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EXECUTIVE SECRETARY
OFFICE OF THE
EXECUTIVE SECRETARY

REC'D TN
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January 2, 1998

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

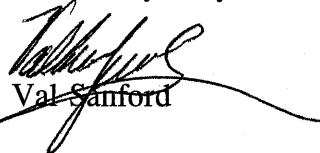
Re: *AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*

Dear Mr. Waddell:

Enclosed for filing are the original and thirteen copies of the Application of AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to extend its territorial area of operations to include the areas currently served by Tennessee Telephone Company, along with our check in the amount of \$25.00 in payment of the filing fee.

Copies are being served on Tennessee Telephone Company.

Yours very truly,


Val Sanford

VS/ghc

Enclosure

cc: Bruce Mottern
T. G. Pappas, Esq.
L. Vincent Williams, Esq.
Robert C. Wiegand, Esq.
Dana Frix, Esq.
Kemal Hawa, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re:

AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application For a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company

Docket No:

98-00001

APPLICATION

REC'D IN
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OFFICE OF THE
EXECUTIVE SECRETARY

AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, and pursuant to TENN. CODE ANN. § 65-4-201(b), hereby requests a Certificate of Public Convenience and Necessity to extend its territorial area of operations to include the areas currently served by Tennessee Telephone Company.

I. Summary of Requests

- 1) Hyperion requests an extension of its Certificate of Public Convenience and Necessity to provide service in the service area of Tennessee Telephone Company.
- 2) As discussed below, federal law, including recent FCC precedent, makes it clear that any state statute precluding competition in a particular territory is preempted; and therefore, Hyperion cannot be precluded from providing a competitive service in the territory served by Tennessee Telephone Company.
- 3) Hyperion expects that Tennessee Telephone Company will comply with its obligations set forth in Sections 251(a) and 251(b) of the Telecommunications Act of 1996.
- 4) By this application, and at this time, Hyperion is not requesting that Tennessee Telephone Company offer Hyperion the heightened obligations set forth in Section 251(c) ("1996 Act").

II. Background

On August 24, 1995, the Tennessee Public Service Commission ("TPSC") granted Hyperion a Certificate of Public Convenience and Necessity to provide telecommunications services throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state.¹ In granting this certificate, the TPSC specifically found that Hyperion possesses the requisite technical, managerial, and financial qualifications to render local exchange telecommunications services throughout the state of Tennessee, and met the requirements of T.C.A. §65-4-201. However, constrained by statutory limitations, the TPSC granted Hyperion a certificate to compete only in those areas of Tennessee which are currently served by entities that have 100,000 or greater access lines in this state. As these statutory limitations are no longer applicable to Hyperion under existing law, Hyperion hereby requests authority to provide service in the areas within Tennessee currently served by Tennessee Telephone Company.

Tennessee Telephone Company is a wholly owned subsidiary of TDS Telecommunications Corporation ("TDS Telecom"), which in turn is a wholly owned subsidiary of Telephone & Data Systems, Inc., a publicly traded corporation having annual revenues in

¹ *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*, Order, Docket No. 94-00661, dated August 24, 1995 ("Hyperion Certification Order", copy is attached as Exhibit 1). In that order the TPSC reserved the question as to whether Hyperion would be authorized to serve that part of Davidson County served by Tennessee Telephone Company and United Telephone Company. Subsequently, on March 8, 1996, the TPSC entered an order holding that T.C.A. §65-4-201 restricts its authority to grant a certificate to a competing telecommunications service provider to serve an area served by an incumbent local exchange telephone company under the conditions specified in the statute; (copy of TPSC Order attached as Exhibit "2").

excess of \$1 billion. TDS Telecom operates 105 telephone companies which serve approximately 493,000 access lines in 28 states, including Concord, Humphreys County, Tellico and Tennessee Telephone Companies, serving approximately 67, 331 residential and 19,478 business customers. Tennessee Telephone Company operates in Tennessee as an incumbent local exchange telephone company with exchanges located at LaVergne, Mt. Juliet, Clifton, Cornersville, Darden, Lobelville, Sardis, Collinwood, Decaturville, Linden, Scotts Hill and Bruceton. It provides service to approximately 45,121 residential and 11,665 business customers.

III. Tennessee Law

On June 6, 1995, prior to the enactment of the 1996 Act,² the Tennessee Legislature enacted Chapter 408 of the Public Acts of 1995. Specifically, the Tennessee Legislature amended Section 65-4-201, to provide that

(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 Tennessee Regulatory Authority a certificate of convenience and necessity for such service or territory...

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

² See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et. seq.*) ("1996 Act").

(d) Subsection (c) is not 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.

Constrained by Section 65-4-201, the TPSC authorized Hyperion to compete only in those areas of Tennessee currently served by entities that have 100,000 or greater access lines. According to the TPSC, "should an incumbent carrier voluntarily elect to enter into telecommunications competition, Competing Telecommunications Service Providers may provide service in that carrier's territory."³ More specifically, the Order stated that:

should a small incumbent carrier 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.

On October 13, 1997, Hyperion formally requested that Tennessee Telephone Company engage in interconnection negotiations with Hyperion for Hyperion's provisioning of telecommunications services in Tennessee Telephone Company's service territory. Tennessee Telephone Company refused Hyperion's interconnection request, stating only that Hyperion's Certificate of Public Convenience and Necessity does not permit Hyperion to provide telecommunications services in Tennessee Telephone Company's service area. In addition, Hyperion has been unable to successfully negotiate a mutual traffic exchange agreement with

³ Hyperion Certification Order at 5.

Tennessee Telephone Company.

IV. The FCC's Silver Star Decision

On September 24, 1997, the Federal Communications Commission ("FCC") issued its *Silver Star*⁴ decision, in which the FCC preempted a provision of the Wyoming Telecommunications Act of 1995 ("Wyoming Act") that empowers certain incumbent LECs to prevent competitors from receiving a certificate of public convenience and necessity to provide service in their territory. In *Silver Star*, the FCC also preempted an order of the Wyoming Public Service Commission ("Wyoming PSC") enforcing the provision of the Wyoming Act.

Factual Background. Silver Star is an incumbent LEC certificated to provide local exchange service in western Wyoming. Silver Star applied to the Wyoming PSC to become certificated to provide local exchange service in nearby Afton, Wyoming. The incumbent LEC serving Afton opposed Silver Star's application. The Wyoming PSC denied Silver Star's application, relying exclusively on a provision in the Wyoming Act which provides that

Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall, after notice and opportunity for hearing, issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if, the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which certification is sought and the incumbent local exchange service provider: (i) Consents to a concurrent certificate; or (ii) Is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought; or (iii) Fails to protest the application for the certificate after notice and opportunity for hearing; or (iv) Has applied for and received a concurrent certificate to provide competitive local

⁴ *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 (Sep. 24, 1996) ("*Silver Star*"), Copy attached as Exhibit 3.

exchange telecommunications services in any area of this state.⁵

Silver Star petitioned the FCC to preempt this provision of the Wyoming Act, and the Wyoming PSC's order denying its certification application (the "*Denial Order*"). Pursuant to its statutory authority under Section 253(d) of the 1996 Act, the FCC preempted both. In keeping with the direction of Section 253(d) to preempt only "to the extent necessary," the FCC did not order the Wyoming PSC to grant Silver Star's certification application. However, the FCC stated that it "expect[s] that the Wyoming Commission will promptly respond to any request by Silver Star to reconsider Silver Star's application for a concurrent CPCN to serve the Afton exchange consistent with the Communications Act and our decision to preempt the enforcement of the *Denial Order* and the Wyoming Act's rural incumbent protection provision."⁶

The FCC's Rationale. In assessing whether to preempt the Denial Order and the incumbent protection provision of the Wyoming Act, the FCC first considered Section 253(a) of the 1996 Act, which provides that

No state or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

In holding that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC noted that "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."⁷ An absolute prohibition on competitive entry "is precisely the type of action

⁵ WYO. STAT. ANN. § 37-15-201(c) (1995) (emphasis added).

