

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**IN THE MATTER OF:** )  
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 )  
**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** )  
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**TENNESSEE REGULATORY AUTHORITY’S PETITION FOR  
RECONSIDERATION OF ORDER AND MEMORANDUM OF  
FEDERAL COMMUNICATIONS COMMISSION OF MAY 27, 1999**

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The Tennessee Regulatory Authority (the “Tennessee Authority” or the “TRA”), pursuant to 47 C.F.R.   1.106, files this its Petition for Reconsideration of the Order and Memorandum issued by the Federal Communications Commission (the “Commission” or the “FCC”) on May 27, 1999.

**Background**

This matter originally came before the Commission upon the Petition of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. (“Hyperion”) for an Order preempting the April 9, 1998, Order of the Tennessee Authority and, more specifically, Tenn. Code Ann.   65-4-201(d). The Tennessee Authority filed Comments in opposition to the Petition. Additional comments opposing the Petition were filed by TDS Telecommunications

Corporation (“TDS”). In its Order issued on May 27, 1999, the Commission granted Hyperion’s Petition in part and denied the Petition in part, specifically preempting the enforcement of the TRA’s Order of April 9, 1998 and of Tenn. Code Ann. § 65-4-201(d).

In rendering its decision, the FCC concluded that

...in denying Hyperion the right to provide competing local exchange service in the area served by Tennessee Telephone, Tenn. Code Ann. § 65-4-201(d) and the Tennessee Authority’s Denial Order violate section 253(a). We further conclude that, because these state and local legal requirements shield the incumbent LEC from competition by other LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in section 253(b). Finally, we conclude that because the requirements violate section 253(a), and do not fall within the boundaries of section 253(b), we must preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) and the Denial Order, as directed by section 253(d).

This Petition seeks Reconsideration of the Commission’s determination that the Tennessee Authority’s Order of April 9, 1998 and Tenn. Code Ann. § 65-4-201(d) do not fall within the protection of Section 253(b) of the federal Telecommunications Act of 1996.

In its Order at Paragraph 11, the FCC paraphrases the argument of the Tennessee Authority as:

Tenn. Code Ann. § 65-4-201(d) falls within section 253(b) because the provision is necessary to preserve and advance universal service and other public welfare goals.

The Commission’s restatement of the TRA’s position avoids the critical elements of the Tennessee Authority’s opposition to Hyperion’s Petition, specifically the concerns the Authority had over the provision of universal service to rural areas in the absence of enforcement of Tenn. Code Ann. § 65-4-201(d). The Tennessee Authority expressed those concerns as follows:

The TRA expressly considered the effect of immediate competition in Tennessee areas where small, independent local exchange carriers and telephone cooperatives serve small areas with relatively few customers, and where such small serving areas include a few large business customers whose revenues support the provision of affordable service to the companies' residential customers. In the judgment of the TRA, the universal service objectives in Tennessee would not be advanced in rural areas by allowing Section 253(a) to force competition into the area that Hyperion seeks to serve. From the TRA's perspective, the goals of federal universal service might likewise be irreparably undermined.

Section 253(b) of the federal Telecommunications Act of 1996 provides:

(b) STATE REGULATORY AUTHORITY.-- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, **ensure the continued quality of telecommunications services, and safeguard the rights of consumers.** (Emphasis supplied.)

Tennessee law expressly provides to Tennessee consumers certain rights concerning the quality and affordability of their telephone service. Tenn. Code Ann. § 65-4-123 sets forth this express policy of the state as follows:

65-4-123. Declaration of telecommunications services policy.

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; **universal service shall be maintained;** and **rates charged to residential customers for essential telecommunications services shall remain affordable.** (Emphasis supplied.)

[Acts 1995, ch. 408, § 1.]

