ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

DEC 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	CC Docket No. 98-184
	)	
and	)	
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee.	)	
	)	
For Consent to Transfer of Control	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion"), by its counsel and pursuant to the Commission's October 8, 1998 *Public Notice*, hereby submits its reply comments in the above-captioned proceeding. As stated in its initial comments in this docket,[1] Hyperion opposes the proposed transfer of control, and believes that the Commission can and should deny this application outright. Hyperion's detailed arguments supporting denial of the application are clearly set forth in its initial comments, and for purposes of brevity will not be reiterated at any length here.[2] In these reply comments, Hyperion urges the Commission to provide a full and satisfactory opportunity on the record to examine the allegations of anticompetitive actions taken by Bell Atlantic Corporation ("BA") and GTE Corporation ("GTE") prior to making a decision

[1] Comments of Hyperion Telecommunications, Inc. in Opposition to the Transfer of Control, CC Docket No. 98-184, filed November 23, 1998 ("Hyperion Initial Comments").

[2] In its Initial Comments, Hyperion also listed stringent market opening conditions that should be imposed in the event that the transfer of control is allowed to proceed. Hyperion Initial Comments at 26-37.

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on the proposed transfer of control. As set forth below, this will require either an additional round of filings before the Commission, or, alternatively, the convening of a limited evidentiary hearing with the opportunity to present testimony and cross-examine witnesses.

Discussion

In its Initial Comments, Hyperion noted that it has had "first-hand experience" in dealing with BA's anticompetitive tactics.[3] In particular, Hyperion referred to its experience in New York as detailed in affidavits it submitted in the New York Public Service Commission's consideration of Bell Atlantic's Section 271 Petition for InterLATA Entry (Case No. 97-C-0271). These "bad acts" on the part of BA included, but were not limited to:

> (1) Bell Atlantic's disruptive RCF provisioning, including late dispatch, lengthy outages lasting for days, and customer operations performed even when Hyperion has canceled customer cutovers; (2) discriminatory compliance with Commission orders, particularly concerning payment of reciprocal compensation for local traffic to ISPs; and (3) bad faith interconnection negotiations that include unreasonable conditions and delay on the adoptions of approved interconnection agreements under Section 252(i) of the Telecommunications Act of 1996.[4]

Hyperion's examination of the initial comments filed by other opponents of the transfer of control in this proceeding reveals a disturbing common thread that bears closer examination by the Commission. As in Hyperion's case, other CLECs filing initial comments indicated that they had been subjected to multifarious "bad acts" at the hands of BA and GTE, seemingly intended to delay, deter, inhibit or eliminate meaningful competition. These problems came into even more acute focus in the context of the Commission's December 14, 1998 *en banc* proceeding convened to hear the views of a variety of industry representatives on the GTE/Bell

[3] Hyperion Initial Comments at 11 and 12-13.

[4] *Id.* at 12, citing Affidavit of Christopher J. Rozycki (dated November 19, 1997) and Supplemental Affidavit of Christopher J. Rozycki (dated January 15, 1998), both in Case No. 97-C-0271.

Atlantic merger and other pending mergers, and to engage in limited questions and answers. At that meeting, specific allegations were made by opposing commenters that GTE and BA have failed to adhere to their lawful obligations under Section 251 of the Act. Robert Young, Executive Vice President and General Counsel of Bell Atlantic, responded to the allegations by denying their accuracy and advising the Commission that Bell Atlantic would supply a detailed written refutation in its reply comments (to be filed contemporaneously herewith).

This series of events shines a spotlight on one of the most crucial public interest issues before the Commission as it seeks to determine whether the proposed transfer of control should be allowed to proceed, *viz.*, whether the *current status* of BA's and GTE's dealings with CLECs comports with applicable law, or whether there is palpable evidence that BA and GTE routinely violate the law and actively seek in a number of subtle and not-so-subtle ways to impede the entry of, and/or competitive viability of, CLECs. As Hyperion pointed out in its Initial Comments, it hardly seems sensible to approve a proposal to greatly increase the size, wealth and market presence of two carriers actively engaged in anticompetitive activities.[5] How could such a regulatory approval be considered consistent with the public interest?