⁶ *Silver Star* at ¶ 47.

⁷ *Silver Star* at ¶ 38.

Congress intended to proscribe under Section 253(a).”⁸

Having determined that the incumbent protection provision of the Wyoming Act violates Section 253(a), the FCC next examined whether the provision falls within Section 253(b)’s exception to Section 253(a)’s proscriptions. The FCC noted that “Section 253(b) preserves a State’s authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) ‘competitively neutral’; (ii) consistent with the Act’s universal service provisions; and (iii) ‘necessary’ to accomplish certain enumerated public interest goals.”⁹ The FCC found “that the rural incumbent protection provision is not competitively neutral...the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry.”¹⁰

V. Subsequent State Action

On October 1, 1997, the State of Vermont Department of Public Service (the “Vermont DPS”) issued its recommended decision that the Vermont Public Service Board (the “Vermont Board”) repeal its existing incumbent protection policy, since the policy is invalid under the *Silver Star* precedent.¹¹

Vermont’s incumbent protection provision prohibited Hyperion from competing in the

⁸ *Silver Star* at ¶ 39.

⁹ *Silver Star* at ¶ 40.

¹⁰ *Silver Star* at ¶ 42.

¹¹ Letter from Sheldon M. Katz, Special Counsel, *The Vermont Department of Public Service*, to Frederick W. Weston, Hearing Officer, *The Vermont Public Service Board* (Oct. 1, 1997) (on file with the Vermont Public Service Board) (“Vermont DPS Letter”). A copy of this Resolution is attached as Exhibit 4.

service area of a Vermont rural telephone company until one year after Hyperion provides notice of its intention to compete in such areas. In granting a Certificate of Public Good¹² to Hyperion in 1997, the Vermont Board conditioned Hyperion's certificate on compliance with Vermont's incumbent protection provision. In its recommendation to the Vermont Board, the Vermont DPS stated that "*Silver Star* holds that absolute prohibitions on new entry into areas of a state served by rural telephone companies ("RTCs"), such as the current prohibition placed on Hyperion barring its entry into areas served by Vermont RTCs until one year after it provides notice of its intent to do so, violate the federal Telecommunications Act of 1996."¹³ Furthermore, the Vermont DPS stated that the issue

is not only whether the current prohibition on Hyperion's certificate should be removed but whether the Board should refrain from placing similar prohibitions on the certificates issued to other new entrants. *Silver Star* resoundingly answers that question in the affirmative. The Board should therefore refrain from prohibiting or delaying competition by new entrants in RTC service areas.¹⁴

VI. Specific Obligations Under the 1996 Act of Concurrently Certificated Carriers

Section 251(a) of the 1996 Act states that each telecommunications carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," and the duty "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established" by the 1996 Act.¹⁵ Section 251(b) provides for the following:

¹² The equivalent of a Certificate of Public Convenience and Necessity in Tennessee.

¹³ Vermont DPS Letter at 2.

¹⁴ Vermont DPS Letter at 4-5.

¹⁵ 47 U.S.C. § 251(a) (1996) (emphasis added).

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.--Each local exchange carrier has the following duties:

(1) RESALE.--The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY.--The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY.--The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF WAY.--The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION.--The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The plain language of Section 251(a) imposes a general duty on "each telecommunications carrier," and Section 251(b) imposes an obligation on "each local exchange carrier." Thus, both Hyperion and Tennessee Telephone Company have the obligation to provide each other with interconnection, resale, number portability, dialing parity, and access to rights-of-way.

VII. The Rural LEC Exemption

Silver Star makes clear that Section 251(f) of the 1996 Act was designed only to provide small or rural incumbent LECs with certain relief from the requirements of Section 251(c). Specifically, 251(f) states that

(f) EXEMPTIONS FOR CERTAIN RURAL TELEPHONE COMPANIES.--

(A) EXEMPTION.--Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State Commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254....

Hyperion is requesting certification, not interconnection under Section 251(c). By this application, and at this time, Hyperion is not requesting that the TRA terminate any small or rural

LEC exemption that Tennessee Telephone Company may claim. Rather, Hyperion is merely requesting that its existing Certificate of Public Convenience and Necessity be extended to allow Hyperion to compete in the service area of Tennessee Telephone Company, in accordance with the current state of the law. To the extent that the rural LEC exemption is applicable (which Hyperion does not concede), only Tennessee Telephone Company's obligations to provide certain services or facilities would be implicated, but would in no way have any impact on the TRA's obligation to allow Hyperion to provide service. Obviously, both Hyperion and Tennessee Telephone Company will be required to comply with the obligations set forth in Sections 251(a) (which applies to all telecommunications carriers) and 251(b) (which applies to all local exchange carriers).

At this time, however, Hyperion is not requesting that Tennessee Telephone Company be required to comply with the obligations of incumbent local exchange carriers set forth in Section 251(c). More specifically, Hyperion is not requesting that Tennessee Telephone Company provide Hyperion with the heightened interconnection requirements of Section 251(c)(2), or that Tennessee Telephone Company make available to Hyperion unbundled access to Tennessee Telephone Company's network elements, as described in Section 251(c)(3). Furthermore, Hyperion is not requesting that the TRA require Tennessee Telephone Company, under Section 251(c)(4), to offer for resale at wholesale rates Tennessee Telephone Company's retail services, or that Hyperion be allowed to collocate facilities on Tennessee Telephone Company's premises, as discussed in Section 251(c)(6). As stated previously, Hyperion is merely requesting that it be authorized to provide service in Tennessee Telephone Company's service area, and that both parties be bound by the obligations of Section 251(a) and 251(b).

VIII. Public Interest Considerations

The Tennessee Legislature, in its declaration of telecommunications services policy stated

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.¹⁶

Grant of this Application will further the goals of the Tennessee Legislature and further the public interest by expanding the availability of competitive telecommunications services in the State of Tennessee. In addition, intrastate offering of these services is in the public interest because the services will provide Tennessee customers with access to new technologies and service choices and can permit customers to achieve increased efficiencies and cost savings. Extension of Hyperion's existing authority to provide local exchange telecommunications services will enhance materially the telecommunications infrastructure in the State of Tennessee and will facilitate economic development.

In particular, the public will benefit both directly, through the use of the competitive services to be offered by Hyperion, and indirectly because the presence of Hyperion in Tennessee Telephone Company's service area will increase the incentives for other telecommunications providers to operate more efficiently, offer more innovative services, reduce

¹⁶ TENN. CODE ANN. § 65-4-123.

their prices, and improve their quality of service. Grant of this Application will enhance further the service options available to Tennessee citizens for the reasons set forth above.

IX. Conclusion

Hyperion's existing Certificate of Public Convenience and Necessity states that in the event that a small or rural LEC voluntarily opens the door to competition, "Hyperion could file a revised tariff to provide service in the incumbent's territory without having to apply to the [TRA] for an amended certificate and without the necessity of a hearing. The necessity for a hearing would be inefficient and wasteful of both the [TRA's] and the carrier's resources."¹⁷ Since Tennessee Telephone Company has not voluntarily agreed to allow Hyperion to compete in its service territory, this precondition has not been met, thus the need for Hyperion to formally file this Application for an extension of its certificate to provide service in Tennessee Telephone Company's service area. Furthermore, as discussed in this Application, Hyperion requests, at this time, that Tennessee Telephone Company and Hyperion comply only with the obligations set forth in Sections 251(a) and 251(b) of the 1996 Act, and does not request that be required to comply with the additional obligations of incumbent local exchange carriers set forth in Section 251(c).

For the foregoing reasons, AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P., hereby requests that the Tennessee Regulatory Authority grant an extension of Hyperion's Certificate of Public Convenience and Necessity, and enter an order authorizing Hyperion to compete in the service territory of Tennessee Telephone Company, in furtherance of federal and Tennessee law.

