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April 10, 1997

VIA HAND DELIVERY

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187

Dear Mr. Caton:

Enclosed for filing, please find an original and sixteen (16) copies of the Joint Response of Hyperion Telecommunications, Inc., KMC Telecom, Inc., and McLeodUSA Telecommunications Services, Inc. in the above-referenced docket.

Please date stamp and return the extra copy. If you have any questions, please do not hesitate to call me at (202) 945-6917.

Sincerely,

Tamar E. Haverty

Tamar E. Haverty

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187
	)	
	)	

JOINT RESPONSE OF HYPERION TELECOMMUNICATIONS, INC., KMC TELECOM, INC., AND MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., TO PETITIONS FOR RECONSIDERATION

Hyperion Telecommunications, Inc. ("Hyperion"), KMC Telecom, Inc. ("KMC") and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"),[1] by undersigned counsel and pursuant to 47 C.F.R. § 1.429(f) and Public Notice Rpt. No. 2181, dated March 21, 1997, hereby file their Joint Response to the Petitions for Reconsideration filed by AT&T Corp. ("AT&T"), MCI Telecommunications Corp. ("MCI"), and Southwestern Bell Telephone Company ("SWBT") in the above-captioned proceeding.[2]

Introduction

Hyperion, KMC and McLeodUSA (collectively, the "Joint Commenters") file this Joint Response in support of the Petitions of AT&T and MCI. Specifically, the Joint Commenters agree with AT&T and MCI that the Federal Communications Commission's ("Commission") interpretation of the phrase "deemed lawful" in Section 402(b)(1)(A) of the Telecommunications Act

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[1] Formerly McLeod Telemanagement, Inc.

[2] KMC and McLeodUSA filed comments and reply comments in response to the Commission's September 6, 1996 *Notice of Proposed Rulemaking* in this proceeding.

of 1996[3] is flawed. The Joint Commenters also urge the Commission to reject the extreme reading of "deemed lawful" proffered by SWBT in its Petition for Reconsideration.

I. The Commission Should Reconsider Its Interpretation of the Phrase "Deemed Lawful" and Adopt a Rebuttable Presumption of Lawfulness

A. The Petitions of AT&T and MCI Provide the Correct Statutory Interpretation of the Phrase "Deemed Lawful"

In their Petitions for Reconsideration, AT&T and MCI highlight several problems with the Commission's interpretation of the phrase "deemed lawful." The Commission ruled in the *Report and Order*[4] that the term "deemed" required a conclusive presumption, meaning that a tariff that becomes effective without Commission action automatically becomes a lawful tariff. In such a case, the Commission would be prevented from awarding refunds or damages for any harm suffered by customers during the time the tariff was in effect. As MCI noted, however, the phrase is capable of "a range of meanings," and therefore the Commission is compelled by law to adhere to the traditional rules of statutory construction in defining it.[5] The Commission's conclusion that "deemed lawful" can have only one meaning -- a conclusive presumption of lawfulness -- is plainly erroneous.

While the Commission cites supportive judicial precedent upholding the Federal Energy

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[3] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §§ 151 *et seq.*) ("1996 Act").

[4] *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, First Report and Order, FCC No. 97-23 (Jan. 31, 1997) ("*Report and Order*").

[5] MCI Petition, at 2.

Regulatory Commission's application of "deemed,"[6] these cases cannot provide an authoritative and unambiguous interpretation of the statutory provision adopted by Congress in the 1996 Act. AT&T and MCI provide numerous citations in their Petitions to cases that conflict with the Commission's interpretation of the term "deemed."[7] In these cases, the word "deemed" was found to constitute simply a *rebuttable presumption of lawfulness*, which in this case would mean that customers (or other carriers) could challenge the presumption and recover for damages suffered from the effective date of the tariff. If the Commission is unwilling to accept the precedent cited by AT&T and MCI as proof that Congress intended to create a rebuttable presumption by use of the term "deemed," it must at a minimum find the term ambiguous in light of this precedent to the contrary.

Given this ambiguity, the Commission must apply long-standing principles of statutory construction. As MCI states, traditional statutory interpretation requires reference to the purpose of legislation and public policy when a statutory phrase is ambiguous.[8] The Commission's interpretation is not supported by the purposes of the 1996 Act or traditional legal tariff doctrines. First, by insulating monopoly LECs from liability for damages from the effective date of the tariff, the Commission undermines the procompetitive goals of the 1996 Act. Leaving competitive LECs and interexchange carriers open to full liability for unlawful tariffs while offering full protection for monopoly LEC's unlawful tariffs is blatantly discriminatory. Moreover, as MCI notes, the

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6 *Report and Order*, at ¶19, n.60, n.61.

