Ben Lomand Rural Telephone Cooperative, Inc (See response and brief for the answer to "Why or why not?") TCA Section 65-29-102 does prohibit competitors from providing service in areas served by telephone cooperatives

2 (c) Answer There is no short answer to this question, and a full answer will be given under the heading of response and analysis

2 (d) Answer In the opinion of Ben Lomand Communications, Inc , TCA Section 65-4-201(d) does not provide cooperatives with an exemption to competition



**RESPONSES TO QUESTIONS,  
ANALYSIS, AND CITATION**

**Question 1. (a) Is Ben Lomand Communications, Inc. a cooperative or a public utility?**

**Response:** Ben Lomand Communications, Inc. is a public utility

**Analysis:** The facts, pleadings, and testimony clearly show that Ben Lomand Communications, Inc. is a for profit corporation organized and existing under the Tennessee Business Corporation Act, Tenn. Code Ann. § 48-11-101 et seq. A copy of the charter of Ben Lomand Communications, Inc. was attached to the application in this cause (98-00600) in composite Exhibit 1 to the application, to which reference is made. On September 8, 1995, in Case No. 95-03109, the Tennessee Public Service Commission recognized Ben Lomand Communications, Inc. as a public utility and issued a certificate of convenience and necessity as an interexchange telecommunications reseller, etc., a copy of the certificate is also a part of composite Exhibit No. 1 to Ben Lomand Communications, Inc.'s application and incorporated herein by reference.

Under the general heading Regulation of Public Utilities By Authority, Tenn. Code Ann. § 65-4-101, subheading "Definitions--(a)" defines the word "public utility" and other commonly used communication phrases as follows:

(a) "Public utility" includes every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof. **"Public utility" as herein defined shall not be construed to include the following (hereinafter called nonutilities):**

(1) Any corporation owned by or any agency or instrumentality of the United States,

(2) Any county, municipal corporation or other subdivision of the state of Tennessee,

(3) Any corporation owned by or any agency or instrumentality of the state,

(4) Any corporation or joint stock company more than fifty percent (50%) of the voting stock or shares of which is owned by the United States, the state of Tennessee or by any nonutility referred to in subdivisions (a)(1), (2), and (3),

**(5) Any cooperative organization, association or corporation not organized or doing business for profit;**

(6) Any individual, partnership, copartnership, association, corporation or joint stock company offering domestic public cellular radio telephone service authorized by the federal communications commission, provided, that the real and personal property of such domestic public cellular radio telephone entities shall be assessed by the comptroller of the treasury pursuant to §§ 67-5-801(a)(1), 67-5-901(a)(1), and § 67-5-1301(a)(2), provided, however, that until at least two (2) entities, each independent of the other, are authorized by the federal communications commission to offer domestic public cellular radio telephone service in the same cellular geographical area within the state, the customer rates only of a company offering domestic public cellular radio telephone service shall be subject to review by the Tennessee regulatory authority pursuant to §§ 65-5-201 -- 65-5-204. Upon existence in a cellular geographical area of the conditions set forth in the preceding sentence, domestic public cellular radio telephone service in such area, for all purposes, shall automatically cease to be treated as a public utility under this title. The Tennessee regulatory authority's authority over domestic public cellular radio telephone service is expressly limited to the above extent and the authority shall have no authority over resellers of domestic public cellular radio telephone service. For the purpose of this subdivision, "authorized" means six (6) months after granting of the construction permit by the federal communications commission to the second entity or when the second entity begins offering service in the same cellular geographical area, whichever should first occur. This subdivision does not affect, modify or lessen the regulatory authority's authority over public utilities that are subject to regulation pursuant to chapter 5 of this title, and

(7) Any of the foregoing nonutilities acting jointly or in combination or through a joint agency or instrumentality

(b) "Public utility" does not include nonprofit homeowners associations or organizations whose membership is limited to owners of lots in residential subdivisions, which associations or organizations own, construct, operate or maintain water, street light or park maintenance service systems for the exclusive use of that subdivision, provided, that

the subdivisions are unable to obtain such services from the local utility district. None of the property, property rights or facilities owned or used by the association or organization for the rendering of such services shall be under the jurisdiction, supervision or control of the Tennessee regulatory authority.

(c) "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 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.

(d) **"Incumbent local exchange telephone company"** means a public utility offering and providing basic local exchange telephone service as defined by § 65-5-208 pursuant to tariffs approved by the commission prior to June 6, 1995.

(e) "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.

(f) "Interconnection services" means telecommunications services, including intrastate switched access service, that allow a telecommunications service provider to interconnect with the networks of all other telecommunications service providers.

(g) "Current authorized fair rate of return" means

(1) For an incumbent local exchange telephone company operating pursuant to a regulatory reform plan ordered by the commission under TPSC rule 1220-4-2-55, any return within the range contemplated by § 1220-4-2-55(1)(c)(1) or 1220-4-2-55(d),

(2) For any other incumbent local exchange telephone company, the rate of return on rate base most recently used by the commission in an order evaluating its rates.

(h) "Gross domestic product-price index (GDP-PI)" used to determine limits on rate changes means the final estimate of the chain-weighted gross domestic product-price index as prepared by the United States department of commerce and published in the Survey of Current Business, or its successor.

[Bold print used for emphasis]

Ben Lomand Communications, Inc does not fall within any of the categories set out in said Tenn Code Ann § 65-4-101, which would cause it to be classified as a nonutility

Black's Law Dictionary 1108 (West 5th ed 1979) defines public utility

A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination

Public utility has been defined by the courts in innumerable ways, however, since the Legislature of the State of Tennessee in the creation of the Tennessee Regulatory Authority in setting out its jurisdiction has defined the words, we do not feel it necessary to burden the Authority further on this point other than to comment that Ben Lomand Communications, Inc by both organizational documents and by its activities (both word and deed) as a long distance reseller and for its proposed activities as a competing local exchange carrier would place it squarely within the definition as contained in Tenn Code Ann § 65-4-101 et seq as a public utility

**Question 1. (b) Under the facts as presented in this case, should Ben Lomand Communications, Inc. be treated as a cooperative under the law?**

**Response:** Ben Lomand Communications, Inc should not be treated as a cooperative under the facts

**Analysis:** Ben Lomand Communications, Inc does not qualify as a cooperative under Tennessee law in any shape, form, or fashion, and especially a telephone cooperative, for the following reasons among others