¹⁷ Hyperion Certification Order at 5.




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

CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a true and exact copy of the foregoing Application of AVR of Tennessee, L.P. d/b/a Hyperion has been served via First Class Mail, postage prepaid, this 2nd day of January, 1998, as follows.



Val Sanford

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93-1402

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

August 24, 1995

IN RE: 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 SERVICES WITHIN DAVIDSON, WILLIAMSON, MAURY, RUTHERFORD, WILSON, AND SUMNER COUNTIES, TENNESSEE

DOCKET NO. 94-00661

ORDER

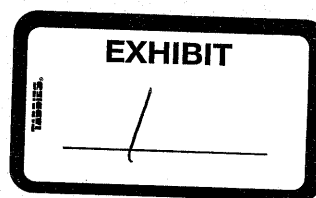
This matter is before the Tennessee Public Service Commission upon the original and the Amended and Supplemental Applications of AVR, L.P., d/b/a Hyperion of Tennessee, L.P. (here "Hyperion") for the following:

(i) Approval of Hyperion's franchise granted by the Metropolitan Government of Nashville and Davidson County;

(ii) Recognition that pursuant to T.C.A. § 65-4-207, as amended by Section 6 of Chapter 408 of the Public Acts of 1995, and the other provisions of that Act, Hyperion will, on the approval of its franchise, be authorized to provide the telecommunications services authorized by its franchise throughout Davidson County;

(iii) The granting of a certificate of convenience and necessity to Hyperion to provide telecommunications services in territories served by BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company in Williamson, Rutherford, Wilson, Sumner, Robertson, Cheatham, and Maury Counties and the various municipalities within those counties;

(iv) The granting of a certificate of convenience and necessity to provide telecommunications services in those parts of Williamson, Rutherford, and Wilson Counties, and the municipalities within those counties, served by United Telephone and Tennessee Telephone Company;



(v) In the alternative, if the Commission should decide for any reason that a certificate is required in Davidson County, or that any other authority is required in order for Hyperion to provide telecommunications services in Davidson and the other counties herein applied for, including the municipalities located therein, the Commission should grant to Hyperion such a certificate or such other authority; and

(vi) In the further alternative, if the Commission determines that it has the power to grant statewide certificates to provide local exchange services in all territories within its jurisdiction, with the specific telecommunications services to specific territories within this state to be designated by tariff filings, then the Commission should grant Hyperion such a statewide certificate.

This matter was set for hearing and heard on June 27, 1995 before Chairman Keith Bissell, Commissioner Steve Hewlett and Commissioner Sara Kyle. At that time the following appearances were entered.

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

CHARLES HOWORTH, Attorney, South Central Bell Telephone Company, 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300; and JAMES HARRELSON and JACQUE SHAIA, Attorneys, South Central Bell Telephone Company, 3535 Colonnade Parkway, Birmingham, Alabama 35203; appearing for South Central Bell Telephone Company

JOHN KENNEDY, Attorney, 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, 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;

JON HASTINGS, Boulton, Cummings, Conners & Berry, Suite 1600, 414 Union Street, Nashville, Tennessee 37219, and MARTHA McMILLIN, MCI Telecommunications, 780 Johnson Ferry Road, Suite 700, Atlanta, Georgia 30342, Attorney, appearing for MCI Metro Access Transmission Services, Inc.;

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

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

JEANNE MORAN, General Utility Counsel, Tennessee Public Service Commission.

At the hearing, Hyperion withdrew that part of its Application seeking a certificate in those parts of Williamson, Rutherford, and Wilson Counties, and the municipalities therein, served by United Telephone Company and Tennessee Telephone Company; and excluded from its Application for statewide authority those territories served by incumbent local exchange telephone companies having fewer than 100,000 total access lines in this state. Hyperion further stated for the record that it was not seeking authority to serve in territories served by telephone cooperatives.

Upon the conclusion of the proof in this case, the Commission approved the franchise granted to Hyperion by the Metropolitan Government of Nashville and Davidson County, recognizing that under the governing statute, Davidson County, by virtue of its adoption of an ordinance prior to the effective date of Chapter 408 of the Public Acts of 1995 declaring the necessity for competition in that county, was excluded from Part 2 of Chapter 4 of Title 65, T.C.A. The Commission, however, in approving Hyperion's franchise, reserved for further consideration issues as to whether it could or should impose a condition on that franchise approval, excluding the territories in Davidson County served by Tennessee Telephone Company and United Telephone Company from that franchise. The Commission further granted a certificate of convenience and necessity to Hyperion to provide telecommunications services in territories served by BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company,

in Williamson, Rutherford, Wilson, Sumner, Robertson, Cheatham, and Maury Counties; and granted a certificate of convenience and necessity to Hyperion to provide telecommunications services throughout Tennessee, except in those territories served by an incumbent local exchange telephone company having fewer than 100,000 access lines in this state.

FINDINGS OF FACT

The Commission finds, on the basis of the statement of counsel in the record and the certificate of service appended to the original and Supplemental Application of Hyperion, that notice was served on all incumbent local exchange telephone companies authorized to do business in Tennessee and on other interested parties, as required by T.C.A. § 65-4-201 as amended by Section 7 of Chapter 408 of the Public Acts of 1995.

The Commission admitted into evidence the original and the Amended and Supplemental Applications of Hyperion, including the exhibits thereto.

The only witness testifying in this matter was Billy R. Wiginton, Director, Regulatory Affairs, for Hyperion Telecommunications, Inc.

From the evidence in the record, the Commission finds that:

1. AVR, L.P., d/b/a Hyperion of Tennessee, L.P., is a limited partnership, organized under the laws of California, and qualified to do business in Tennessee. Its general partners are Viacom Telecom, Inc., a subsidiary of Viacom, Inc.; and Hyperion Telecommunications of Tennessee, Inc., a subsidiary of Hyperion Telecommunications, Inc., which is a subsidiary of Adelphia Cable Communications Corp. Its limited partner is Robin Media Group, Inc., which is a subsidiary of Intermedia Partners.

2. Viacom, Inc., Adelphia Cable Communications Corp. and Intermedia Partners are each one of the larger cable operators in the United States. Viacom

operates the cable TV system serving Davidson County, Tennessee, and Robin Media Group, Inc. conducts cable TV operations in several areas in Middle and East Tennessee.

3. The partnership is governed by a management committee composed of representatives of each of the partners. Management services, such as network monitoring, engineering, marketing support, billing, and accounting are performed by Hyperion. The day-to-day activities, such as local sales, installation, and maintenance, are conducted by partnership employees located at the offices of Hyperion in Nashville, Tennessee.

4. The management of Hyperion is composed of persons having broad experience in the operations of telecommunications companies, from both a managerial and technical perspective.

5. Initially, Hyperion proposes to offer access service and private line services that will provide a dedicated connection between customer locations for the transmission of voice, data, and video services. These services may be within an exchange, between exchanges, or connections from a customer to an interexchange carrier that, in turn, would carry traffic within or cross-LATA boundaries. As regulatory and market conditions permit and justify, Hyperion will increase its service offerings until it provides the full range of local exchange telecommunications services, both business and residential, and basic and non-basic throughout the territory in which it is authorized to serve.

6. The witness Wiginton explained in some detail the technical aspects of the facilities and services Hyperion proposes to utilize and offer; and those facilities and services are in keeping with the provision of high quality service to Tennessee customers.

7. Hyperion filed an illustrative tariff as an exhibit to its original Application. Hyperion is familiar with the tariff filing process in other jurisdictions where its affiliates operate; and Hyperion proposes to file tariffs in Tennessee consistent with Commission policies and rules.