Section 65-4-123, was passed by the General Assembly into law as part of Public Chapter 408, the Tennessee telecommunications act of 1995. Public Chapter 408 also included Tenn. Code Ann. § 65-4-201(d). The Act intrinsically links together the introduction of competition, preservation of universal service, consumer safeguards and carrier of last resort obligations. The FCC's preemption of the consumer safeguards adopted by the Tennessee General Assembly in Section 65-4-201(d) impacts all phases of Tennessee's policy and severely jeopardizes Tennessee's transition to fair and reasonable local telecommunications competition.

**I. Preemption of Tenn. Code Ann. § 65-4-201(d) is not competitively neutral to Tennessee Rural Incumbent Carriers because these carriers have obligations under state and federal laws that are not imposed on new entrants.**

In refusing to acknowledge the applicability of section 253(b), the FCC specifically stated, at Paragraph 15, that “the lack of competitive neutrality renders the Tenn. Code Ann. § 65-4-201(d) and the Denial Order (the Authority's April 9, 1998 Order) ineligible for the protection of section 253(b).” The FCC explained its finding in this regard as follows:

...a state legal requirement would not as a general matter be “competitively neutral” if it favors incumbent LECs over new entrants (or vice versa). Neither the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market – new entrants – and not to all carriers in that market...[S]ection 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue.” Order, Paragraph 16.

As demonstrated in this petition, Federal preemption of Tenn. Code Ann. § 65-4-201(d), without appropriate universal service mechanisms in place, will cause unreasonable increase in rates above current, affordable levels for consumers of

Tennessee's rural telephone providers and place insurmountable burdens on rural carriers that are clearly not "competitively neutral."

The FCC Order does not address the impact on "competitive neutrality" in the rural areas of Tennessee in the absence of enforcement of Tenn. Code Ann. § 65-4-201(d). Tenn. Code Ann. § 65-4-201(d) is as much a protection in place for the rural residential customer as it is for the local incumbent service provider. Removing this enforcement mechanism means removing the protection of these affordable rates to rural residential customers. More important, if the new entrant is permitted, without restriction, to selectively target and service the few large industrial customers of the incumbent LEC without also servicing the rural residential customers, the incumbent LEC will not be able to continue to offer affordable rates to those remaining residential customers.

The incumbent rural telephone carrier is the only eligible telecommunications carrier in many areas of the state. Therefore, under Section 214(e)(4) the incumbent rural carrier has a carrier of last resort obligation that a new entrant does not.<sup>1</sup> Costs incurred to fulfill this obligation are costs unique to the incumbent that a new entrant will not incur. Hyperion has never requested certification as an eligible telecommunications carrier in Tennessee. This is clearly not competitively neutral to the incumbent rural provider.

Federal preemption of Tenn. Code Ann. § 65-4-201(d) is inconsistent with the Commission's previous interpretations of competitive neutrality, as outlined in the Preemption Order. Footnote 46 quotes the Commission's Telephone number Portability Third Report and Order<sup>2</sup>:

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<sup>1</sup> Section 214(e)(4) states that "A state commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier."

<sup>2</sup> Telephone Number Portability, Third Report and Order FCC 98-82, paragraph 53.

“a competitively neutral cost mechanism (1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return”

Also, Footnote 55 references another FCC finding on competitive neutrality:

“competitive neutrality means that universal service mechanisms and rules neither unfairly advantage nor disadvantage one provider over another.”<sup>3</sup>

The carrier of last resort obligations imposed on rural telephone companies in section 214(e)(4) imposes significant costs on rural carriers because much of their serving territories are in high cost areas providing potential competitors with distinctive “incremental cost advantages.” In addition, the State’s mechanism to allow carriers to rebalance rates to reflect the change in market conditions, Tenn. Code Ann. § 65-5-207(c), is tied to the implementation of the intrastate universal service fund.<sup>4</sup> Since rural carriers will not have the opportunity to rebalance rates to reflect changing market conditions until the intrastate high-cost fund is established, opening rural markets to competition as is being done through this Federal preemption clearly places the rural incumbents at a competitive disadvantage and violates the competitive neutrality requirements of section 253(b) and is inconsistent with the above interpretations of competitive neutrality as reflected in the FCC Order.