1 Ben Lomand Communications, Inc is organized under the for profit section of the Tennessee laws Tenn Code Ann § 48-11-101 et seq

2 Ben Lomand Communications, Inc is owned by its stockholder or future stockholders A telephone cooperative is owned by its members, the people it serves Ben Lomand Communications, Inc does not have members It has customers and/or stockholders

3 Ben Lomand Communications, Inc cannot qualify as an exempt organization 501 (c) 12 or (c) 3 A telephone cooperative may be exempt from the payment of income tax on its margins and is exempt under Section 501 (c) 3 and/or 501 (c) 12 of the Internal Revenue Code Ben Lomand Rural Telephone Cooperative, Inc has qualified as an exempt organization

4 Ben Lomand Communications, Inc does not fall within any of the exclusions contained in the definition of a public utility, Tenn Code Ann § 65-4-101, whereas a telephone cooperative, under the definitions contained in Tenn Code Ann § 65-4-101 (a) (5), is specifically held (see above quoted statute) not to be a public utility Ben Lomand Communications, Inc was under the jurisdiction of the Public Service Commission of the State of Tennessee when it was organized and when it started business as a reseller of long distance services and as such has paid fees, assessments, and the like to the Tennessee Public Service Commission Currently, since it is under the jurisdiction of the Tennessee Regulatory Authority, Ben Lomand Communications, Inc has paid fees and assessments under the rules and regulations of TRA A telephone cooperative, not being under the jurisdiction of the Public Service Commission and now the TRA, except for specific specified purposes which are very limited, has not been assessed nor required to pay the fees and assessments

5 Any net margins of Ben Lomand Rural Telephone Cooperative, Inc are returned to its members/patrons as capital credits for the year created Customers of Ben Lomand Communications, Inc do not get return of any profits, unless they are as stockholders

Further analysis to this question will be given in the response to Question No 1

(c)

**Question 1. (c). If Ben Lomand Rural Telephone Cooperative, Inc. is the sole stockholder of Ben Lomand Communications, Inc., then is Ben Lomand Communications, Inc. merely an extension of Ben Lomand Rural Telephone Cooperative, Inc.? If that is the case, would Ben Lomand Communications, Inc. (as an extension of the cooperative) be prohibited by TCA Section 65-29-102 from duplicating service where reasonably adequate telephone service is available?**

**Response:** The testimony currently before the Tennessee Regulatory Authority is that Ben Lomand Rural Telephone Cooperative, Inc. is the owner of all of the current stock in Ben Lomand Communications, Inc. that has been sold. Nonetheless, Ben Lomand Communications, Inc. is not an extension of Ben Lomand Rural Telephone Cooperative, Inc. either in law or in fact.

Since Ben Lomand Communications, Inc. is by law and in fact a separate entity from Ben Lomand Rural Telephone Cooperative, Inc., we presume that no further response to this question is necessary.

**Analysis:** 18 Am. Jur. 2d Corporations § 55 **Generally**

The subject of the separate corporate entities of subsidiary, affiliated and commonly owned corporations is but an aspect of the broader concept of separate corporate existence vis-a-vis stockholders (be they individuals or corporations).

*Observation* The principle, followed in a case involving a one-man corporation, that actual fraud is not necessary to hold an individual liable under a contract of his corporation has been extended to a parent-subsidary relationship, the court pointing out that there was nothing in the opinion to prevent the application of the principle to a different context.

As with corporations solely owned or controlled by one or a few individuals, corporations solely owned or controlled by other corporations do not, by virtue of such stock ownership alone, lose their identities as distinct legal entities. And just as a holding or parent corporation has a

separate corporate existence and is to be treated as a separate entity, in the absence of circumstances justifying disregard of the corporate entity, so, too, are subsidiary corporations ordinarily independent of each other

18 Am Jur 2d Corporations § 57 **Factors affecting liability**

Just as no one factor or circumstance is generally conclusive on the issue of a corporation's existence as distinct from its shareholders, so too it is with parent corporations and their subsidiaries

The fact that a corporation owns all or the majority of the stock of another corporation does not in itself destroy the identity of the latter as a distinct legal entity, and, ordinarily, for example, no liability may be imposed upon the parent for the torts of the subsidiary corporation. However, such fact of stock ownership, together with other circumstances indicating control of, or unity of interest with, the subsidiary, may justify disregard of the subsidiary's separate corporate entity. And the fact that the stockholders, officers or directors in two corporations may be the same persons does not operate to destroy the legal identity of either corporation, nor does the fact that the one corporation exercises a controlling influence over the other through the ownership of its stock or through the identity of stockholders make either the agent of the other or merge the two corporations into one, but this fact, together with other circumstances showing strong connections between the parent and subsidiary, will support a finding of identity of the two corporations

A leading case in Tennessee which clearly holds that corporate entities will be recognized as separate and distinct from their stockholders is set out in the case of Continental Bankers Life Insurance Company of the South, Petitioner v The Bank of Alamo, Respondent 578 S W 2d 625 at page 631 [9], the Supreme Court of Tennessee speaking through Justice Fones said

The general rule is that corporate entities will be recognized as separate and distinct from their stockholders and that to disregard the corporate entities requires, in the case of parent and subsidiary, more than a showing that they have similar corporate names and locations and the exercise of dominion through corporate common officers and directors. See 18 Am Jur 2d *Corporations*, Section 17 at 564-65 (1965). The case law covers a broad spectrum of disagreement as to the additional elements of proof required to disregard corporate entities

Speaking further on the separate instrumentality question, Justice Fones said on page 632, portion of [9] and [10]

We are persuaded that the rule as formulated in *Lowendahl v Baltimore & O R Co*, 247 App Div 144, 287 N Y S 62 (1936), aff'd 272 N Y 360, 6 N E 2d 56, *rehearing denied*, 273 N Y 584, 7 N E 2d 704 (1937), expresses the elements of proof required in a plurality of jurisdictions and is consistent with the expressions and results reached in most of the Tennessee cases. See, e g, *Fisser v International Bank*, 282 F 2d 231 (2d Cir 1960), *Majestic Co v Orpheum Circuit, Inc*, 21 F 2d 720 (8th Cir 1927), *Brown v Margrande Compania Naviera S.A*, 281 F Supp 1004 (E D Va 1968), *National Bond Finance Co v General Motors Corp*, 238 F Supp 248 (W D Mo 1964), aff'd, 341 F 2d 1022 (8th Cir 1965)