8. The management personnel of Hyperion are familiar with conducting operations under the regulatory authority of agencies such as this Commission; and recognize the necessity of compliance with the rules, policies, and orders of regulatory authorities. Witness Wiginton stated Hyperion's intent to observe the rules, policies, and orders of this Commission.

9. Hyperion of Tennessee had total assets in excess of \$4 Million as of April 30, 1995, as reflected in its balance sheet. It is financed through equity investments of its partners, who have the financial capability to provide assurance of financial support for the operations Hyperion proposes to render.

10. With respect to the aspect of its application seeking approval of its franchise, Hyperion proposes to bring to the telecommunications market in Nashville and Davidson County the efficient, technologically advanced system of telecommunications services envisioned by the declaration of policy stated in Chapter 408 of the Public Acts of 1995, including high quality transmission, security, a broad range of services, diversity, reliability, and responsive service. The Metropolitan Government of Nashville and Davidson County supported the approval of Hyperion's franchise.

11. Hyperion plans to begin its operations in Nashville and Davidson County and as soon as developments permit, expand its services there and into the other counties which are part of that single economic market; and then as developments permit, to expand its services into other areas of the state.

12. Hyperion has the managerial, technical and financial abilities to provide the services for which it has applied. No evidence was introduced to the contrary.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact, and after reviewing all the evidence presented in this matter, the Commission concludes that:

1. The approval of the franchise granted to Hyperion by the Metropolitan Government of Nashville and Davidson County is necessary and proper for the public convenience and properly conserves the public interest; but the Commission reserves the question as to whether it can or should impose a condition on such approval as to the territorial areas within Davidson County served by Tennessee Telephone Company and United Telephone Company. On such approval, Hyperion will be authorized to provide telecommunications services in Nashville and Davidson County, subject to the issues reserved, and will be fully subject to regulation by this Commission as any other telecommunications service provider.

2. Hyperion has demonstrated that it will adhere to all applicable Commission policies, rules, and orders.

3. Hyperion possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

COMMISSION DECISION

On the basis of the foregoing findings of fact and conclusions of law, the Commission decides and determines that:

1. The franchise granted to Hyperion by the Metropolitan Government of Nashville and Davidson County should be and is approved; subject to the reservation of the question as to whether the Commission can or should impose a

condition on such approval as to the territorial areas within Davidson County served by Tennessee Telephone Company and United Telephone Company.

2. The approval of its franchise authorizes Hyperion to provide telecommunications services in Davidson County without the granting of a certificate of convenience and necessity. The operations of Hyperion within Davidson County are as fully subject to the regulatory authority of this Commission as those of any other telecommunications service provider.

3. The parties shall submit briefs as to the reserved issues by Thursday, July 20, 1995; and the Commission will decide those issues on the basis of the record in this matter without further hearing.

4. A certificate of convenience and necessity should be granted to Hyperion to provide telecommunications services in territories served by BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company, in Williamson, Rutherford, Wilson Sumner, Robertson, Cheatham, and Maury Counties.

5. A certificate of convenience and necessity should be granted to Hyperion to provide telecommunications services throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state.

6. Nothing in this Order should be construed as granting authority to provide telecommunications services in any area served by a telephone cooperative.

IT IS, THEREFORE, ORDERED that:

1. The franchise granted to AVR, L.P., d/b/a Hyperion of Tennessee, L.P., by the Metropolitan Government of Nashville and Davidson County is hereby approved; but the Commission reserves the question as to whether it can or should

impose a condition on such approval as to the territorial areas within Davidson County served by Tennessee Telephone Company and United Telephone Company.

2. The approval of its franchise authorizes Hyperion to provide telecommunications services in Davidson County without the granting of a certificate of convenience and necessity. The operations of Hyperion within Davidson County are as fully subject to the regulatory authority of this Commission as those of any other telecommunications service provider.

3. The parties in this matter shall submit briefs as to the reserved issues by Thursday, July 20, 1995; and the Commission will decide those issues on the basis of the record in this matter without further hearing.

4. A certificate of convenience and necessity is granted to Hyperion to provide telecommunications services as a Competing Telecommunications Provider in territories served by BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company in Williamson, Rutherford, Wilson, Sumner, Robertson, Cheatham, and Maury Counties.

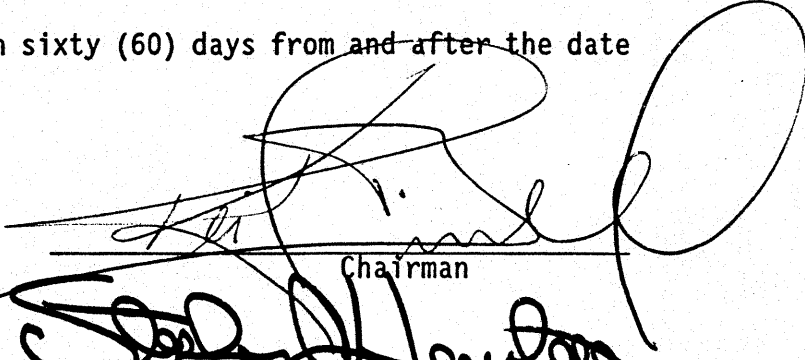
5. A certificate of convenience and necessity is granted to Hyperion to provide telecommunications services as a Competing Telecommunications Provider throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state.

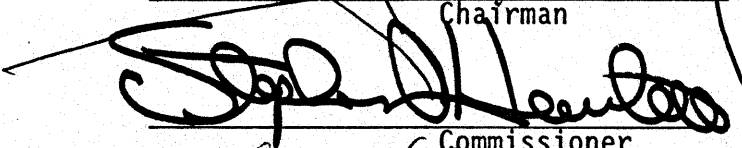
6. Nothing in this Order shall be construed as granting authority to provide telecommunications services in any area served by a telephone cooperative.

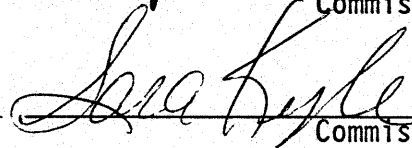
7. AVR, L.P., d/b/a Hyperion of Tennessee, L.P., may commence service pursuant to this Order when it has filed proper tariffs for services to be offered and is otherwise in compliance with all applicable Commission rules and regulations.

8. Any party aggrieved with the Commission's decision in this matter may file a petition to reconsider with the Commission within ten (10) days from and after the date of this Order.

9. Any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing 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

Citation
1997 WL 591969 (F.C.C.)

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

IN THE MATTER OF **SILVER STAR** TELEPHONE COMPANY, INC. PETITION FOR PREEMPTION
AND DECLARATORY RULING
CCB Pol 97-1

FCC 97-336

Adopted: September 23, 1997

Released: September 24, 1997

By the Commission:

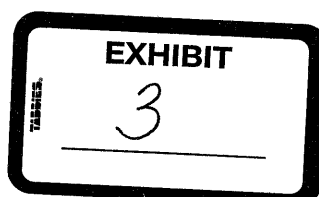
I. INTRODUCTION

1. On January 16, 1997, **Silver Star** Telephone Company, Inc. (**Silver Star**) filed the above-captioned petition (Petition) asking the Commission to: (i) preempt the Order Denying Concurrent Certification issued by the Wyoming Public Service Commission (Wyoming Commission) on December 4, 1996, [FN1] and (ii) direct the Wyoming Commission to grant **Silver Star** a Certificate of Public Convenience and Necessity (CPCN) for the Afton, Wyoming local exchange area. The Wyoming Commission's Denial Order rejected **Silver Star's** application for a "concurrent" CPCN to provide local exchange service in competition with the incumbent certificated local exchange carrier (LEC) in the Afton, Wyoming local exchange area. [FN2] **Silver Star's** Petition asserts that the Wyoming Commission's Denial Order violates section 253(a) of the Communications Act of 1934, as amended, [FN3] falls outside the scope of authority reserved to the Wyoming Commission by section 253(b) of the Act, [FN4] and thus satisfies the requirements for preemption by the Commission pursuant to section 253(d) of the Act. [FN5]

2. The Commission placed **Silver Star's** Petition on public notice on January 21, 1997. [FN6] The Association for Local Telecommunications Services (ALTS), U S WEST Communications, Inc. (U S WEST), and Union Telephone Company (Union) filed comments, and **Silver Star**, ALTS, RT Communications, Inc. (RTC), and TCT West, Inc. and Tri County Telephone Exchange, Inc. (collectively, TCT) filed replies. Moreover, local government officials and bodies, [FN7] local businesses, [FN8] and local residents [FN9] filed letters supporting the Petition.

