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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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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

**OPPOSITION OF AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P. TO THE
MOTION FOR STAY OF THE TENNESSEE REGULATORY AUTHORITY AND
REQUEST FOR SUMMARY DISMISSAL OF MOTION**

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") hereby submits this Opposition to the Motion for Stay of Enforcement of Order and Memorandum of the Tennessee Regulatory Authority ("TRA") in the above-captioned proceeding.

I. INTRODUCTION

On May 27, 1999, the Commission granted in large part Hyperion's petition for relief in this proceeding by preempting Tennessee Code § 65-4-201(d), which barred the entry of competitive carriers into the service areas of incumbent local exchange carriers in Tennessee that serve fewer than 100,000 access lines, and the order of the TRA to the extent that it denied Hyperion's application to provide service in the service area of Tennessee Telephone Company on the basis of Tenn. Code § 65-4-201(d).¹ On June 28, 1998 the TRA and TDS Telecommunications Corporation

¹ 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, Memorandum Opinion and Order, CC Docket No. 98-92,

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("TDS") filed separate Petitions for Reconsideration. Hyperion filed an opposition to TDS' Petition on July 8, 1999.² The TRA now seeks a stay of enforcement of the Commission's Order.³

II. THE TRA HAS NOT SATISFIED THE STANDARD FOR A MOTION FOR STAY

A. Standard of Law

The Commission applies a four-part test in consideration of motions for stay.⁴ To justify a stay, the TRA must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the absence of any substantial harm to other interested parties if the stay is granted, and (4) that public interest favors the stay.

B. The TRA Does Not Have Any Probability of Success on the Merits Because the Mandate of Section 253 is Clear and Because the Commission has Already Considered and Rejected the TRA's Arguments

The TRA asserts a reasonable probability that the Commission will grant its Petition for Reconsideration because it argues that the Commission should refrain from enforcing Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253, until it has implemented its intrastate mechanism for supporting high-cost rural carriers. The Commission rejected this argument in its Order, and it must reject it again by denying both the Motion for Stay and the Petitions for Reconsideration.

FCC 99-100 (rel. May 27, 1999) ("Order").

² Hyperion did not file an opposition to the TRA's Petition for Reconsideration because its counsel of record in this proceeding was not served with the Petition. However, Hyperion believes that its opposition to TDS' Petition for Reconsideration and this Opposition to the TRA's Motion for Stay, in conjunction with the Commission's Order, provide sufficient basis to reject the TRA's Petition for Reconsideration.

³ TRA states that if the Commission does not reverse the Order, it must "in the least clarify" its May 27 decision. Hyperion respectfully submits that it does not understand what clarification the TRA seeks.

⁴ See *Virginia Petroleum Jobbers Ass'n*, 259 F.2d 921, 925 (D.C. Cir.1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.1977).

The TRA made the same argument to the Commission one year ago in its initial comments, when the TRA defended Tenn. Code § 65-4-201(d) by arguing that the statute was needed to protect its universal service interests "during the period of time that permanent universal service mechanisms were being considered in more rural areas of the state."⁵ The Commission, recognizing that the plain language of Section 253 compels the result in this matter, concluded, "[t]hat 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."⁶

Significantly for the purposes of the instant motion, the Order then proceeded to specifically discredit the TRA's universal service argument, stating that, "we remain doubtful that it is necessary to exclude competing LECs from small, rural study areas in order to preserve universal service."⁷ In the corresponding footnote 50 of the Order, the Commission offered that other alternatives are available to states to protect universal service consistent with Section 253, and concluded that, "[i]n choosing less competitively restrictive means of protecting rural and small LECs . . . Congress revealed its intent to preclude states from imposing the far more restrictive protection of an absolute ban on competition."⁸

Hyperion shares the TRA's concern for universal service and the protection of the public interest. However, these important objectives cannot save the unlawful barrier to entry erected by

⁵ TRA Comments at 5.

⁶ Order at ¶ 18 (citations omitted).

⁷ Order at ¶ 18.

⁸ Order at footnote 50, citing *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order*, 12 FCC Rcd 15639, 15658-59, ¶¶ 43-44 (1997) ("*Silver Star Preemption Order*").

Tenn. Code § 65-4-201(d). Section 253 does not provide any exception for discriminatory measures designed to protect universal service. Furthermore, there is utterly no support for the TRA's assertion that Congress intended to delay application of Section 253 pending the implementation of the regulations and support for Section 254. It was plainly foreseeable when the Act was adopted that time would pass before Section 254 could be implemented. If Congress had intended to tie application of Section 253 to Section 254, it would have done so. Instead, Congress adopted other measures available to states for the protection of universal service, as discussed in Footnote 50 of the Order. Section 253 proscribes the erection of discriminatory barriers to entry by states, and requires that states address any of their concerns, including universal service concerns, on a competitively neutral basis.