[10] Paraphrased from *Lowendahl*, application of the instrumentality rule requires proof of the following three elements

- (1) The parent corporation, at the time of the transaction complained of, exercises complete dominion over its subsidiary, not only of finances, but of policy and business practice in respect to the transaction under attack, so that the corporate entity, as to that transaction, had no separate mind, will or existence of its own
- (2) Such control must have been used to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of third parties' rights
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of

Justice Fones then in his opinion commented on the case of Tennessee Consol. Coal Co vs Home Ice & Coal Company 25 Tenn App 316, 156 S W 2d 454 (1941) and proceeded to comment on the facts in that particular case and the comments of the deciding justice in this Tennessee Appeals Court case wherein it was said by that appellate court

"It is not necessary for one to show that he has been misled, deceived or actually defrauded, to enable him to invoke this rule. It is enough that the parent corporation's domination of the subsidiary was so complete as to make them practically indistinguishable or to make the subsidiary a mere tool, agency or instrumentality of the parent, and that he will suffer loss unless the parent is held "

After analyzing the *Home Ice & Coal Co* case, Justice Fones said on page 633



In a factual situation involving priority among creditors, the courts are inclined to require less dominion of corporation operations and little equity, where, as here, the transaction attached involves a direct contractual relationship, the proof required is more stringent. We agree with the result reached in *Home Ice & Coal Co* but do not agree that the instrumentality rule was appropriately used or stated therein.

Then on page 637 [15], Justice Fones states

We conclude that the bank has failed to carry the burden of proving the three elements necessary to invoke the instrumentality rule. The corporate structure of PPC and its subsidiaries may have been such that PPC, through common officers and directors, exercised dominion over subsidiaries, but in this transaction the facts show that PPLI had a mind of its own and that the bank knew or should have known that the insurance company's \$50,000 was not deposited either as security or as a potential set off, if the loan was not paid. We further find that such control as PPC exercised over PPLI was not used to commit fraud, misrepresentation or a dishonest or unjust act upon the bank.

The record does not show that any of the three elements set out under Tennessee law would cause Ben Lomand Communications, Inc. or Ben Lomand Rural Telephone Cooperative, Inc. to be disregarded as separate entities.

Though not a part of the record and in all fairness to the Authority, it must be stated that at the present time four of the nine Ben Lomand Rural Telephone Cooperative, Inc. directors are on its five-person Ben Lomand Communications, Inc. board. The record does show that all of the stock sold by Ben Lomand Communications, Inc. was purchased by Ben Lomand Rural Telephone Cooperative, Inc.

By the same token, though not in the record, Ben Lomand Communications, Inc. has paid Ben Lomand Rural Telephone Cooperative, Inc. for direct and indirect services and fees (not dividends) in the amount of \$792,764.47 for billing and collecting services and \$153,250.00 for management fees.

**Question 1. (d): Is Ben Lomand Rural Telephone Cooperative's status as a cooperative jeopardized if Ben Lomand Communications, Inc. obtains a certificate of public convenience and necessity?**

**Response:** It is the opinion of the general counsel of Ben Lomand Communications, Inc , upon which our response is based, it would not affect the exemption of Ben Lomand Rural Telephone Cooperative, Inc

**Analysis:** As set out in the Analysis to the answer to Question 1 (c) above [See also Analysis to Question 2 (c)], Ben Lomand Rural Telephone Cooperative, Inc obtains its territorial protection exemption by way of Tenn Code Ann § 65-29-102 It exists and operates under the Tennessee "Telephone Cooperative Act", Tenn Code Ann § 65-29-101 et seq , and so long as Ben Lomand Rural Telephone Cooperative, Inc does not materially deviate from the purpose, powers, and mandatory provisions of said act, its status as a telephone cooperative is not jeopardized

The fact that it (Ben Lomand Rural Telephone Cooperative, Inc ) purchases stock in another corporation or owns all the stock of another corporation ("subsidiary" defined as one in which another corporation (i e , parent) owns at least a majority of the shares, and thus has control Said of a company more than 50 percent of whose voting stock is owned by another - Black's Law Dictionary 1280 [West 5th ed 1979]) does not of itself merge one entity into the other so that they become one or the agency of the other or the alter ego of the other See Continental case and others cited in Analysis to Question 1 (c) .

Both Ben Lomand Rural Telephone Cooperative, Inc and Ben Lomand Communications, Inc have maintained their separate identities, but even if they had not, the status of the parent would not be jeopardized

According to counsel of Ben Lomand Communications, Inc , in his interpretation of cases decided in Tennessee, the granting of a certificate of convenience and necessity would not jeopardize Ben Lomand Rural Telephone Cooperative, Inc 's status as a cooperative unless the officers and directors of the parent try to exercise too much direct control and that said control was used to commit fraud or dishonest or unjust act

upon a complainant (there are no complainants or intervenors in this matter), the three elements set out in the Continental case set out in the Analysis to Question 1 (c) above

In the case of Electric Power Board of Chattanooga v St Joseph Valley Structural Steel Corp, 691 S W 2d 522 (1985) on page 526, the Continental case ruling was followed Also in the case of Tennessee Racquetball Investors Ltd v Bell, 709 S W 2d 617 (Tenn App 1986), the Continental case was cited and followed

There are many other cases which hold that parent and subsidiary corporations are separate entities A few 6th Circuit cases of Federal Courts (Tennessee is in the 6th Circuit) are as follows

970 F2d 202  
584 FS 398  
667 FS 575  
743 FS 1283

There are occasions, and the courts have so held, that the corporate veil can be pierced which would make one corporation liable for the debts of the other and for that purpose only when the control was used to commit fraud, misrepresentation, dishonest, or unjust acts

The writer of this response has not found any case in Tennessee or any other jurisdiction when the existence of a nonprofit corporation is jeopardized by the acts of a third party or of another corporation even if it is a subsidiary

If the word "status" in this question refers to exemption, see Analysis to Question 2 (d) for further analysis of the subject question

**Question 2. (a) Does Ben Lomand Communications propose to compete for customers in the service area of Citizens Telecom?**

**Response:** Ben Lomand Communications, Inc does propose to compete for customers in the service area of Citizens Telecom, however, the proposed geographical area is set out in Ben Lomand Communications, Inc 's application which states that the

area will be in Warren County and primarily the City of McMinnville and White County, primarily in the City of Sparta, Tennessee

**Analysis:** As set out in oral testimony before the Tennessee Regulatory Authority, Ben Lomand Communications, Inc. did cause to be made a survey of potential customers in the City of McMinnville and in Sparta to determine if the potential customers in that area wanted the opportunity to obtain service from a competitive local exchange carrier and the result was that a large number would like such an opportunity. The study had been made due to the fact that a number of persons in both McMinnville and Sparta had asked that they be served by Ben Lomand Communications, Inc. coupled with the fact that a number of citizens in McMinnville being served by Citizens Telecom had requested a hearing before the Public Service Commission and/or Tennessee Regulatory Authority in an effort to improve the service then being offered.