3. On April 22, 1997, **Silver Star** filed a pleading amending its Petition (Amended Petition). The Amended Petition seeks preemption of certain provisions of the Wyoming Telecommunications Act of 1995, [FN10] as well as preemption of the Denial Order, because those statutory provisions were "the basis of [the] Wyoming PSC's decision." [FN11] On April 24, 1997, the Commission placed **Silver Star's** Amended Petition on Public Notice. [FN12] AT&T Corp. (AT&T) and Union filed comments, and **Silver Star** filed a reply.

4. Neither the State of Wyoming nor the Wyoming Commission filed comments, formal or informal, at any stage of this proceeding. By letter dated May 30, Copr. (C) West 1997 No Claim to Orig. U.S. Govt. Works



1997, however, **Silver Star** filed a permissible ex parte submission and attached a Memorandum dated February 27, 1997 from the Office of the Attorney General of the State of Wyoming to the Wyoming Commission. This Memorandum of the Wyoming Attorney General is an "Opinion on preemption issues created by the enactment of the Federal Telecommunications Act of 1996." [FN13]

5. For the reasons described below, we grant **Silver Star's** Amended Petition in part and deny it in part. Specifically, we preempt the Wyoming Commission's Denial Order and the section of the Wyoming Telecommunications Act of 1995 on which that Order is based (i.e., Wyo. Stat. Ann. s 37-15-201(c)), but we decline to preempt other statutory provisions or to direct the Wyoming Commission to grant **Silver Star's** CPCN application. We expect, however, that upon a request from **Silver Star**, the Wyoming Commission will expeditiously reconsider **Silver Star's** application in a manner consistent with the Communications Act and this Memorandum Opinion and Order.

II. BACKGROUND

A. **Silver Star's** Efforts to Obtain a CPCN for the Afton Exchange

6. **Silver Star** is an incumbent LEC certificated by the Wyoming Commission to provide local exchange telecommunications services in Lincoln County in western Wyoming. Its exchange boundary is approximately eight miles from the Town of Afton, Wyoming. The Afton exchange area serves approximately 2336 access lines. [FN14]

1. The Wyoming Commission's Final Order for the Sale of Telephone Exchanges

7. The Wyoming Commission determined in 1993 that U S WEST provided inadequate telephone service to subscribers in many of its rural telephone exchanges in Wyoming. [FN15] The Wyoming Commission subsequently ordered U S WEST to upgrade its Wyoming telephone exchanges. [FN16] U S WEST chose to sell twenty-seven of its most rural exchanges rather than make the necessary upgrades to those exchanges. [FN17] In 1993, U S WEST agreed to sell some of those exchanges to TCT's parent company (Tri County Telephone Association, Inc.), others to RTC's parent company (Range Telephone Cooperative, Inc.), and the remainder -- including the Afton exchange -- to Union. [FN18] In doing so, U S WEST rejected a bid by **Silver Star** to purchase the Afton exchange. [FN19]

8. U S WEST and each of the three purchasers filed with the Wyoming Commission joint applications for approval of the sales and for the requisite amendments to their various CPCNs. [FN20] The Wyoming Commission consolidated those applications in one proceeding. [FN21] **Silver Star** intervened in that proceeding and sought an amendment to its CPCN that would allow it, rather than Union, to serve the Afton exchange. [FN22]

9. The Wyoming Commission issued its order in that proceeding on February 18, 1994. [FN23] The Wyoming Commission granted all but one of the requested sale approvals and CPCN amendments, with certain conditions not relevant here. The disapproved sale and amendment concerned the Afton exchange. The Wyoming Commission concluded that **Silver Star** could provide higher quality service to the Afton exchange than Union. Consequently, the Wyoming Commission: (i) denied the joint application of U S WEST and Union to issue certificate

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authority to Union to serve the Afton exchange; (ii) granted **Silver Star's** application for amendment of its CPCN to authorize service to the Afton exchange; and (iii) directed U S WEST and **Silver Star** to negotiate an agreement to sell the Afton exchange to **Silver Star** rather than to Union. [FN24] Moreover, the Wyoming Commission directed all of the purchasing parties "to complete the upgrade of the purchased facilities to the modern service level required by the Commission within a three-year period from the date of this Order." [FN25] The Wyoming Commission observed that "the utility facilities which U S WEST proposes to sell are outmoded and substandard for current service requirements of its customers, and do not meet the statutory requirements that service facilities must be adequate and efficient...." [FN26]

10. U S WEST and Union appealed parts of the Wyoming Commission's Sale Order, arguing, inter alia, that the Wyoming Commission lacked authority to invalidate U S WEST's sale of the Afton exchange to Union and to direct the sale of that exchange to **Silver Star**. [FN27] Approximately two years later, in February 1996, the Supreme Court of Wyoming agreed with U S WEST and Union. The Wyoming Supreme Court reversed the grant of authority to **Silver Star** to serve the Afton exchange, reversed the direction to U S WEST to sell the Afton exchange to **Silver Star**, and remanded the case to the Wyoming Commission for further proceedings consistent with the Court's opinion. [FN28] On remand, the Wyoming Commission approved the sale of the Afton exchange to Union and denied **Silver Star's** application to amend its CPCN to serve the Afton exchange. [FN29]

2. The Wyoming Commission's Denial Order

11. On February 27, 1996, **Silver Star** filed with the Wyoming Commission an application requesting CPCN authority to provide local exchange telecommunications service in the Afton local exchange in competition with the incumbent certificated provider. [FN30] Union and U S WEST opposed **Silver Star's** application. They relied on a provision of the Wyoming Telecommunications Act of 1995 (Wyoming Act) that, under certain circumstances, insulates qualifying local exchange carriers from competition (the rural incumbent protection provision). [FN31] As more fully described below, [FN32] that provision allows a LEC that (i) was the incumbent certificated provider in an area as of January 1, 1995, and (ii) has 30,000 or fewer access lines in the State of Wyoming, to block the grant of a CPCN to any carrier seeking to provide local exchange service in competition with the incumbent LEC until at least January 1, 2005. [FN33]

12. The disposition of **Silver Star's** application hinged on whether U S WEST or Union was the incumbent certificated LEC for the Afton exchange as of January 1, 1995. If Union was the incumbent certificated LEC, the rural incumbent protection provision would require the Wyoming Commission to grant Union's opposition to **Silver Star's** application, because Union had fewer than 30,000 access lines in Wyoming; if it was U S WEST, the rural incumbent protection provision would not allow U S WEST (or any other LEC) to veto **Silver Star's** application, because U S WEST had more than 30,000 access lines in Wyoming. [FN34]

13. On December 4, 1996, the Wyoming Commission held that Union, not U S WEST, was the incumbent certificated provider for the Afton exchange as of January 1, 1995. [FN35] Accordingly, as required by the rural incumbent

protection provision, the Wyoming Commission implemented Union's veto and denied **Silver Star's** application for certificate authority to provide local exchange telecommunications service in the Afton local exchange in competition with Union:

The Commission concludes based upon the clear language of W.S. s 37-15-201(c) and the exercise by Union of the certificate protection provided for in subparagraph (iii) that the Commission must deny, based upon Wyoming law, the concurrent certificate application of **Silver Star** to provide local exchange service to the Afton, Wyoming, exchange. [FN36]

The Wyoming Commission also stated that, "[i]n deciding as we do, we do not express any opinion of the rights which any party may have or come to have under the federal Telecommunications Act of 1996." [FN37]

14. On January 2, 1997, **Silver Star** filed a petition for judicial review of the Denial Order in the District Court of the First Judicial District in and for the County of Laramie, State of Wyoming. [FN38] That petition for judicial review apparently remains pending to date.