Requests for stay may be warranted to delay implementation of regulations or legal interpretations that later may be deemed contrary to law on reconsideration or appeal. The TRA's motion, on the other hand, effectively requests the Commission to stay the law itself. Repeal of Section 253 is not within the scope of this proceeding. Therefore, the TRA has no probability of success on the merits in its Petition for Reconsideration or on appeal.

C. TRA Is Not Irreparably Harmed

The TRA argues that it will suffer irreparable harm because preemption of Tenn. Code § 65-4-201(d) would allegedly disrupt its plan for addressing universal service. However, a myriad of alternative options are available to the TRA in approaching this issue. The Commission has not ordered an end to the protection of universal service in Tennessee; it has merely confirmed that Section 253 prohibits the barrier to competition established by Tenn. Code § 65-4-201(d). The TRA has not established that its former solution of absolute exclusion of competitors is the *only* solution,

or even the preferable solution, to its universal service concerns.⁹ The TRA must now seek to develop new, lawful regulations to effectuate its universal service agenda, rather than arguing that it will suffer irreparable harm by the Commission's order to enforce the law and promote competition.

D. It is Beyond Dispute that Hyperion Will Suffer Substantial Harm From a Stay

The TRA's Motion states, without any supporting argument, that "Hyperion would not be harmed as a result of a stay."¹⁰ On that basis, the TRA seeks an order that would indefinitely preclude Hyperion from exercising its rights under the Telecommunications Act of 1996 to offer competitive telecommunications services in Tennessee markets which are important to its business plan. Hyperion has actively sought entry into the service territory of Tennessee Tel in Davidson County, Tennessee for several years. Hyperion's initial application for local exchange authority, which requested authority throughout Davidson County, was filed in 1994. Hyperion's request to serve Tennessee Tel's territory in Davidson County was ultimately rejected by the TRA's predecessor, the Tennessee Public Service Commission, on March 8, 1996. After the Commission's *Silver Star* decision declared such market exclusions to be in violation of Section 253 on September 24, 1997, Hyperion immediately renewed its attempt to enter the Tennessee Tel market by requesting TDS to initiate interconnection negotiations on October 13, 1997.¹¹ After its request was rejected,

⁹ The relief requested by the TRA would still violate § 253 even if the TRA did in fact establish this proposition.

¹⁰ TRA Motion for Stay at 5.

¹¹ The October 13, 1997 letter is attached to TDS' Comments at Appendix A.

Hyperion filed its Petition with the TRA for authority to provide service in the territory of Tennessee Tel on January 2, 1998. Denial of that application led to the instant proceeding.

The TRA now asks the Commission to lock Hyperion out of Tennessee Tel's market indefinitely despite the existence of clear, federal legislation and Commission orders prohibiting discriminatory barriers to market entry.¹² Grant of the TRA's motion would substantially harm Hyperion by perpetuating this unlawful barrier to entry.

E. A Stay is Not in the Public Interest

The TRA's Motion for a Stay must also be rejected because it would continue to deprive many Tennessee consumers of the benefits of the Telecommunications Act of 1996, which have been unlawfully withheld from them for more than three years. Competition offers consumers dynamic and innovative services at efficient prices. Congress intended all citizens to benefit from the Act, and the Commission should not delay application of the Act to all consumers in Tennessee. Therefore, grant of the motion to stay would not serve the public interest.

¹² The TRA suggests that it will not even begin to address universal service subsidies until after the implementation of federal support for high-cost rural carriers on or after January 1, 2001. TRA Motion for Stay at 3.

III. CONCLUSION

The TRA has failed to establish any of the four conditions necessary to justify a stay of the Commission's Order. Therefore, for the reasons stated herein, and for the reasons set forth in the Commission's prior order in this proceeding, the Commission should deny the TRA's Motion for Stay.

Respectfully submitted,

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Dated: July 20, 1999

CERTIFICATE OF SERVICE

I, Karen Biscoe, hereby certify that on July 20, 1999, true copies of the foregoing Opposition to the Motion for Stay of Enforcement of Order and Memorandum of the Tennessee Regulatory Authority, filed by AVR, L.P. d/b/a Hyperion of Tennessee, L.P. in CC Docket No. 98-92, have been served via first-class mail, or by hand delivery where indicated with an asterisk, to the parties identified below:

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