The response to 2 (c) is to be considered in response to this question.

**Question 2. (b) If so, will Citizens Telecom be able to legally compete for customers in the service area of Ben Lomand Rural Telephone Cooperative? Why or why not? Does TCA Section 65-29-102 prohibit competitors from providing service in areas served by telephone cooperatives?**

**Response:** Neither Citizens Telecom nor any other local exchange carrier will be able to legally compete for customers in the service area of Ben Lomand Rural Telephone Cooperative, Inc. See Analysis for Response to "Why or why not?" Tenn Code Ann. § 65-29-102 does prohibit duplication of service.

**Analysis:** Almost without exception, state legislators, the state executive branches, and the U.S. Congress have, since the enactment of the Communications Act of 1934, had for their purpose, generally speaking, in creating the Federal Communications Commission as set out in 47 U.S.C. Section 151

to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio

- communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,

The 1996 Communication Act also specifies under the heading "Universal service" at 47 U S C S § 254 (b), the principles for the Joint Board and the Commission to follow They were in part

- (1) Quality and rates Quality services should be available at just, reasonable, and affordable rates
- (2) Access to advanced services Access to advanced telecommunications and information services should be provided in all regions of the Nation
- (3) Access in rural and high cost areas Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas

The policies and philosophies expressed above have been followed by virtually all of the states of the Union along with the Public Service Commissions or Regulatory Authorities over a number of years

It has long been recognized by both state and federal regulatory agencies and by the executive and legislative branches of the states in the federal government that access in rural and high cost areas would require special action, special funding, and in some instances, special privileges

The Ben Lomand Rural Telephone Cooperative, Inc area is one such area It has a very low density It serves, for the most part, rural areas and moderate income people It was organized as a nonprofit organization and exists as a nonprofit organization and has, over the years, through good leadership and management, developed a system in a rural area and has achieved area coverage By that, we simply mean that any person who lives within the service area of Ben Lomand Rural Telephone

Cooperative, Inc can now have service if they so desire, which is a modern up-to-date system, which improves with new technologies and furnishes new services as they become available in the more metropolitan areas. In order to continue this service to this type of area of low density, it is necessary that it be the sole supplier and that its territory be protected from competitors who would choose only those areas which are more lucrative and the ones on which the Cooperative depends to equalize the cost to all persons on the system. This economic truth was one of the reasons that the Legislature in its wisdom in adopting a Telephone Cooperative Act for the state of Tennessee provided that there can be no duplication of service by other telecommunications servers in a telephone cooperative's area nor can a telephone cooperative duplicate service in another telecommunications servers area where reasonable service is being offered. Ben Lomand Rural Telephone Cooperative, Inc, which is a nonprofit organization, is not and has not applied for a certificate of convenience and necessity from the Tennessee Regulatory Authority to serve in another company's or utility's area. A subsidiary of Ben Lomand Rural Telephone Cooperative, Inc, which under the law is a separate entity, has filed to serve in the area of a local exchange carrier who is not protected under Tennessee law. The application is specific in that it excludes any territories of cooperatives or small rural furnishers or large rural furnishers who are protected under Tenn. Code Ann. § 69-4-201 (d).

It certainly is in the public interest and in the interest of rural America that the territory of Ben Lomand Rural Telephone Cooperative, Inc and like organizations be protected in order that modern up-to-date service might be furnished in that area which is in keeping with the policies of the state of Tennessee, the federal government, and other states in the Union.

The protection of territory in rural and sparsely populated areas may not be the only way of achieving the goal of universal service, however, it is one of the known proven ways that universal service has been achieved to a large extent.

As stated previously, Ben Lomand Communications, Inc. is a separate entity from Ben Lomand Rural Telephone Cooperative, Inc. It is a different type of vehicle entirely from a nonprofit organization in that it is a for profit organization, pays the same taxes as the company in the area in which it seeks to compete. It is a virtually level playing field. Both the Legislature of the state of Tennessee and the legislative branch as well as the executive branch of Tennessee and of the federal government felt it to be in the public interest that competition exist in certain territories, not all territories. Otherwise there would be no exclusion. The territory in which Ben Lomand Communications, Inc. is seeking to furnish service is one that is not exempt from protection or that is not protected. It is also a territory in which there have been innumerable complaints by the citizens of that territory --first, it was inadequate and antiquated equipment which was being used by the then server (this was several years ago), then it was the complaint of paying for services which were not being rendered, and finally, the last major complaints were those that there were no individuals within the area with whom the customer could apply for service, complain about service, or question the accuracy of a bill, etc.

**Question 2. (c) How is the public interest served by allowing cooperatives to establish subsidiaries to enter the territories of other telecommunications carriers while the territory of the cooperative is exempt from competition?**

**Response & Analysis:** The writer of this response will not attempt to go into the history of how competition in the telephone or telecommunications industries grew. It developed through federal legislation in an effort to cure what the legislators deemed to be monopolistic trends and unfair pricing, and they felt that the vehicle which would cure these illnesses in the telephone industry or telecommunications industry would be that of competition. The Legislature of the state of Tennessee, the now nonexistent Public Service Commission of the State of Tennessee, the United States Congress, the Federal Communications Commission, and the Tennessee Regulatory Authority all have enacted laws or adopted rules or regulations which encourage telephone competition, however,

the Tennessee Legislature in its wisdom has excluded competition in certain other areas  
The areas in Tennessee which are protected by law are set out in Tenn Code Ann  
§ 65-4-201(d), which states

(d) 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 of its service area existing on June 6, 1995

As set out in Ben Lomand Communications, Inc 's response of October 23, 1998, Tenn Code Ann § 65-4-101 Definitions (d) provides the following "(d) "Incumbent local exchange telephone company" means a public utility offering and providing basic local exchange telephone service as defined by § 65-5-208 pursuant to tariffs approved by the commission prior to June 6, 1995 "