B. The Wyoming Telecommunications Act of 1995

15. The Wyoming Telecommunications Act of 1995 became law on March 1, 1995. In a provision entitled "Legislative Intent," the Wyoming Act describes its purpose as follows:

It is the intent of this act to ensure essential telecommunications services are universally available to the citizens of this state while encouraging the development of new infrastructure, facilities, products and services.... It is the intent of this act to provide a transition from rate of return regulation of a monopolistic telecommunications industry to competitive markets and to maintain affordable essential telecommunications services through the transition period.... [FN39]

16. As mentioned above, the Wyoming Act contains a provision -- Wyo. Stat. Ann. s 37-15-201(c) -- that, under certain circumstances, allows small incumbent LECs to decide whether they will face competition before January 1, 2005. [FN40] This rural incumbent protection provision requires the Wyoming Commission to honor a qualifying LEC's veto of a potential competitor's CPCN application:

Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall, after notice and opportunity for hearing, issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which certification is sought and the incumbent local exchange service provider: (i) Consents to a concurrent certificate; or (ii) Is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought; or (iii) Fails to protest the application for the certificate after notice and opportunity for a hearing; or (iv) Has applied for and received a concurrent certificate to provide competitive local exchange telecommunications services in any area of this state; or (v) On or after the effective date of this chapter, begins to provide one-way

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transmission of radio or video signals through terrestrial, nonsatellite local distribution facilities in an area with existing service. [FN41] Moreover, incumbent LECs protected by the rural incumbent protection provision may extend that protection for an additional three years, up to and including January 1, 2008, if:

the commission finds that the applicant has demonstrated by clear and convincing evidence that it has yet to substantially recover its investment for upgraded services ordered by the commission or for which it has committed as of [March 1, 1995].... [FN42]

Once the protection of the rural incumbent protection provision lapses, the Wyoming Commission:

shall ... issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, if the applicant has a sufficient plan under which it will provide service to the entire local exchange area within five (5) years, or a longer time period as determined by the commission, of the date upon which the applicant first begins to provide local exchange service to the area for which the concurrent certificate is sought. [FN43]

C. Section 253 of the Telecommunications Act of 1996

17. Through the 1996 Act, Congress sought to establish "a pro-competitive, deregulatory national policy framework" for the United States telecommunications industry. [FN44] It also sought "to accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition." [FN45] To accomplish those objectives, the 1996 Act, among other things, amended the Communications Act by adding new section 253. Section 253(d) [FN46] directs the Commission to preempt, to the extent necessary, the enforcement of any State or local statute, regulation, or legal requirement that is proscribed by section 253(a) and is outside the authority reserved to State and local governments by section 253(b). [FN47] Section 253(a) provides that:

[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. [FN48]

Section 253(b) provides that nothing in section 253:

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. [FN49]

III. POSITIONS OF THE PARTIES

A. Silver Star

18. **Silver Star** argues that because the Denial Order precludes **Silver Star** from lawfully providing local exchange service in the Afton exchange, the Denial Order violates section 253(a)'s proscription of State legal requirements

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that prohibit the ability of any entity to provide any telecommunications service. According to **Silver Star**, the Denial Order, like the franchise denials that our Classic Telephone Decision [FN50] preempted, runs afoul of section 253(a) by barring all but one entity from providing a certain telecommunications service. [FN51] **Silver Star** also contends that, even though the Denial Order arguably may pertain only to intrastate services, section 2(b) of the Communications Act [FN52] does not prevent the Commission from preempting the Denial Order, because section 253 expressly empowers the Commission to preempt State and local laws that restrict the provision of intrastate as well as interstate services. [FN53]

19. **Silver Star** further argues that section 253(b) does not save the Denial Order from preemption, because: (i) section 253(b) applies only to post-certification "requirements" attendant to providing service, not to bans on service altogether; [FN54] (ii) the Denial Order makes no finding that its result is "necessary" to accomplish any of the objectives listed in section 253(b); [FN55] (iii) the Sale Order's finding that **Silver Star's** ability to serve the Afton exchange exceeded Union's ability to do so means that preventing **Silver Star** from serving the Afton exchange could not possibly be "necessary" within the meaning of section 253(b); [FN56] (iv) the Denial Order is not "competitively neutral" under section 253(b) because it favors the incumbent LEC over new entrants; [FN57] and (v) neither the Wyoming Commission nor the Wyoming Attorney General has participated in this proceeding to defend the Denial Order or the Wyoming Act as either "competitively neutral" or "necessary" under section 253(b). [FN58]

20. **Silver Star** relies on the Attorney General Opinion as support for its position regarding section 253(b). The Attorney General Opinion responds to, inter alia, the following question from the Wyoming Commission: "Is the [Wyoming Act], specifically Wyo. Stat. s 37-15-201, preempted by the [Communications Act]?" The Attorney General Opinion appears to answer that question in the affirmative. It seems to conclude that Wyo. Stat. Ann. s 37-15-201 conflicts with sections 251(b) and 251(c) of the Communications Act [FN59] and is not "competitively neutral," "consistent with section 254" of the Communications Act, [FN60] or "necessary" within the meaning of section 253(b). [FN61]

21. According to **Silver Star**, because the Denial Order derives directly from the statutory rural incumbent protection provision, the Commission can preempt that statutory provision for essentially the same reasons (described above) that require preemption of the Denial Order. [FN62] Moreover, in **Silver Star's** view, the absence of legislative history concerning the rural incumbent protection provision -- or any other provision of the Wyoming Act -- makes it impossible to conclude that the Wyoming legislature believed the rural incumbent protection provision to be necessary to ensure the continued quality of telecommunications services or to preserve and enhance universal service. [FN63] **Silver Star** argues, furthermore, that the Wyoming legislature enacted the rural incumbent protection provision to protect the investments of LECs that purchased exchanges from U S WEST, not to protect consumers. [FN64]

22. **Silver Star** also maintains that the provisions of the Communications Act pertaining to rural areas -- primarily sections 214(e)(2), 251(f), and 253(f) -- [FN65] do not authorize States to erect entry barriers to protect rural carriers. Instead, according to **Silver Star**, those sections create

potential protections for rural carriers far short of entry barriers, and they must be read in harmony with section 253(a)'s clear proscription of such barriers. [FN66]

23. **Silver Star** contends, in addition, that the Commission has provided adequate public notice under section 253(d). [FN67] **Silver Star** points out that the second Public Notice specifies the provisions of the Wyoming Act at issue and was served on the Wyoming Attorney General; the Wyoming Commission was aware of this proceeding from the beginning; and numerous individuals, local businesses, and local officials filed comments. [FN68]

B. The Commenters

24. For essentially the same reasons explained by **Silver Star**, ALTS and AT&T argue that the Commission should preempt the rural incumbent protection provision and any Wyoming Commission decision implementing that provision. [FN69] ALTS and AT&T add that preemption is appropriate also because: (i) the delay in competition mandated by the rural incumbent protection provision is so long as to be tantamount to an absolute entry barrier proscribed by section 253(a), and (ii) the rural incumbent protection provision fails to satisfy section 253's requirements that any State effort to achieve the objectives listed in section 253(b) must employ means "carefully tailored and limited to satisfy those [objectives]," [FN70] avoid entry barriers proscribed by section 253(a), and eschew prohibitions on entry applicable only to certain carriers and not others. [FN71]

25. All of the commenters who filed letters support **Silver Star's** position. [FN72] They state generally that competition in the local exchange market in the Afton exchange would benefit the Afton community. The Afton Government asserts, for example, that "[i]n the new age of technological advances, Afton and much of rural America has been left behind.... [O]pen access and competition will substantially improve the substandard communication services Afton and the surrounding areas have endured in the past." [FN73]

26. U S WEST, Union, RTC, and TCT oppose **Silver Star's** Petition. U S WEST characterizes the Petition as a ploy by **Silver Star** to abort U S WEST's sale of its Afton exchange to Union. [FN74] Union, RTC, and TCT agree with U S WEST's characterization of the Petition, and provide reasons for their position based on the language and intent of the Wyoming Act and the Communications Act.

