

**BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION**  
**Nashville, Tennessee**

March 8, 1996

**IN RE: THE APPLICATION OF ICG ACCESS SERVICES, INC.  
(FORMERLY TELEPORT-DENVER, INC.) FOR A CERTIFICATE  
OF CONVENIENCE AND NECESSITY TO PROVIDE  
INTRASTATE PRIVATE LINE AND TELECOMMUNICATIONS  
ACCESS SERVICE WITHIN THE STATE OF TENNESSEE.**

**Docket No. 93-07922**

**IN RE: THE APPLICATION OF MCI METRO ACCESS  
TRANSPORTATION SERVICES, INC. (FORMERLY KNOWN AS  
ACCESS TRANSMISSION SERVICES, INC.) FOR A  
CERTIFICATE OF CONVENIENCE AND NECESSITY TO  
PROVIDE INTRASTATE PRIVATE LINE SERVICES,  
TELECOMMUNICATIONS ACCESS SERVICES, SWITCHED  
LOCAL EXCHANGE SERVICES, AND CARRIER ACCESS  
SERVICES.**

**Docket No. 93-08793**

**IN RE: THE APPLICATION OF AVR, L.P. D/B/A HYPERION OF  
TENNESSEE. L.P. FOR A CERTIFICATE OF PUBLIC  
CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE  
POINT-TO-POINT AND TELECOMMUNICATIONS ACCESS  
SERVICE WITHIN THE STATE OF TENNESSEE.**

**Docket No. 94-00661**

**ORDER**

This matter is before the Tennessee Public Service Commission upon its  
own motion, having reserved the issues set forth below in the above dockets  
and having requested those issues be briefed.

The following attorneys appeared in the above said dockets and/or prepared briefs on the pertinent issues.

**APPEARANCES:**

JON HASTINGS, Attorney at Law, Boulton, Cummings, Conners & Berry, Suite 1600, 414 Union Street, Nashville, Tennessee 37219, appearing on behalf of MCI Metro Access Transmission Services, Inc.

MARTHA MCMILLIN, Attorney at Law, 780 Johnson Ferry Road, Suite 700, Atlanta, Georgia 30342, appearing on behalf of MCI Metro Access Transmission Services, Inc.

VAL SANFORD and JOHN KNOX WALKUP, Attorneys at Law, Gullett, Sanford, Robinson & Martin, P.O. Box 198888, Nashville, Tennessee 37219-8888, appearing on behalf of AVR, L.P., d/b/a Hyperion of Tennessee, L.P.

CHARLES HOWORTH, Attorney at Law, South Central Bell Telephone Company, 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300 appearing on behalf of South Central Bell Telephone Company.

JAMES HARRELSON and JACQUE SHAIA, Attorneys at Law, South Central Bell Telephone Company, 3535 Colonnade Parkway, Birmingham, Alabama 35203, appearing on behalf of South Central Bell Telephone Company.

JOHN KENNEDY, Attorney at Law, Metropolitan Government, Department of Law, Room 204, Metro Courthouse, Nashville, Tennessee 37201, appearing on behalf of the Metropolitan Government of Nashville and Davidson County.

T.G. PAPPAS and JOE WELBORN, Attorneys at Law, Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, appearing on behalf of Tennessee Telephone Company and United Telephone Company, and the Tennessee Telephone Association.

D. BILLYE SANDERS, Attorney at Law, Waller, Lansden, Dortch & Davis, 511 Union Street, Suite 2100, Nashville, Tennessee 37219, appearing on behalf of ICG Access Services, Inc., formerly Teleport Denver.

VINCENT WILLIAMS and DAVID YATES, Attorneys of the Consumer Advocate Division, Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243, appearing in the interest of Tennessee consumers.

JEANNE MORAN, General Utility Counsel, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505, appearing on behalf of the Commission Staff.

The Public Service Commission in granting ICG Access Services, Inc., MCI Metro Access Transportation Services, Inc., and AVR, L.P. d/b/a Hyperion of Tennessee, L.P. certificates of convenience and necessity, reserved two issues for further consideration:

1. THE COMPETITION ISSUE: Whether certificate holders should be allowed to automatically serve the territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee, when statutory conditions under which competition in these areas would be permitted were met, or whether application for specified authorization to serve these areas would be required.
2. THE FRANCHISE ISSUE: Whether the Commission has the power to impose conditions upon franchise approvals.