Hyperion submits that there is an unsettling track record for both of these companies since the enactment of the Telecommunications Act of 1996 (the "1996 Act"). Concededly, some of the initial CLEC complaints may have been the result of understandable difficulties in implementing a new and untested legal and practical regime. With respect to such historical problems, BA and GTE may attempt to argue that they amount to no more than good faith bumbling in the wake of sweeping regulatory change. Be that as it may, there is a distinct and material difference between what may have been the ILECs' initial puzzlement and their deliberate anticompetitive actions taking place now. If in fact BA and GTE, *more than two years* after the enactment of the 1996 Act, are *still* engaging in damaging anticompetitive activities that delay, confound and deny the CLECs' legal rights, this is something that should weigh heavily

[5] *See, e.g.*, Hyperion Initial Comments at 14-15.

on the approval of their proposed merger. At this point, it is no longer credible for BA and GTE to cite confusion, or misunderstanding of what is required.

Hyperion maintains a "bad acts" file for each of BA's and GTE's jurisdictions in which Hyperion operates. Sadly, these files are constantly expanding in girth, despite BA's and GTE's claims of compliance.[6] There seems to be no end to the clever subterfuge engaged in by BA and GTE to hinder competitors, or the enthusiasm with which it is wielded. Hyperion submits that BA and GTE are not properly focused on what they must do to comply with law, but instead what they can "get away with" without getting caught. Thus, in addition to blatant anticompetitive acts, BA and GTE engage in a multiplicity of actions that are more subtle and harder to prove, calculated to fall just below the radar beam. These actions are nevertheless injurious to competitors.

As a matter of fact, even as these reply comments are being prepared, Bell Atlantic-Vermont ("BA-VT") is deliberately tempting fate by denying Hyperion Telecommunications of Vermont its legal rights under Section 252(i) of the Act. Hyperion has requested to "opt in" to an existing agreement between KMC Telecom, Inc. and BA-VT: in fact, BA-VT has agreed to allow this, as required. However, BA-VT has forwarded for execution to Hyperion an agreement which, *in addition to* the terms and conditions agreed to by KMC Telecom, Inc., contains other terms and conditions which BA-VT presently insists Hyperion must agree to *before* it can "opt in" to the agreement! These additional terms and conditions are contained in so-called "Clarifications" which BA-VT has presented for signature along with the agreement. One of the "Clarifications" is that BA-VT requires Hyperion to amend its tariffs to provide residential local exchange service within 60 days of signature of the new interconnection agreement, and provide residential service no later than 90 days thereafter.[7]

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[6] In the course of responding to proponents' reply comments, or in an evidentiary hearing convened for this purpose, Hyperion could make all of this information available to the Commission for its review.

[7] A true and complete photocopy of the relevant portions of the proposed interconnection agreement are attached as "Exhibit 1" hereto (see p. 4).

Perhaps BA-VT simply included the extra language as a sort of commercial "dirty trick" in the hope that Hyperion would sign it without reading it, and will ultimately back off in the knowledge that it is violating the law. Or perhaps BA-VT intends to stick to its guns, and force Hyperion to appeal to the state Commission. For the time being at least, BA-VT's representatives have consistently repelled any attempts by Hyperion to appeal to reason or to the law. Whatever BA-VT's thinking is on this issue, one thing is clear: although it cannot ultimately enforce these additional requirements, it will take Hyperion additional money, time and trouble to adjust the situation. And, *even better* (from BA-VT's point of view), these inconvenient impositions are possible essentially without any real cost to BA-VT. As the incumbent carrier, BA-VT has an almost unlimited capacity to impede, impair and befuddle its would-be competitors. BA-VT can win the war by attrition even if it eventually loses almost every battle along the way. And, unfortunately, this is just the tip of the potential iceberg represented by a merged BA and GTE – 90% of the competitive problems to come are presently lurking menacingly below the waterline.