7 AT&T Petition, at 6-7; MCI Petition, at 4.

8 MCI Petition, at 6.

Congressional intent behind Section 402(b)(1) of the 1996 Act was to streamline the tariff review process itself, not to eviscerate the complaint remedy as it relates to tariffs.[9] While a rebuttable presumption of lawfulness may streamline the procedures for tariff approval, a conclusive presumption of lawfulness serves a separate (and extreme) purpose of insulating LECs from liability for unlawful tariff provisions. Congress simply did not intend the Commission to take that additional step.

The historical context of tariff policy also supports the positions advocated by AT&T and MCI. As AT&T notes, "An unbroken line of Supreme Court cases holds that a common carrier's customers are required by law to pay that carrier's tariffed rate, but permits them to recover damages if they can later establish that the tariffed rate is unreasonable."[10] The Commission cannot assume away one-half of this carefully balanced equation without an affirmative Commission finding that a particular tariff is in fact reasonable and lawful. The Commission must therefore reconsider its decision in the *Report and Order* to insulate LECs from liability by virtue of the term "deemed," and instead find that the phrase "deemed lawful" merely establishes higher burdens for suspensions and investigations.

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9 *Id.*, at 7-8.

10 AT&T Petition, at 8.

B. SWBT's Interpretation of "Deemed Lawful" Would Eviscerate Customer Remedies for a LEC's Unlawful Tariffs

Whether or not the Commission grants AT&T's and MCI's Petitions, the Joint Commenters urge the Commission to deny SWBT's efforts to further undermine the valuable protections for customers contained in Title II of the Communications Act of 1934. SWBT argues that the phrase "deemed lawful" provides a "safe harbor" in which LECs can issue tariffs "without fear of post-effective attack upon their rates or tariffs."[11] SWBT's reasoning contravenes the pro-customer rationale underlying the tariff process. SWBT claims that its interpretation does not "preclude complainants from filing Section 208 complaints against a carrier for acts . . . other than those where a carrier is merely applying a tariffed rate or practice."[12] This rationalization does not address the fundamental unfairness of denying a customer damages for unlawful LEC tariffed rates or practices and should be rejected as anti-consumer and anticompetitive. Insulating LECs from liability under Section 208 of the Communications Act of 1934, as SWBT would have the Commission do, will eviscerate the remedies available to customers for a carrier's unlawful tariffs.[13]

II. The Commission Should Allow Interested Parties at Least Two Business Days to File Oppositions Against Seven-Day Tariff Filings

In the *Report and Order*, the Commission required that petitions opposing tariff filings by LECs on 7 days' notice must be submitted to the Commission no later than 3 days from the date the

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[11] SWBT Petition, at 3.

[12] *Id.*, at 2.

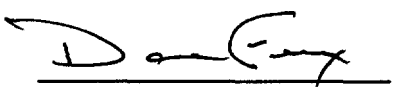
[13] 47 U.S.C. § 208 (1996).

tariff is filed. The Commission's timetable could place unreasonable constraints on a customer's ability to challenge a particular tariff. The Joint Commenters join with AT&T in asking for a clarification of this schedule. As AT&T notes, LEC tariffs effective on 7 days' notice will inevitably be filed on Fridays just before the close of business, meaning that opponents will have only one business day to prepare a challenge to the filings.[14] While *streamlining* the tariff review process may be a laudable goal, the Commission's rule with respect to 7-day tariff filings in practice will effectively *eliminate* the review process. At the very least, the Commission should follow AT&T's proposal and clarify that the 3 calendar days must include 2 business days.

Conclusion

For the foregoing reasons, the Joint Commenters respectfully request that the Commission grant the Petitions for Reconsideration of AT&T and MCI and deny the Petition of SWBT as recommended herein.

Respectfully submitted,



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Dated: April 10, 1997

[14] AT&T Petition, at 11.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 1997, copies of the foregoing Joint Response of Hyperion Telecommunications, Inc., KMC Telecom, Inc., and McLeodUSA Telecommunications Services, Inc. were served by hand delivery* or first class mail, postage prepaid, on the following:

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