As set out heretofore, Ben Lomand Rural Telephone Cooperative, Inc does not fall under the definition of a public utility, and to be an incumbent local exchange telephone company as defined by 65-4-101(d), it must be a public utility

Ben Lomand Rural Telephone Cooperative, Inc 's territorial protection comes not from Tenn Code Ann 65-4-201(d) but, to the contrary, comes from the Tennessee Telephone Cooperative Act, Tenn Code Ann § 65-29-102 Cooperatives do, through their powers, have the authority to invest in other corporations and/or subsidiaries which are complete separate entities as shown by Ben Lomand Communications, Inc 's answer to 1 (c) and (d) above

In short, the answer to the question is very simple The Legislature of the State of Tennessee, the Tennessee Regulatory Authority through its rules and regulations, the Federal Communications Commission through its rules and regulations, and the U S Congress through its laws have stated that it is in the public interest that there be competition in the telecommunications industry in certain areas of service so long as that



entity who is competing possesses sufficient managerial, financial, and technical abilities to provide the applied for services and the applicant has demonstrated that it will adhere to all the applicable authority, policies, rules, and orders. If the subsidiary is a complete and separate entity from the cooperative, which it is, and it has met the qualifications of the TRA, which it has, and since the cooperative exemption comes from a separate statute (Tenn. Code Ann. § 65-29-102) than that from which public utilities receive their exemption (Tenn. Code Ann. § 65-4-201(d)), and since there would be a virtual even playing field between the subsidiary and the local exchange carrier against which it is competing, the public interest of all would be advanced, that is, those people residing in rural communities where the density is low, having the territory of their cooperative protected and those persons who reside in a local exchange carrier's territory, which the Tennessee Legislature, and the TRA, and the FCC, and the Congress has determined should have competition would be better served by a separate entity, even though it may be a subsidiary of a cooperative, or a subsidiary of Bell, or a subsidiary of United, or a subsidiary of Citizens Communications.

As to whether it is in the public interest of the citizens in the City of McMinnville and/or the City of Sparta that there be competition in those areas by a public utility which is currently certified as a reseller who has proven managerial skills, technical ability, and the financial ability to serve the area as a competing local exchange carrier is a matter which can only be answered by the Tennessee Regulatory Authority.

**Question 2. (d): Does TCA Section 65-4-201(d) provide cooperatives with an exemption to competition?**

**Response:** It is the opinion of the general counsel of Ben Lomand Communications, Inc. upon which our response is based, Tenn. Code Ann. § 65-4-201(d) would not provide cooperatives with an exemption to competition, however, TCA Section 65-29-102 does give territorial protection.

**Analysis:** Telephone cooperatives are exempt under the laws of the state of Tennessee (Tenn Code Ann § 65-29-102) and by federal laws so long as reasonably adequate service is being furnished by the cooperative. Referring to the exemption set out in Tenn Code Ann § 65-4-201(d), according to Ben Lomand Communications, Inc.'s general counsel, cooperatives were not included in this exemption, as the Legislature, when considering this section, by statements made on the Senate floor and by letters to the House floor leader, assured certain members of the Legislature that cooperatives were exempt from competition under Tenn Code Ann § 65-29-102 et seq as set out in our previous answer. The reasoning behind the decision of Ben Lomand Communications, Inc.'s counsel that cooperatives are not exempt under 65-4-201(d) is basically the literal interpretation of the definitions as set out in Tenn Code Ann § 65-4-101 headed "Definitions". Subsection (d) of 65-4-201 states

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 June 6, 1995

[Bold type used for emphasis]

The exemption goes to **incumbent local exchange telephone companies**. Tenn Code Ann § 65-4-101 under definitions subsection (d) states

"Incumbent local exchange telephone company" means a **public utility** offering and providing basic local exchange telephone service as defined by § 65-5-208

[Bold type used for emphasis]

See Tenn Code Ann § 65-4-101(a) definition of public utility copied in Analysis to Question 1 (a) -- Cooperatives are not public utilities

If by some stretch of the imagination and using a liberal interpretation and construction of the statutes a cooperative should be held to be exempt under Tenn

Code Ann § 65-4-201(d), it (the Co-op) would not lose its exemption unless that exempt entity (the Co-op) applied for a certificate to provide telecommunications service in an area other than its own or unless such company (Co-op) voluntarily enters into an inter-connection agreement. The key in this particular sentence is the word "voluntarily."

## CONCLUSION

The questions involved in this matter coming out of the hearing are questions of fact along with a few questions involving long established principles of law, and some of the questions are new in both law and fact and have no court precedents

In this writer's opinion, the paramount question, and one which is not of first impression in the state of Tennessee, is 1 (c) This involves the question of whether a subsidiary corporation and a parent corporation are separate entities, and we contend that the law is clear on this point and that they are separate entities as decided in Continental Bankers Life Insurance Company of the South case unless three certain elements were proved beyond a reasonable doubt as set out in the Lowendahl case cited in the Continental case There is no evidence before the Authority that any of the three elements set out in the Continental Bankers case are applicable to the Ben Lomand Rural Telephone Cooperative, Inc or Ben Lomand Communications, Inc

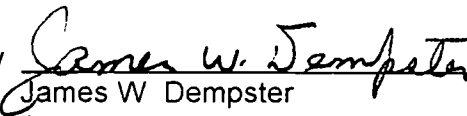
Considering the newness and complexities of the questions propounded involving not for profit and for profit corporations, the applicant has attempted to thoroughly research the Tennessee jurisdiction and other state jurisdictions for cases which might shed light on their answers with only marginal success If there are other questions which the Authority desires answered by the applicant, it will be our pleasure to attempt to do so

Applicant respectfully requests that its application for a certificate of public convenience and necessity as a competing local exchange carrier be issued to Ben Lomand Communications, Inc as it has, at the hearing and by documents filed with the Authority prior to the hearing, shown that notice was given to the incumbent local exchange telephone company and other interested parties to the filing of the application and of the hearing and has demonstrated or has endeavored to demonstrate that it will adhere to all applicable Authority policies, rules, and orders, and further, it has proven,

as expressed from the bench, that the applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services

For these and all of the foregoing reasons, the applicant does request that it be granted a certificate of public convenience and necessity to be a competing telecommunications service provider in the area set out and requested in its application

BEN LOMAND COMMUNICATIONS, INC ,  
Applicant

By   
James W Dempster  
Attorney for Applicant  
118 E Main Street  
P O Box 332  
McMinnville, TN 37111  
Phone (931) 473-4934  
Fax (931) 473-7190

STATE OF TENNESSEE

DEPARTMENT OF STATE

I, James H. Cummings, Secretary of State of the State of Tennessee, do hereby certify that the annexed Instrument with Certificate of Acknowledgment was filed in my office and recorded on the 2nd day of October 1952 in Corporation Record Book Volume O-18, page 115.