As demonstrated during the Commission's *en banc* proceeding on December 14, 1998, whether BA and GTE are still engaged in anticompetitive activities is a factual question that is in dispute in this proceeding. A representative of BA has stated that its reply comments herein will refute opponents' allegations of wrongdoing. However, the question of whether BA and GTE are currently engaged in anticompetitive activities is of the essence of this proceeding. If true, the Commission should deny the proposed transfer of control without even reaching the myriad other questions of law and policy associated with it. It is a *threshold consideration*, and as such it demands closer scrutiny and a full opportunity for both sides to present their cases.

At present, without further action by the Commission, this will not be possible. BA and GTE will presumably submit their exculpatory claims in their reply comments, and no further opportunity will be afforded for opponents to analyze and respond to those claims. This procedural treatment of what is, *or should be*, at the heart of the Commission's inquiry here, is entirely too cursory to protect the interests of the public and of other competitive local carriers.

Hyperion urges the Commission to address this problem squarely, so that the issues involved can be presented fully on both sides, and resolved.

At a minimum, this requires another round of filings before the Commission in which merger opponents can respond to BA's and GTE's exculpatory claims. This is an essential step, because it will afford the Commission an opportunity to investigate the *bona fides* of the allegations made by merger opponents in detail, and determine whether BA and GTE's current compliance status is redolent of the character necessary to enable the merger, or not. Alternatively, Hyperion would also support the convening of an evidentiary hearing, complete with presentation of testimony and cross-examination of witnesses, to examine these factual disputes. Such a hearing would be expressly limited in scope to the allegations of anticompetitive actions, and would not address the larger issues of whether the merger should be permitted.[8]

Conclusion

Whether BA and GTE are currently engaged in anticompetitive activities that adversely affect CLECs' ability to enter and ply their trade in the local telecommunications market is a threshold question that must be considered prior to decision on the proposed transfer of control. The allegations of misconduct raised by merger opponents, and the refutation that BA stated that it would provide in its reply comments, are at the heart of this proceeding and require a full and careful examination. At a minimum, this would require affording opponents the opportunity to respond to BA's reply comments; a more complete approach would be the convening of a limited evidentiary hearing to address these issues. The failure properly to investigate the status of each company's compliance with applicable law as part of considering this transfer of control would do a disservice to the public interest, and would cast a pall over the potential for

[8] Such an evidentiary hearing would also be warranted in the event that the reply comments filed on behalf of BA/GTE do not in fact attempt to refute the allegations of anticompetitive acts, thereby depriving opponents of anything to address in an additional filing. The factual question that is in controversy is important enough that it should be addressed fully whether or not BA/GTE respond to it in their reply comments.

development of competitive local exchange carriers in the many jurisdictions where a combined BA and GTE would do business. Hyperion urges the Commission to take appropriate steps to ensure that this factual controversy is adequately examined.

Respectfully submitted,

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EXHIBIT 1

Proposed Interconnection Agreement
Between BA-VT and Hyperion Telecommunications

SEP 16 1998

Bell Atlantic
1095 Avenue of the Americas, 14th Floor
New York, NY 10036
212-395-3799

Roberta Favant
Contract Negotiations

Bell Atlantic

BY OVERNIGHT MAIL

September 15, 1998

Douglas G. Bonner, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007

Dear Mr. Bonner:

Enclosed please find for execution a final Interconnection Agreement between Hyperion Telecommunications of Vermont, Inc. ("Hyperion") and Bell Atlantic ("BA") for the State of Vermont. This agreement was requested by Hyperion pursuant to Section 252(i) of the Act and is based upon the Interconnection Agreement between BA and KMC Telecom, Inc. for Vermont dated as of February 14, 1997, as approved by the Vermont Public Service Board on June 16, 1997.

Please have your client sign both of the attached signature pages and return both to my attention at the above address. I will then return one fully-executed signature page to you at the earliest possible date.