Rates of rural incumbents in Tennessee are regulated under the rate of return approach. Tennessee statutes require the Authority to establish rates that provide these carriers with the opportunity to earn a just and reasonable rate of return. Federal preemption of Tenn. Code Ann. § 65-4-201(a) will result in new entrants, who have no obligation to serve, taking away or driving down the rates of the largest customers with no

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<sup>3</sup> Accord Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Red 8776, 800 ( 47.

mechanism in place to preserve the lost revenues and maintain affordable rates for the remaining customers. The Authority will then have no choice but to allow irreparable increases to the remaining customers, perhaps to unaffordable levels in order to allow these rural carriers to earn a just and reasonable return on investment.

The Commission incorrectly interpreted the competitive neutrality provision of Section 253(b) in isolation without regard to other requirements of the act. Paragraph 18 of the FCC Order states:

That Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* are not competitively neutral suffices of itself to disqualify these requirements from the 253(b) exception. Therefore, we need not reach the question of whether Tenn. Code Ann. § 65-4-201(d) and the *Denial Order* are unnecessary, or inconsistent with section 254 within the meaning of section 253(b). We note, however, that, for the reasons we gave in response to similar arguments that were raised in our *Silver Star Preemption Order* decision, we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service. Moreover, by requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never “necessary” to preserve and advance universal service within the meaning of section 253(b).

Congress, however, adopted the telecommunications act in its entirety including consumer safeguards such as universal service mechanisms to preserve affordable telephone service. The Tennessee General Assembly has adopted similar safeguards in TCA §65-4-201(d). It is reasonable to conclude that in requiring competitive neutrality, Congress assumed that the universal service safeguards of Section 254 would be in place to preserve affordable telephone service. Such is not the case at this point in time.

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<sup>4</sup> Tenn. Code Ann. § 65-5-207 requires a rebalancing of rates at the time the intrastate universal service mechanism is established.

**II. SECTION 65-4-201(d) IS NECESSARY TO PRESERVE AND ADVANCE UNIVERSAL SERVICE, PROTECT THE PUBLIC SAFETY AND WELFARE, ENSURE THE CONTINUED QUALITY OF TELECOMMUNICATIONS SERVICES AND SAFEGUARD THE RIGHTS OF CONSUMERS WITHIN THE STATE OF TENNESSEE**

As the April 9, 1998 Order pointed out, the Tennessee General Assembly stated in its Preamble to the legislation at issue in this matter that: “It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market.” Further, the General Assembly stated that “Universally affordable basic telephone service should be preserved.” Thus, Tenn. Code Ann. § 65-4-201(d) clearly has a dual purpose of fostering competition and preserving universal service. It is also clear that federal lawmakers were concerned about the preservation of universal service when they enacted the Telecom Act because the language of Section 253(b) places a tremendous burden on the Act’s enforcer to ensure that universal service is not impaired.

In Tennessee, universal service could be substantially impaired if Tenn. Code Ann. § 65-4-201(d) is not upheld. Hyperion rejects this position of the TRA and argues that: “Nothing in the legislative history of § 65-4-201(d) supports the TRA’s assertions that the Tennessee General Assembly enacted the statute due to universal service concerns.”<sup>5</sup> Hyperion is simply mistaken. In its original comments filed on July 10, 1998, the Tennessee Authority pointed out that the legislative history of Tennessee’s Telecommunications Act makes clear that universal service was a critical factor in the enactment of Tennessee’s Telecommunications Act, of which Tenn. Code Ann. § 65-4-201(d) is a part.