27. Union challenges the Commission's power to grant **Silver Star's** Petition. According to Union, the Commission cannot preempt a Wyoming Commission order issued pursuant to Wyoming law where, as here, the petitioner has not sought preemption of the law on which the order is based. [FN75] Moreover, in Union's view, neither section 253 nor any other section of the Communications Act empowers the Commission to direct the Wyoming Commission to issue a certificate to **Silver Star**, even if the Commission preempts the Denial Order and/or the rural incumbent protection provision. [FN76]

28. Union also challenges the procedures by which the Commission solicited comments in this proceeding. With respect to **Silver Star's** Petition, Union claims that the Commission failed to comply with the notice and comment requirement of section 253(d), because the Commission's Public Notice did not: (i) identify the statute, regulation, or legal requirement that might violate section 253; (ii) describe the Commission's actions under

consideration; or (iii) indicate the Commission's interpretation of the phrase "to the extent necessary" in section 253(d) in the context of this matter.

[FN77] With respect to **Silver Star's** Amended Petition, Union claims that the Commission again violated the notice and comment requirement of section 253(d), because the Commission's Public Notice did not (i) indicate the subject matter of the Wyoming law at issue; (ii) state why the Commission was contemplating preemption of the Wyoming law; (iii) provide meaningful notice to "ordinary Wyoming consumers and consumers of other States that may be concerned with the Commission's contemplated preemption action;" or (iv) "provide States and their consumers with any specific guidelines as to what state action [the Commission] deems either consistent or inconsistent with Section 253(b)." [FN78]

29. Union further argues that the Wyoming Act's preclusion of certain competition until at least January 1, 2005 "does not constitute an absolute prohibition against entry" proscribed by section 253(a), because it "merely determines an orderly time period for the transition of rural areas from a form of regulation that correlates investment commitment with reasonable assurances of cost recovery to a new form that will no longer present similar risk and reward characteristics." [FN79] Union claims, in other words, that "[e]ntry restrictions limited to a reasonable time period to assure stability in a state as extremely rural as Wyoming are not in violation of, or inconsistent with, the 1996 Act." [FN80] According to Union, the ten-to-thirteen year period at issue is reasonable, because: (i) rural incumbents need that time to recoup the substantial network investments mandated by the Wyoming Commission, and (ii) rural incumbents "operat[e] under the constraints imposed by limited customer pools, the risks carried by the revenue reliance on few large-volume customers, and the dependence on regulatory mechanisms for high-cost recovery." [FN81]

30. Union also contends that, by affording small rural carriers exemptions from and suspensions of interconnection obligations pursuant to sections 3(37) and 251(f) of the Act, [FN82] Congress showed its concern that small rural carriers may need special protections from the advent of competition in order to preserve and advance universal service. [FN83] According to Union, like section 251(f) of the Communications Act, Wyoming's rural incumbent protection provision stems from "the recognition that all areas of the country, or of a single state, may not be subject concurrently to the same market conditions that would sustain the introduction of competitive local exchange service in a manner that will serve the public interest." [FN84]

31. Union, RTC, and TCT claim that, even if the rural incumbent protection provision falls within the proscription of section 253(a), section 253(b) saves that provision from preemption. [FN85] In their view, section 253(b) "reflects the Congressional recognition that a state should maintain the authority to enact measures to ensure that the introduction of competition proceeds in a manner that will serve the overall public interest of the citizenry of its state." [FN86] They argue, therefore, that:

[t]he Wyoming legislature understood in enacting [the rural incumbent protection provision] that if small, rural telephone companies are to be expected to continue to invest in uneconomic areas, they must have some assurances that their market and their future revenue streams are predictable and sufficient to risk such investments.... [T]he temporary measures set forth in the Wyoming law are necessary to ensure that the plan the state

established for modernization and infrastructure development in rural Wyoming will be carried out. [FN87]

32. According to Union, RTC, and TCT, the Wyoming Commission has determined, after extensive expert inquiry, that massive improvements must be made to many rural telephone exchanges in order to provide safe, reliable, modern, high-quality telecommunications services to all of Wyoming's citizens; that such improvements will be made only if the investing carriers are guaranteed a reasonable recovery of their investments; and that the rural incumbent protection provision implements a reasonable method to accomplish such recovery. Indeed, Union, RTC, and TCT profess to have relied on the rural incumbent protection provision in deciding to invest heavily in modern, high-quality infrastructure, facilities, products, and services for their rural exchanges. [FN88] Thus, in the view of Union, RTC, and TCT, the rural incumbent protection provision 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 meaning of section 253(b).

33. RTC and TCT also argue that the rural incumbent protection provision is "consistent with section 254" of the Act within the meaning of section 253(b). [FN89] They state, in particular, that by encouraging small rural carriers to make the investments necessary to provide high-quality telecommunications services to all residents in their territories, the rural incumbent protection provision adheres to the "principles" set forth in section 254(b) "for the preservation and advancement of universal service." [FN90]

IV. DISCUSSION

34. Contrary to Union's argument, we find that the notice-and-comment procedures utilized in this proceeding are fully consistent with relevant statutory provisions. Declaratory rulings issued pursuant to section 253 are informal adjudications. The Administrative Procedure Act (APA) [FN91] provides no notice-and-comment procedures applicable to agency informal adjudication. [FN92] We therefore look to our organic statute for guidance regarding the required procedure in this context.

35. Section 253(d) of the Communications Act requires the Commission to provide "notice and an opportunity for public comment" before determining whether to preempt a State or local legal requirement pursuant to section 253. [FN93] Section 253(d) does not, however, specify any particular means of providing such notice and opportunity for comment. The procedures that we followed in this proceeding are consistent with those that the Commission has used for years with respect to informal adjudications. Specifically, we issued written notices regarding **Silver Star's** Petition and Amended Petition. These notices briefly summarized the Petition and Amended Petition and described how and when to submit written comments. These notices were available to the public at the Commission, on the Internet, and via numerous subscription services. The Petitions themselves were available to the public for inspection and copying at the Commission. As noted above, we received comments in response to these notices from affected local residents, local businesses, and local government officials and bodies, as well as interested telecommunications entities and trade associations. [FN94]

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36. Had Congress intended to require the Commission to follow more elaborate notice-and-comment procedures in preemption proceedings, it could have directed the Commission to employ those mandated by the APA for rulemakings or other types of agency action [FN95] or included more specific procedures in section 253. Because Congress did not do so, we believe that section 253 affords us discretion to use in the preemption context our existing notice-and-comment procedures for informal adjudications. We conclude, therefore, that the procedures we followed in this proceeding afforded adequate notice and opportunity for comment within the meaning of section 253(d). [FN96]

37. In assessing whether to preempt the Denial Order and the rural incumbent protection provision of the Wyoming Act pursuant to section 253, we first determine whether those legal requirements are proscribed by the terms of section 253(a), which states:

No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. [FN97]

If we find that the Denial Order and the rural incumbent protection provision are proscribed by section 253(a), considered in isolation, we then determine whether they fall within the exception to section 253(a)'s proscription set forth in section 253(b). If the Denial Order and the rural incumbent protection provision are impermissible under section 253(a), and do not satisfy the requirements of section 253(b), we must preempt the enforcement of those legal requirements in accordance with section 253(d). If, however, the Denial Order and the rural incumbent protection provision satisfy section 253(b), they are not preemptable under section 253(d), even if they are inconsistent with section 253(a), considered in isolation. [FN98]