Please call me at 212-395-3799 should you have any questions.

Very truly yours,

Roberta Favant

Roberta Favant

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of this ___ day of _____, ____.

HYPERION TELECOMMUNICATIONS, INC.	BELL ATLANTIC-VERMONT
By:_____	By:_____
Printed:_____	Printed: Jeffrey A. Masoner
Title:_____	Title: Vice President – Interconnection Services Policy & Planning

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of this ___ day of _____, ____.

HYPERION TELECOMMUNICATIONS, INC.	BELL ATLANTIC-VERMONT
By:_____	By:_____
Printed:_____	Printed: Jeffrey A. Masoner
Title:_____	Title: Vice President – Interconnection Services Policy & Planning

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of _____ __, 1998

by and between

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,
d/b/a
BELL ATLANTIC - VERMONT

and

HYPERION TELECOMMUNICATIONS OF VERMONT, INC.

BA-VT/Hyperion. Based on KMC Telecom Agreement dated as of February 14, 1997.

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

This Interconnection Agreement (this "Agreement"), under Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"), is effective as of the ___ day of _____, 1998 (the "Effective Date"), by and between New England Telephone and Telegraph Company, d/b/a Bell Atlantic - Vermont ("BA"), a New York corporation with offices at 125 High Street, Boston, Massachussetts 02110, and Hyperion Telecommunications of Vermont, Inc. ("Hyperion") a Delaware corporation with offices at DDI Plaza Two, 500 Thomas Street, Suite 400, Bridgeville, Pennsylvania 15017 (each a "Party" and, collectively, the "Parties").

WHEREAS, Hyperion has requested that BA make available to Hyperion interconnection, service and unbundled network elements upon the same terms and conditions as provided in the Interconnection Agreement (and amendments thereto) between KMC Telecom, Inc. and BA, dated February 14, 1997, for Vermont, approved by the Vermont Public Service Board ("Board") under Section 252 of the Act (the "Separate Agreement") and attached as Appendix 1 hereto; and

WHEREAS, BA has undertaken to make such terms and conditions available to Hyperion hereby only because and, to the extent required by, Section 252(i) of the Act.

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Hyperion and BA hereby agree as follows:

1.0 Incorporation of Appendix by Reference

1.1 Except as expressly stated herein, the terms and conditions of Appendix 1 hereto (with all Schedules and Exhibits thereto) are incorporated by reference in their entirety herein and form an integral part of this Agreement.

1.2 References in Appendix 1 hereto to KMC Telecom, Inc. or to KMC shall for purposes of this Agreement be deemed to refer to Hyperion.

1.3 References in Appendix 1 hereto to the "Effective Date", the date of effectiveness thereof and like provisions shall for purposes of this Agreement be deemed to refer to the date first written above. Unless terminated earlier in accordance with the terms of Appendix 1 hereto, this Agreement shall continue in effect until the Separate Agreement expires or is otherwise terminated.

1.4 The Joint Process referred to in Section 8.1 of Appendix 1 hereto shall be developed upon the request of either Party within a reasonable amount of time after receipt of such request.

1.5 Notwithstanding Section 27.6 of Appendix 1 hereto, at such time as BA makes available the Performance Monitoring Reports set forth in the Memorandum Opinion and Order adopted by the FCC on August 14, 1997 (the "FCC Merger Order") to other Telecommunications Carriers purchasing Interconnection from BA, BA shall provide Hyperion with the Performance Monitoring Reports applicable to Hyperion in accordance with the requirements of said FCC Merger Order.

