

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION**

MCI Telecommunications Corporation (MCI) hereby submits its comments on the petition for preemption filed by Hyperion of Tennessee, L.P. (Hyperion).<sup>1</sup> Section 65-4-201(d) of the Tennessee Code is discriminatory on its face and in violation of sections 253(a) and (b) of the Telecommunications Act of 1996 (Act). By protecting Tennessee Telephone and other incumbent local exchange carriers (ILECs) that have less than 100,000 access lines from competition, Section 65-4-201(d) of Tennessee Code represents a clear and direct barrier to entry under section 253 of the Act.

**I. SECTION 65-4-201(d) OF THE TENNESSEE CODE AND ITS ENFORCEMENT BY THE TENNESSEE REGULATORY AUTHORITY VIOLATE SECTION 253(a) OF THE ACT**

Section 65-4-201(d) of the Tennessee Code unlawfully prohibits CLECs from entering

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<sup>1</sup> 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 (filed May 29, 1998) (Hyperion Petition).

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local markets where there are ILECs who have fewer than 100,000 access lines.<sup>2</sup> The effect is to insulate ILECs in areas where the ILEC has less than 100,000 access lines from competition-- indefinitely -- and deprive consumers in the affected areas of the benefit of competitive choice.

Section 253 of the Act empowers the Commission to preempt state and local legal and regulatory requirements that impede competitive entry.<sup>3</sup> Specifically, 253(a) sets out a direct prohibition to state laws that place limits on the ability of any entity to provide a telecommunications service. The Commission determines whether the regulation “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>4</sup> As Hyperion comprehensively demonstrated in its petition, section 65-4-201(d) unlawfully bars competition in rural areas in Tennessee. The Commission has already dealt with state regulations that raise similar issues and concluded that the statutes were unlawful and conflicted with Congress’s goal to facilitate local competition.

In Texas, the Commission has determined, however, that such blatant prohibitions on local competition, including competition in rural areas, is unlawful in violation of section 253(a) of the Act.<sup>5</sup> The Commission also found that the outright bar on competitive entry, precluding competitors from providing any service in specified areas, resulted in a restriction on the ability of competitors to resell the incumbent’s services. This was viewed as discriminatory in violate

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<sup>2</sup> Hyperion Petition at 6.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> TCI Cablevision of Oakland County, Inc., FCC 97-331 at ¶ 97 (TCI).

<sup>5</sup> Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, FCC 97-346 at ¶¶ 106-107 (rel. Oct. 1, 1997) (Texas).

of section 251(c)(4(B) of the Act, which imposes resale obligations on all ILECs.

Similarly, in the Silver Star case,<sup>6</sup> the Commission rejected statutes designed to protect incumbents in Western Wyoming, concluding that any flat prohibition on the competitive provision of local service cannot be upheld. The Commission has clearly recognized the anticompetitive nature of state or local requirements that restrict competition in the name of the public interest. As noted in the Hyperion petition, “an absolute prohibition on competitive entry is precisely the type of action Congress intended to proscribe under section 253 (a).”<sup>7</sup>

Section 65-4-201(d) goes far beyond materially limiting competition, but rather is an outright prohibition in areas where the incumbent has less than 100,000 access lines. State and local governments that impose legal and regulatory requirements that are not competitively neutral are effectively erecting barriers to entry that impede competitive entry. Section 65-4-201(d) is not competitively neutral and amounts to a clear barrier to entry.

## **II. SECTION 253(b) DOES NOT ENCOMPASS STATUTES SUCH AS SECTION 65-4-201(d)**

Contrary to the Tennessee Regulatory Authority’s (TRA) claim,<sup>8</sup> the denial of Hyperion’s application to provide local service pursuant to section 65-4-201(d) is unlawful under section 253(b) of the Act. While Section 253(b) preserves states’ ability to impose requirements that are consistent with the public interest, such requirements must be competitively neutral. Section 65-4-201(d) cannot be justified under Section 253(b) because it imposes an obligation of

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<sup>6</sup> In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1 (September 24, 1996) (Silver Star).

<sup>7</sup> Hyperion Petition at 16.

<sup>8</sup> Hyperion Petition, Exhibit A at 8.

competitive neutrality that the State of Tennessee has not satisfied.

There is no basis upon which to justify a statute that completely forecloses entry to all competitive providers in various pockets of the state or against certain ILECs. Even assuming arguendo that this drastic rule is “necessary,” and “represents a legitimate exercise of the rights acknowledged by Sections 253(b) to maximize the safety of the traveling public,”<sup>9</sup> “Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry . . . .”<sup>10</sup> Tennessee cannot ignore or misconstrue the requirements. For example, as noted in the Hyperion petition, the TRA concludes that by virtue of its application to “all telecommunications service providers” in Tennessee, § 65-4-201(d) could be considered competitively neutral.<sup>11</sup> Clearly, this is an inaccurate view of competitive neutrality and is inconsistent with the Commission’s decisions in Silver Star, and Texas, where the Commission preempted statutes that barred competitive entry. As Hyperion pointed out, the Commission has consistently held that flat prohibitions on competitive entry cannot be upheld.

No interests other than those of the protected ILEC are furthered by section 65-4-201(d).<sup>12</sup> This provision of the Tennessee Code only serves to limit competition, for ILECs with

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<sup>9</sup> Petition at 5.

<sup>10</sup> Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd 13082, at ¶38 (1996).

<sup>11</sup> Hyperion Petition at 10.

<sup>12</sup> In Silver Star, for example, the Commission further recognized that the actions in Wyoming did not warrant an exception under 253(b), and recognized clearly that the provisions included in the state law only served to protect and preserve the incumbent’s place in the market. Silver Star at ¶ 42.

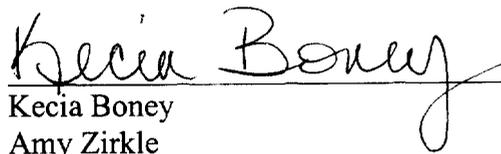
less than 100,000 access lines and thus, does nothing to advance the public interest. If anything, the statute actually places the public interests of consumers in jeopardy by limiting their choice of a local carrier. The objective of the Act under section 253(b) is the establishment and the assurance of a competitively fair marketplace that does not accord any special treatment to the incumbent.

### CONCLUSION

For the foregoing reasons, the Commission should preempt Tennessee Code section 65-4-201(d) and the TRA order enforcing the statute and denying Hyperion's application for local service.

Respectfully submitted,

**MCI TELECOMMUNICATIONS CORPORATION**



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Dated: July 13, 1998

## CERTIFICATE OF SERVICE

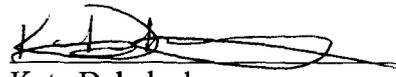
I, Kate Debelack, hereby certify that on this 13<sup>th</sup> day of July 1998, I served by first-class United States Mail, postage prepaid, a true copy of the foregoing Comments, upon the following:

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