Neither the FCC nor the Tennessee Regulatory Authority have implemented a universal service mechanism for rural carriers that reflects the changes in the marketplace

as required by Section 254 of the Act. The existing Federal high cost fund was created in a monopoly environment and is not sufficient to meet the requirements of Section 254 of the Act. In the absence of some other mechanism that would maintain the affordability of these rates to rural residential customers, the removal of the enforcement of Tenn. Code Ann. § 65-4-201(d) impairs the ability of the State of Tennessee to fulfill its obligation under Tenn. Code Ann. § 65-4-123 to assure that “universal service shall be maintained and rates charged to residential customers for essential telecommunications services shall remain affordable.”

In its First Report and Order in CC Docket 96-45, the Commission determined that “non-rural carriers would begin to receive high-cost support based on forward-looking costs on July 1, 1999, **but that the implementation of support based on forward-looking costs for rural carriers would be delayed at least until January 1, 2001**, pending further review by the Commission, the Joint Board, and a Joint Board appointed Rural Task Force.”<sup>6</sup> [Emphasis supplied]. The Commission later extended the implementation date for non-rural high cost support to January 1, 2000.<sup>7</sup>

Tennessee intrastate high-cost support cannot be calculated until the amount of federal support is determined. Therefore, a Tennessee, intrastate high cost fund has not been implemented.

Rural telephone companies in Tennessee generally rely on subsidies from a few large business customers to maintain affordable rates for all consumers, especially

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<sup>5</sup> Hyperion Petition at 13.

<sup>6</sup> *First Report and Order*, 12 FCC Rcd at 8910, para. 254, 8917-18, paras. 252-256.

<sup>7</sup> Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket 96-45. Released May 28, 1999.

residential consumers. This is plainly demonstrated by TDS's Tennessee operations.<sup>8</sup> Business customers in the areas served by TDS affiliates make up only 12 % of the TDS's total customer base, yet generate 46% of TDS's local revenues.<sup>9</sup>

The reliance of rural telephone companies on a few large business customers has been articulated by Commissioner Gloria Tristani in a recent speech to New Mexico State Regulatory Issues Conference. Commissioner Tristani said:

Actually, it's clear to me that rural telephone companies *are* different from large carriers. For instance, in rural areas, there are often just one or two businesses that are the principal buyers of telecommunications service. If the rural company loses one of those large customers to a competitor, that can have devastating consequences for the rural company. And those big customers are exactly the ones that competitors will target first. The FCC and state commissions need to be aware of how the loss of just one major customer can change the financial prospects for a rural carrier.

Another way that small rural carriers are different from the major LECs is their greater reliance on support mechanisms to keep their local rates low. That fact obviously derives from the kind of network needed to serve more dispersed populations. Thus a greater amount of support is needed to keep local rates affordable.”<sup>10</sup>

The Commission's preemption of Tenn. Code Ann. § 65-4-201(d) without the appropriate universal service mechanisms in place to keep local rates low, flies in the face of the policy advocated by Commissioner Tristani.

Further, the FCC's Order is in direct conflict with the Commission's universal service order issued subsequent to the preemption order. On May 28, 1999, the Commission released its *Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket 96-45*. In Paragraph 30 of that Order the FCC states that:

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<sup>8</sup> TDS affiliates in Tennessee include Tennessee Telephone, Concord Telephone, Tellico Telephone and Humphreys County Telephone.

<sup>9</sup> This information is based on the TRA, 3.01 Monthly Surveillance Reports

<sup>10</sup> Remarks of Commissioner Gloria Tristani before the New Mexico State University Regulatory Issues Conference, March 8, 1999.

We agree with the Joint Board that a central purpose of federal universal service support mechanisms is to enable rates in rural areas to remain reasonably comparable to rates in urban areas, and we adopt the Joint Board's interpretation of the reasonable comparability standard to refer to "a fair range of urban/rural rates both within a state's borders, and among states nationwide." This does not mean, of course, that rate levels in all states, or in every area of every state, must be the same. In particular, as the local exchange market becomes more competitive, it would be unreasonable to expect rate levels not to vary to reflect the varying costs of serving different areas. The Joint Board and the Commission have concluded that current rate levels are affordable. **Therefore, we interpret the goal of maintaining a "fair range" of rates to mean that support levels must be sufficient to prevent pressure from high costs and the development of competition from causing unreasonable increases in rates above current, affordable levels...**[Emphasis supplied]

Preempting Tenn. Code Ann. § 65-4-201(d) and allowing competitors access to the most profitable customers of rural carriers without appropriate universal service mechanisms in place, could unquestionably lead to “unreasonable increases in rates above current, affordable levels” for consumers of rural telephone companies in Tennessee.