### **THE COMPETITION ISSUE**

On June 6, 1995, the Tennessee Legislature enacted Chapter 408 of the Public Acts of 1995, substantially altering Tennessee Code Annotated Title 65, Chapter 4, Parts 1 and 2, and Chapter 5, Part 2, regarding the regulation of telecommunications service providers by the Public Service Commission. Specifically, T.C.A. §65-4-201 was amended as follows:

- b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or

provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Commission a certificate of convenience and necessity for such service or territory; provided, however that no Telecommunications Services Provider offering and providing a Telecommunications Service under the authority of the Commission on the effective date of this act shall be required to obtain additional authority in order to continue to offer and provide such Telecommunications Services as it offers and provides as of such effective date.

- c) After notice to the Incumbent Local Exchange Telephone Company and other interested parties and following a hearing, the Commission shall grant a certificate of convenience and necessity to a Competing Telecommunications Service Provider if after examining the evidence presented, the Commission finds:
  - (i) The applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and
  - (ii) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.
- d) Subsection (c) shall not be applicable to areas served by an Incumbent Local Exchange Telephone Company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider or unless such Incumbent Local Exchange Telephone Company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

Subsection (d) clearly restricts the authority of the Public Service Commission to grant a certificate to a Competing Telecommunications Service Provider to serve an area already served by a small Incumbent Local Exchange Telephone Company unless one of two conditions are met:

- 1) the incumbent local exchange company voluntarily entered into an interconnection agreement with a competing telecommunications service provider; or
- 2) the incumbent local exchange company applied for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of the legislation.

Chapter 408 declares that those areas should be protected from competition until the incumbent LEC either "...voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider" or the incumbent LEC "...applies for a certificate to provide telecommunications services in an area outside its service area."

In other words, should a small incumbent carrier voluntarily elect to enter into telecommunications competition, Competing Telecommunications Service Providers may provide service in that carrier's territory. There should be no dispute over whether an incumbent LEC has opened the door to competition. The LEC has either entered into an interconnection agreement with a competing carrier or it has not. Similarly, the small carrier either has applied for a certificate in an area outside its service area or it has not. Should either of these two events occur, a Competing Telecommunications Service Provider could file a revised tariff to provide service in the incumbent's territory without having to apply to the Public Service Commission for an amended certificate and without the necessity of a hearing. The necessity for a hearing would be inefficient and wasteful of both the Commission's and the carrier's resources.

Competing Telecommunications Service Providers should be required to file revised tariffs whenever entrance into new service territory is contemplated. The amended tariff should explain whether the incumbent LEC has signed an interconnection agreement or applied to serve other areas. Should the incumbent LEC dispute the tariff, it could file an objection and request a hearing before the Public Service Commission.

### **THE FRANCHISE ISSUE**

The last issue reserved for determination is whether the Tennessee Public Service Commission has the power to impose conditions upon franchise approvals. T.C.A. §65-4-107 is set forth below:

**65-4-107. Approval of privilege or franchise.** — No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by the commission, such approval to be given when, after hearing, the commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the commission shall have the power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require; provided, that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a certificate of convenience from the commission for such purpose. [Emphasis added].

The statute is unequivocal and states that certain conditions may be imposed upon franchises by the Public Service Commission. The Commission may impose conditions that relate to construction, equipment, maintenance,

service or operation as long as such conditions are reasonably in the public interest.

**WHEREFORE**, having considered the briefs and the statutory criteria, the Commission finds that certificate holders of statewide authority need not file a new application with the Commission to serve territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee when statutory conditions under which competition in these areas would be permitted are met. The Commission also finds it has the power to impose certain conditions upon franchise approvals.

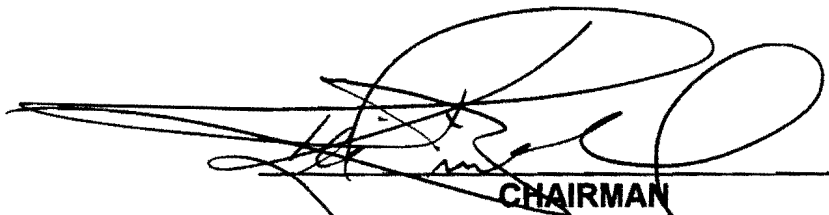
**IT IS THEREFORE ORDERED:**

1. That certificate holders of statewide authority need not file new applications with the Tennessee Public Service Commission to serve territories reserved for incumbent local exchange telephone companies having fewer than 100,000 access lines in Tennessee when statutory conditions under which competition in these areas would be permitted are met.

2. That the Tennessee Public Service Commission has the power to impose conditions relating to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require.

3. That any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this Order.

4. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

  
CHAIRMAN  
COMMISSIONER  
COMMISSIONER

ATTEST:



EXECUTIVE DIRECTOR