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

JUL 27 1998

In the Matter of

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

AVR, L.P. d/b/a
Hyperion of Tennessee, L.P.

CC Docket No. 98-92

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

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI) hereby submits its reply to comments filed in response to the above-captioned petition filed by Hyperion of Tennessee, L.P. (Hyperion).¹

The record supports MCI's position that, 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 in violation of section 253(a) of the Telecommunications Act of 1996(Act). Section 253(b) does not save this statute from preemption.

I. SECTION 65-4-201(d) VIOLATES SECTION 253(a) AND (b) OF THE ACT AND SHOULD THEREFORE BE PREEMPTED

Because section 65-4-201(d) of the Tennessee Code completely prohibits competitive local exchange carriers (CLECs) from entering local markets where there are ILECs that have

¹ Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas (filed May 29, 1998) (Hyperion Petition).

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fewer than 100,000 access lines,² section 65-4-201(d) violates section 253(a) of the Act. As MCI and other parties demonstrated in their comments, the net effect is to insulate ILECs in areas where they have fewer than 100,000 access lines from competition, and deprive consumers in the affected areas of the benefit of competitive choice.³ It is critical therefore that the Commission reaffirm its position that any flat prohibition on the competitive provision of local service cannot be upheld.⁴

Contrary to the Tennessee Regulatory Authority's claim,⁵ section 253(b) does not save section 65-4-201(d) of Tennessee Code. Outright bans on competition cannot be upheld. As the Association for Local Telecommunications Services pointed out, the Commission has made clear that in preserving universal service, Congress envisioned that "states and localities would enforce the public interest goals delineated in section 253(b) through means *other than* absolute prohibitions on entry, such as clearly defined service quality requirements or legitimate enforcement actions (emphasis added)."⁶ Certainly there are other measures that the State can take to protect universal service that are less drastic than a blanket prohibition on competition,

² *Id.* at 8.

³ See e.g., Comments of MCI Telecommunications Corporation at 2.

⁴ See 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); see also 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 ¶¶ 106-107 (rel. Oct. 1, 1997).

⁵ Tennessee Regulatory Authority's Comments in Response to Hyperion's's Petition for Preemption at 6.

⁶ Comments of the Association for Local Telecommunications Services, at 4, n. 4; KMC Telecom Inc., Comments at 4 (quoting In the Matter of Classic Telephone Company, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, CCB Pol 96-10, FCC 96-397 at ¶ 25 (rel. Oct. 1, 1996)).

which only serves to protect the Tennessee Telephone.

Moreover, both the Tennessee Regulatory Authority's and TDS Telecom's claim that the Tennessee Regulatory Authority action is competitively neutral because Section 65-4-201(d) of the Tennessee Code applies "even-handedly" to competitors is a totally backwards interpretation of the term "competitive neutrality." Statutes that protect ILECs from competition by completely banning competitive entry are unlawful.⁷ The Commission has concluded that "[a]t the very least, this mandate of competitive neutrality requires the Cities to treat similarly situated entities in the same manner."⁸ No statute or regulation that prohibits all but a single entity from providing service in a given service area can ever be "competitively neutral."⁹ No interests other than those of the protected ILECs are furthered by Section 65-4-201(d). The statute not only serves to limit competition but also disadvantages consumers by limiting their choice of a local carrier. The objective of the Act under 253(b) is the establishment and the assurance of a competitively fair marketplace that does not accord any special treatment to the incumbent.

As most commentators agreed, the need to preempt enforcement of Section 65-4-201(d) of the Tennessee Code is strong. Hyperion has strongly indicated its willingness to deploy its advanced fiber network outward from Nashville out into adjacent areas so that it may provide service to customers now served exclusively by the ILEC. This is precisely the type of head-to-head, facilities-based competition that the ILECs claim to support, and that the Commission should encourage.¹⁰

⁷ Classic Telephone, ¶ 38.

⁸ Id. at ¶ 37.

⁹ See e.g., KMC Comments at 4.

¹⁰ See e.g., WorldCom Comments at 2-3.

CONCLUSION

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

Respectfully submitted,

**MCI TELECOMMUNICATIONS
CORPORATION**



Kecia Boney
Lisa B. Smith
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-3040

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