Thus, it is in consideration of the language of Section 253(b) and the clear policy behind Tenn. Code Ann. § 65-4-201(d) that the TRA interpreted the provisions of Section 253 in such a way as to address its legitimate concern that competition was not legislatively intended to jeopardize universal service during the period of time that permanent universal service mechanisms were being considered in more rural areas of the state.

It is also important to note that the Tennessee General Assembly is required to review the state statute every two (2) years and would have a keen interest in both remedying any negative impact on universal service and ensuring that the benefits of competition are available to all Tennessee consumers.

**III. The FCC should reconsider its May 27, 1999 Order because it did not fully consider the unity of purpose behind the Federal Act and Tenn. Code Ann. § 65-4-201(d).**

In determining that preemption of the TRA's April 9, 1998 Order and Tenn. Code Ann. § 65-4-201(d) was required, the Commission relied strictly on Section 253(d) which provides

(d) PREEMPTION.-- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement **to the extent necessary to correct such violation or inconsistency.**(Emphasis supplied)

In analyzing whether a statute, regulation, or legal requirement should be preempted, the Commission must determine whether an actual conflict exists. The United States Supreme Court, in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 126, 94 S.Ct. 383, 389, 38 L.Ed.2d 348 (1973) held that examining the purpose behind potentially conflicting statutes must be a part of a preemption analysis.

[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile “the operation of both statutory schemes with one another rather than holding one completely ousted.” 414 U.S. at 127, 94 S.Ct. at 389-390, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

The Court further held that a state law should be preempted, ““only to the extent necessary to protect the achievement of the aims of the [federal act in question].”” *Merrill Lynch*, 414 U.S. at 127, 94 S.Ct. at 390, quoting *Silver*, 373 U.S. at 361, 83 S.Ct. at 1259.

The Sixth Circuit Court of Appeals has held:

In interpreting statutes, courts must not be guided by a single sentence or portion of a sentence, but must look to the provisions of the whole law, and to its object and policy. See *Kelly v. Robinson*, 479 U.S. at 43, 107 S.Ct. at 357-58. We are convinced that the district court reached its conclusion on the preemptive effect of subsection (i) on a reading of only a portion of the statutory language, instead of reading the language in context, thus violating Kelly's instruction on statutory interpretation. *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469,479 (6<sup>th</sup> Cir. 1997)

The FCC did not consider the purpose behind Tennessee's telecommunications act and how it coincides with the purpose behind the federal telecommunications act of 1996. Such a consideration would have clearly demonstrated to the Commission that the TRA's enforcement of Tenn. Code Ann. § 65-4-201(d) is "competitively neutral," "consistent with Section 254," and "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

#### **IV. CONCLUSION**

While 47 U.S.C. Section 253(a) prohibits certain state legislation that restricts a competing local exchange carrier from providing intrastate telecommunications services, Section 253(b) makes clear that Section 253(a)'s limitations do not apply in every instance. In its Order of April 9, 1998, the TRA found that the requirements under Tenn. Code Ann. § 65-4-201(d) were necessary to preserve universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Further, in determining that such statutory requirements are competitively neutral and consistent with section 254, the TRA's order falls within the protective scope of Section 253(b).

For the foregoing reasons, the TRA urges the Commission to reconsider and reverse its Order of May 27, 1999.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of June, 1999, the original of this Petition was filed electronically with the Federal Communications Commission and a true and exact copy of the foregoing has been either hand-delivered or delivered via U.S. Mail, postage pre-paid, to the following persons:

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