1.6 All notices, affidavits, exemption-certificates or other communications to Hyperion under Section 29.8 of Appendix 1 hereto shall be sent to the following address:

Hyperion Communications
DDI Plaza Two
500 Thomas Street, Suite 400
Bridgeville, PA. 15017-2838
Attn: Janet S. Livengood, Esq., Director of Legal and
Regulatory Affairs

1.7 All notices, affidavits, exemption-certificates or other communications to BA under Section 29.8 of Appendix 1 hereto shall be sent to the following address:

Tax Administration
Bell Atlantic Corporation
1095 Avenue of the Americas
Room 3109
New York, New York 10036

1.8 Notices to Hyperion under Section 29.12 of Appendix 1 hereto shall be sent to the following address:

Hyperion Communications
DDI Plaza Two
500 Thomas Street, Suite 400
Bridgeville, PA. 15017-2838
Attn: Janet S. Livengood, Esq., Director of Legal and
Regulatory Affairs
Facsimile: (412) 220-5162

with a copy to:
Swidler Berlin, Shereff Friedman, LLP
3000 K Street, N.W.
Washington, D.C. 20007
Attn: Dana Frix and Douglas G. Bonner
Facsimile: (202) 424-7645

1.9 Notices to BA under Section 29.12 of Appendix 1 hereto shall be sent to the following address:

Bell Atlantic Corporation
1095 Avenue of Americas
40th Floor
New York NY 10036
Attn: President - Telecom Industry Services
Facsimile: (212) 597-2585

with a copy to:

Bell Atlantic Network Services, Inc.
Attn: Mr. Jack H. White,
Associate General Counsel
1320 N. Court House Road, 8th Floor
Arlington, Virginia 22201
Facsimile: (703) 974-0744

with a copy to:

Bell Atlantic Corporation
Attn: Mr. Thomas Dailey
General Counsel, Vermont
185 Franklin Street, R. 1403
Boston, MA 02110
Facsimile: (617) 737-0648

1.10 Schedule 4.0 set forth at Appendix 2 hereto shall replace and supersede in its entirety Schedule 4.0 of Appendix 1.

2.0 Clarifications

2.1 The Parties agree that if any judicial or regulatory authority of competent jurisdiction determines (or has determined) that BA is not required to furnish any service or item or provide any benefit to telecommunications carriers otherwise required to be furnished or provided to Hyperion hereunder, then BA may, at its sole option, avail itself of any such determination by providing written notice thereof to Hyperion.

2.2 Notwithstanding anything to the contrary contained in this Agreement, the Parties agree that BA shall only be required to provide Combinations and any services related to its provision of Combinations to the extent (a) required by Applicable Law or (b) mutually agreed to by the Parties in writing after the date hereof.

2.3 The reciprocal compensation provisions set forth in this Agreement do not apply to Internet-bound traffic because such traffic is not local traffic.

2.4 The entry into, filing and performance by BA of this Agreement does not in any way constitute a waiver by BA of any of the rights and remedies it may have to seek review of

any of the provisions of the Separate Agreement, or to petition the Commission, other administrative body or court for reconsideration or reversal of any determination made by any of them, or to seek review in any way of any portion of this Agreement in connection with Hyperion's election under Section 252(i) of the Act.

2.5 Hyperion has an extensive network of facilities in Vermont over which it provides a wide variety of business local exchange, toll, and data services in diverse locations around Vermont. Hyperion also has business and residence local exchange Tariffs on file with the Public Service Board, and the facilities in place to deliver competitive local exchange services in urban, suburban, and rural areas of Vermont. The delivery of such residence services, on a facilities basis, is an important matter of public policy in Vermont.

Recognizing the importance of facilities-based competition to Vermont, Hyperion agrees to take all necessary steps to provide residence local exchange services, using its own or predominantly its own facilities, at diverse locations in Vermont, including the following:

(a) On or before 60 days following the execution of this Agreement, Hyperion agrees to amend its existing residence Tariffs to include prices and any other terms as may be necessary to provide residence local exchange service;

(b) On or before 60 days after the filing of such Tariffs, to provide public notice of the availability of residence local exchange service and to begin the provision of such service within 30 days thereafter.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 1998, copies of the foregoing REPLY COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. IN OPPOSITION TO THE TRANSFER OF CONTROL; CC DOCKET NO. 98-184, on the following parties listed below via First-Class Mail, postage prepaid, or via Messenger* to the person(s) on the attached service list.

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