In Testimony Whereof, I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this 2nd day of October A. D. 1952.

/s/ James H. Cummings  
Secretary of State

S E A L

## STATE OF TENNESSEE

# Charter of Incorporation

Be It Known, That R. B. Miller, J. H. Ashburn, Howard McGregor, Dennis Brown,  
Fred Hoover

and hereby constituted a body politic and corporate, by the name of and style of  
Ben Lomand Rural Telephone Cooperative  
for the purpose of furnishing, constructing, improving and expanding telephone  
service to its members and to other persons. The corporation shall be  
a non-profit cooperative association within the provisions of Paragraph  
10 of Section 4146 of Williams Code Ann. (1934) which provides that  
" Non-profit cooperative associations may be incorporated and organized".  
It shall have and may exercise all powers, rights and privileges granted  
by law to cooperations organized for this purpose.

The general powers of said corporation shall be: (1) To sue and be sued by the corporate name. (2) To have and use a common seal, which it may alter at pleasure; if no common seal then the signature of the name of the corporation, by any duly authorized officer, shall be legal and binding (3) Any corporation chartered under the laws of Tennessee for religious, charitable, educational, missionary, or other eleemosynary purposes, and not for profit, shall have the power to receive property, real, personal or mixed, by purchase, gift, devise, or bequest, sell the same and apply the proceeds toward the promotion of the objects for which it is created, or hold any such property and apply the income and profits towards such objects. Unless otherwise specifically directed in the trust instrument by which any real or personal property, money, or other funds, are given, granted, conveyed, bequeathed, devised to, or otherwise vested in, corporations formed for religious, educational, scientific, or other charitable purposes, the directors, the governing board, or the authorized finance committee thereof, when authorized by the corporation, shall have power to invest funds thus received, or the proceeds of any property thus received, in such investments as in the honest exercise of their judgment they may, after investigation, determine to be safe and proper investments, and to retain any investments heretofore so made. (4) Any corporation heretofore chartered for any of the foregoing purposes, desiring to avail itself of these powers, shall submit the question to its directors or trustees at any regular meeting, or special meeting, called for the purpose, or to any regular or special meeting of its executive committee, and if a majority of said directors, trustees, or executive committee vote in favor of applying for the amendment, it may then proceed in usual course to file an amendment to its charter. (5) to establish by-laws, and make all rules and regulations not inconsistent with the laws and constitution, deemed expedient for the management of corporate affairs. (6) To appoint such subordinate officers and agents, in addition to a president and secretary, or treasurer, as the business of the corporation may require. (7) To designate the name of the office, and fix the compensation of the officer. (8) To borrow money to be used in payment of property bought by it, and for erecting buildings, making improvements, and for other purposes germane to the objects of its creation, and secure the repayment of the money thus borrowed by mortgage, pledge, or deed of trust, upon such property, real, personal, or mixed, as may be owned by it; and it may, in like manner, secure by mortgage, pledge, or deed of trust, any existing indebtedness which it may have lawfully contracted.

The said five or more incorporators shall, within a convenient time after the registration of this charter, elect from their number a president, secretary, and treasurer, or the last two officers may be combined into one, said officers and the other incorporators to constitute the first board of directors. Any corporation not for profit may increase its directors or trustees to a number not more than one hundred, by due and proper amend-

ment to its by-laws, unless otherwise specifically provided. In all elections each member to be entitled to one vote, either in person or by proxy, and the result to be determined by a majority of the votes cast. Due notice of any election must be given by advertisement in a newspaper, personal notice to the members, or a day stated on the minutes of the board one month preceding the election. The term of officers may be fixed by the by-laws, the said term not, however, to exceed three years. All officers hold office until their successors are duly elected and qualified.

The general welfare of society, not individual profit, is the object for which this charter is granted, and the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members.

The board of directors shall keep a record of all their proceedings, which shall be at all times subject to the inspection of any member. The corporation may establish branches in any other County in the State.

The members may, at any time, voluntarily dissolve the corporation by a conveyance of its assets and property to the State of Tennessee, any County or municipality of the State, or to any other corporation holding a charter from the State for purposes not of individual profit, first providing for corporate debts; provided, that assets and property so conveyed shall be used by the grantee for purposes similar to those of the conveying corporation.

Whenever there has been no meeting of the members for a period of five years or more, and because of the death of members or the condition of the corporate records it is impossible to notify a sufficient number of members to constitute a quorum, notice of a meeting of the members may be made by publication in some newspaper in the County where such corporation has its principal location, at least thirty days before such meeting shall be held. The members attending such meeting shall be deemed to constitute a quorum for the purposes of electing directors or trustees, and authorizing such directors or trustees to dissolve the corporation and convey its property and assets in accordance with this section.

The charter is subject to modification and amendment; and in case said modification or amendment is not accepted, corporate business is to cease, and the assets and property, after payment of debts, are to be conveyed, as aforesaid, to some other corporation holding a charter for purposes not connected with individual profit. Acquiescence in any modification, thus declared, shall be determined in a meeting of the members especially called for that purpose, and only those voting in favor of the modification shall thereafter compose the corporation.

The means, assets, income, or other property of the corporation shall not be employed, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation, and by no implication shall it engage in any kind of trading operation, nor hold any more real estate than is necessary for its legitimate purposes.

Expulsion shall be the only remedy for the nonpayment of dues by the members, and there shall be no individual liability against the members for corporate debts, but the entire corporate property shall be liable for the claims of creditors.

We, the undersigned, the incorporators above mentioned, hereby apply to the State of Tennessee for a charter of incorporation for the purposes declared in the foregoing instrument.

Witness our hands this, the 28 day of July, 1952

SUBSCRIBING WITNESS:

*R. B. Miller*  
*J. H. Ashburn*  
*Howard McGregor*  
*Dennis Brown*  
*Fred Hoover*

STATE OF TENNESSEE, COUNTY OF Warren

Personally appeared before me H. C. Redmon

(Clerk of the County Court or Notary Public), the within named incorporators,

R. B. Miller, J. H. Ashburn, Howard McGregor, Dennis Brown, Fred Hoover

with whom I am personally acquainted, and who acknowledged that they executed the within application for a Charter of Incorporation for the purposes therein contained and expressed.

Witness my hand and official seal at office in McMinnville, Tennessee, this 28th day of July, 1952

*H. C. Redmon*  
(Signature of County Court Clerk or Notary Public)

(If Notary Public) My commission expires 3 day of July, 1953

(Official Title) Notary Public



(Certificate of Probate for Subscribing Witness if not acknowledged by all of the Incorporators)

STATE OF TENNESSEE, COUNTY OF .....

Personally appeared before me.....

of said County, the within named.....  
the subscribing witness and incorporator, with whom I am personally acquainted, and who acknowledged  
that he executed the within application for a Charter of Incorporation for the purposes therein contained and  
expressed; and the said ....., subscribing witness to the signa-  
tures subscribed to the within application, being first duly sworn, deposed and said that he is personally ac-  
quainted with the within named incorporators, .....

.....  
and they did in his presence acknowledge that they executed the within application for a Charter of Incorpora-  
tion for the purposes therein contained and expressed.

Witness my hand and official seal at office in....., Tennessee, this .....  
day of....., 19.....

.....  
(Signature of County Court Clerk or Notary Public)

(If Notary Public) My commission expires.....day of ....., 19.....

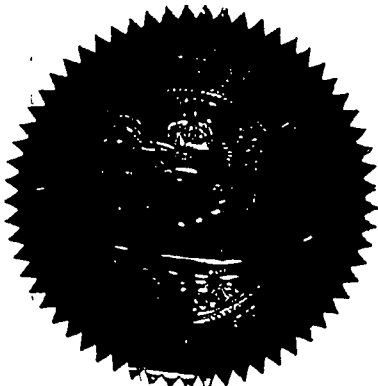
(Official Title).....



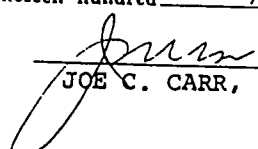
## Department of State

I, JOE C. CARR, Secretary of State of the State of Tennessee, hereby certifies that the attached document was received for filing on behalf of BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC., was duly executed in accordance with the Tennessee Telephone Cooperative Act, Chapter 330, Public Acts of Tennessee 1961, was found to conform to law and was filed by the undersigned, as Secretary of State, on the date noted on the document.

THEREFORE, the undersigned, As Secretary of State, and by virtue of the authority vested in him by law, hereby issues this certificate and attaches hereto the document which was filed on October Fifth, 1972.



IN WITNESS WHEREOF, I have hereto affixed my signature  
and the Great Seal of the State, at Nashville, this 11th  
day of January in the year of our Lord  
nineteen hundred 73

  
JOE C. CARR,

Secretary of State

ARTICLES OF CONVERSION  
OF  
BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.

Executed Pursuant to the Telephone Cooperative Act  
Public Acts of Tennessee 1961, Chapter 330

Ben Lomand Rural Telephone Cooperative, Inc., for the purpose of becoming converted into a cooperative, non-profit membership corporation pursuant to the "Telephone Cooperative Act", Tennessee Public Acts of 1961, Chapter 330, Tennessee Code Annotated 65-2901 through 65-2932, hereby certifies and states as follows:

- (1) The name of the corporation prior to this conversion into a cooperative under Tennessee Public Acts of 1961, Chapter 330, is BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.
- (2) The address of the principal office of the corporation is CHANCERY STREET, McMINNVILLE, WARREN COUNTY, TENNESSEE.
- (3) The date of the filing of the Articles of Incorporation of Ben Lomand Rural Telephone Cooperative, Inc. in the office of the Secretary of State was 2 October, 1952.
- (4) The corporation was organized under Paragraph 10, of Section 4146 of Williams' Tennessee Code Annotated (1934).
- (5) The name assumed by the corporation is BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.
- (6) The corporation elects to become a cooperative, non-profit, general welfare, membership corporation subject to the Telephone Cooperative Act, Tennessee Public Acts of 1961, Chapter 330, Tennessee Code Annotated 65-2901 to 65-2932, inclusive, and any amendments thereto.
- (7) The manner and basis of converting membership and/or memberships of the corporation into membership and/or memberships in the converted corporation is that each member of the corporation shall be and become a member of the converted corporation, whether individually held, jointly held, or held by a partnership, corporation, or association, without the necessity of any affirmative action upon the part of such member or, upon written application by an individual member or an individual member's spouse, such member and such member's spouse shall jointly become a member therein and a certificate evidencing such individual or joint membership in the converted corporation shall be issued to such member or to such member and such member's spouse as the case may be.

72 OCT 5 AM 10 21

(8) (a) The persons who shall constitute the Board of Directors and officers of the converted corporation shall be the duly elected and/or appointed Directors and officers of the current corporation at the date the conversion is filed with the Secretary of State of the State of Tennessee and they shall hold their respective office or offices in the converted corporation for the same term or period of time as they would have held had there been no conversion or until their successors shall have been elected and qualified.

(b) By-laws of the current corporation in effect at time of filing of conversion with the Secretary of State shall be and become the by-laws for the converted corporation and shall remain in effect until the first meeting of the Board of Directors, the Board of Directors shall adopt the first by-laws to be adopted following conversion. Thereafter, by-laws shall be adopted, amended or repealed by its members, by the affirmative vote of a majority of those members voting thereon at a meeting of the members.

(c) At the time of conversion all assets of the corporation shall become the assets of the converted corporation and all liabilities and indebtedness of the current corporation shall become the liabilities and indebtedness of the converted corporation, the policies of the current corporation shall become the policies of the converted corporation, the rules, regulations, tariffs of the current corporation shall become those of the converted corporation, all contractual, employee, management, or other obligations shall become the obligations of the converted corporation and all property of the current corporation shall become the property of the converted corporation.

IN WITNESS WHEREOF Ben Lomand Rural Telephone Cooperative, Inc. has caused these Articles of Conversion to be executed in its name by its President, and its corporate seal to be hereto affixed and attested by its Secretary, this the 27 day of September, 1972.

BEN LOMAND RURAL TELEPHONE  
COOPERATIVE, INC.

By William J. McEwen

President

ATTEST:

Dennis Brown  
Secretary

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STATE OF TENNESSEE  
COUNTY OF WARREN

Personally appeared before me, the undersigned, a Notary Public in and for said county and state, Howard McGregor, who is known to me to be the President of Ben Lomand Rural Telephone Cooperative, Inc., and with whom I am personally acquainted, and who acknowledged the execution of the foregoing Articles, after same had been approved by the members of the corporation, for the purposes therein contained.

Witness my hand and official seal of office at office in McMinnville, Tennessee, this the 29 day of September, 1972.

My commission expires:  
~~MY COMMISSION EXPIRES~~  
JULY 10, 1973

B. L. Oll  
Notary Public

STATE OF TENNESSEE  
COUNTY OF WARREN

I, Howard McGregor, make oath in due form of law that I am the President of Ben Lomand Rural Telephone Cooperative, Inc., and that I acknowledged the execution of the Articles of Conversion as such President and on behalf of Ben Lomand Rural Telephone Cooperative, Inc.; that such execution and acknowledgment were made after the approval of the Board of Directors of Ben Lomand Rural Telephone Cooperative, Inc. at a regular meeting of the Board of Directors, and after the affirmative action of the members approving the Articles of Conversion at a regular meeting thereof of the proposition for the conversion of the corporation into a cooperative under the Telephone Cooperative Act, Public Acts of Tennessee 1961, Chapter 330, and such Articles of Conversion were duly complied with.

Howard McGregor  
President

Sworn to and subscribed before me  
this 29 day of September, 1972.

B. L. Oll  
Notary Public

My commission expires:  
~~MY COMMISSION EXPIRES~~  
JULY 10, 1973

1972 OCT 5 AM 10 21

I, JOE C. CARR, Secretary of State, do hereby certify  
Articles of Conversion  
that ~~this amendment to charter~~, with certificate attached, the  
foregoing of which is a true copy, was this day registered and  
certified to by me. This the 5th day of October, 1972.

JOE C. CARR,  
SECRETARY OF STATE

FEE: \$10.00

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TILEY DARNELL  
SECRETARY OF STATE

CHARTER  
OF  
BEN LOMAND COMMUNICATIONS, INC.

The undersigned natural persons having capacity to contract and acting as the incorporators of a corporation under the "Tennessee Business Corporation Act," Tennessee Code Annotated 48-11-101 et seq., adopts the following charter for such corporation

- 1 The name of the corporation is BEN LOMAND COMMUNICATIONS, INC
- 2 NUMBER OF SHARES. The corporation is authorized to issue 10,000 shares of common stock with no par value
3. REGISTERED OFFICE AND AGENT: The street address and zip code of the corporation's initial registered office is 311 N. Chancery Street, McMinnville, Tennessee 37110, County of Warren. Its initial registered agent at that office is Levoy Knowles.
- 4 INCORPORATORS The name, address, and zip code of each incorporator is as follows.

- (a) Janey Ruth Price  
Route 8, Box 400-99  
Sparta, TN 38583
- (b) Bobby A. Thompson  
P O. Box 47  
Beersheba Springs, TN 37305
- (c) J R. Troop  
Route 10  
McMinnville, TN 37110
- (d) Robert W Jones  
Route 3  
McMinnville, TN 37110
- (e) James W. (Bill) Hickey  
Route 2, Box 132  
Sparta, TN 38583
- (f) Charles M. Boyd  
P.O Box 218  
Tracy City, TN 37387
- (g) Donald Hollingsworth  
Star Route  
Spencer, TN 38585
- (h) Robert Bramblett  
Route 1  
Hillsboro, TN 37342
- (i) Joe C. Roper  
Route 2, Box 5A  
Hillsboro, TN 37342

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5 PRINCIPAL OFFICE. The street address and zip code of the principal office of the corporation is 311 N. Chancery Street, McMinnville, Tennessee 37110

6 DESIGNATION. This corporation is for profit

7. PURPOSES This corporation is being organized for the purpose of engaging in or furthering the cause of area-wide rural telephone service, as defined in T.C.A. 65-29-103(3), and for the purpose of acquiring communication facilities or assuring more adequate telephone service to the members of Ben Lomand Rural Telephone Cooperative, Inc

8. NUMBER OF DIRECTORS The number of directors shall be as provided in the bylaws This number shall not exceed fifteen and shall not be less than five

9 BOARD OF DIRECTORS: The corporate affairs, business, and functions of the corporation shall be conducted by a Board of Directors consisting of not less than five directors whose qualifications, terms of office, election, number, and filling of vacancies thereof shall be determined and fixed by the bylaws of the corporation.

Under the authority of T.C.A. 48-12-102(b)(3) of the "Tennessee Business Corporation Act," a director shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except that this provision shall not eliminate or limit the liability of a director:

(a) For any breach of the director's duty of loyalty to the corporation or its shareholders,

(b) For acts or omissions not in good faith which involve intentional misconduct or a knowing violation of law, or

(c) For any unlawful distribution of assets in violation of T.C.A. 48-18-304 of the "Tennessee Business Corporation Act "

10. BYLAWS. The corporation shall adopt bylaws for managing the business and regulating the affairs of the corporation and may contain any provisions not consistent with the laws of the State of Tennessee and this Charter of Incorporation.

11. DISSOLUTION: The corporation will not have provisions which will be inconsistent with laws regarding the distribution of assets upon dissolution.

DATED July 27, 1993

Janey R Price  
Janey Ruth Price - Incorporator

Bobby A Thompson  
Bobby A. Thompson - Incorporator



RECEIVED  
STATE OF TENNESSEE

93 JUL 29 PM 2 25

J R Troop  
J R Troop - Incorporator

Robert W. Jones  
Robert W. Jones - Incorporator

James W. Hickey  
James W. (Bill) Hickey - Incorporator

Charles M. Boyd  
Charles M. Boyd - Incorporator

Donald Hollingsworth  
Donald Hollingsworth - Incorporator

Robert Bramblett  
Robert Bramblett - Incorporator

Joe C. Roper  
Joe C Roper - Incorporator

STATE OF TENNESSEE, WARREN COUNTY

The foregoing instrument and certificate were noted  
Note Book 18, Page 24 At 9:45 o'clock AM 8-5 19 93  
and recorded in 1712 Book 8, Series 553  
State Tax Paid \$ — Fee — Recording Fee 5.00 Total \$ 5.00  
Witness My Hand.  
Recolpt No. 47558

J M McNamee  
Registrar

Recorded