38. Wyoming's rural incumbent protection provision gives incumbent LECs with 30,000 or fewer access lines the ability to block the grant of CPCN applications of potential competitors. [FN99] The incumbent LEC involved in this matter, Union, [FN100] exercised that veto power with respect to **Silver Star's** CPCN application to provide competing local exchange service in the Afton exchange; in turn, as required by the Wyoming Act's rural incumbent protection provision, the Wyoming Commission denied **Silver Star's** application and thereby barred **Silver Star** from entering the Afton local exchange market. [FN101] Consequently, the rural incumbent protection provision and the Denial Order clearly prohibit **Silver Star** from providing telecommunications service in the Afton exchange, a prohibition proscribed by section 253(a). Indeed, section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers. The express preemption authority granted to the Commission under section 253 is designed to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals. [FN102]

39. The opposing commenters point out that the rural incumbent protection provision may effectively expire as "soon" as January 1, 2005, and certainly no later than January 1, 2008. Section 253(a), however, does not exempt from its reach State-created barriers to entry that are scheduled to expire several

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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.

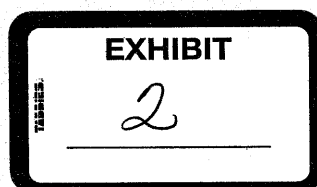
Docket No. 93-08793

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.

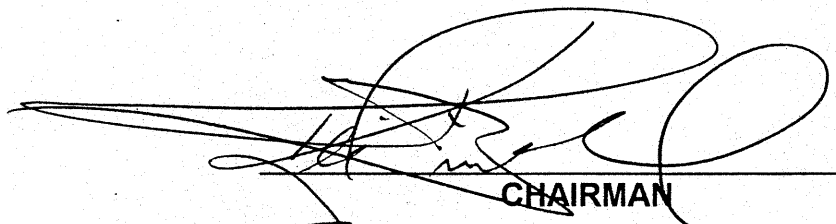
IT IS THEREFORE ORDERED:

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

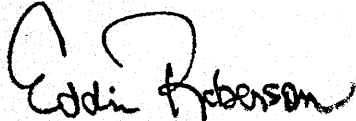


COMMISSIONER



COMMISSIONER

ATTEST:



EXECUTIVE DIRECTOR

years in the future. In any event, a "temporary" ban on competition that lasts for a minimum of nine years and a maximum of twelve years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition. Indeed, any law freezing the telecommunications status quo for a nine-to-twelve year period would severely restrict the development of competition that Congress sought to promote by passing the 1996 Act. [FN103] Thus, this absolute prohibition on **Silver Star's** competitive entry for a minimum of nine years from the date of enactment of the 1996 Act is precisely the type of action Congress intended to proscribe under section 253(a), absent a demonstration that the rural incumbent protection provision and the Denial Order are an exercise of authority specifically reserved to the State of Wyoming under section 253(b). [FN104]

40. Section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public interest goals. [FN105] Thus, we must preempt the Denial Order and the rural incumbent protection provision pursuant to section 253(d) unless they meet all three of the criteria set forth in section 253(b).

41. The opposing commenters argue that the Denial Order and the rural incumbent protection provision meet the latter two of those three criteria. None of the opposing commenters, however, contends that the Denial Order and the rural incumbent protection provision meet the first criterion, competitive neutrality.

42. We find that the rural incumbent protection provision is not competitively neutral. This State statutory provision favors certain incumbent LECs over all potential new entrants and allows those incumbent LECs, entirely at their own discretion, to determine if and when they will face competition until at least January 1, 2005. Further, the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage -- preservation of monopoly status -- and saddles potential new entrants with the ultimate competitive disadvantage -- an insurmountable barrier to entry. Such disparity in the treatment of classes of providers violates the requirement of competitive neutrality [FN106] and undermines the pro-competitive purpose of the 1996 Act. [FN107] We reiterate what we stated in the Classic Telephone Decision: "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry...." [FN108]

43. The terms of section 251(f) bolster rather than contradict that conclusion. [FN109] Section 251(f) affords rural and small LECs certain avenues of relief from the so-called "interconnection" duties set forth in sections 251(b) and (c). [FN110] Congress did recognize, therefore, that the special circumstances of rural and small LECs do, indeed, warrant special regulatory treatment. By granting rural and small LECs relief from interconnection obligations instead of an outright prohibition on competition, however, Congress demonstrated its intent to open all markets to potential competitors -- even markets served by rural or small LECs that may qualify for interconnection relief. In other words, in choosing a less competitively restrictive means of "protecting" rural and small LECs, Congress revealed its intent to preclude States from imposing the far more competitively restrictive

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protection of an absolute ban on competition.

44. In sections 253(f) and 214(e)(2) of the Act we find similar support for our determination that the rural incumbent protection provision falls outside the authority reserved for the States by section 253(b). [FN111] Both of those sections afford States special latitude in regulating emerging competition in markets served by rural telephone companies. Section 253(f) allows a State, notwithstanding sections 253(a) and (d), to require a telecommunications carrier to meet certain universal service requirements as a condition for obtaining permission to compete with a rural telephone company. [FN112] Section 214(e)(2) permits a State, with respect to an area served by a rural telephone company, to decline to designate more than one common carrier as an "eligible telecommunications carrier" for purposes of receiving universal service support; and if a State wishes, nevertheless, to designate more than one such carrier, it must first find that doing so would be in the public interest. [FN113] These accommodations to the unique circumstances of rural telephone companies, like those in section 251(f), indicate that Congress did not contemplate that States could "protect" rural telephone companies with the much more competitively restrictive method of a categorical ban on entry. [FN114]

45. The question of whether the rural incumbent protection provision and the Denial Order are "necessary" to achieve the public interest objectives enumerated in section 253(b) is more fact-specific than the competitive neutrality query in this proceeding. The "necessary" question requires a detailed analysis of means and ends, whereas the competitive neutrality query requires, in the context of an outright ban on competition, only a facial review of the text of the challenged law. The present record on the "necessary" question is not robust, however. On the one hand, certain provisions of the Wyoming Act itself and the opposing commenters plausibly indicate that the rural incumbent protection provision promotes the universal service and quality objectives specified in section 253(b). On the other hand, the absence of direct participation in this proceeding by the State of Wyoming and the Wyoming Commission leaves the record without perhaps the most probative evidence concerning whether the rural incumbent protection provision is "necessary" to achieve those section 253(b) goals. [FN115] Given these circumstances, we conclude that the present record does not permit us to make a determination on the merits of the "necessary" issue. [FN116] The lack of competitive neutrality is, in any event, dispositive standing alone. Therefore, we need not and do not reach the question of whether the rural incumbent protection provision and the Denial Order are "necessary" within the meaning of section 253(b).

46. Given our conclusion that the Wyoming Act's rural incumbent protection provision lacks competitive neutrality, we further conclude that the rural incumbent protection provision and the Denial Order implementing it fall outside the scope of authority reserved for the States by section 253(b). Preempting only the Denial Order would be an empty act, because the rural incumbent protection provision, if still in force, would require the Wyoming Commission to deny **Silver Star's** CPCN application again, if and when **Silver Star** refiled it. Accordingly, pursuant to section 253(d), we preempt the enforcement of the Denial Order and the rural incumbent protection provision, Wyo. Stat. Ann. s 37-15-201(c).

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47. We decline, however, to grant **Silver Star's** request for preemption of other provisions of the Wyoming Act, i.e., Wyo. Stat. Ann. ss 37-15-201(d), (e), and (f). Those provisions are derivative of the rural incumbent protection provision and/or not implicated by the instant circumstances. Thus, preemption of those provisions is not "necessary" within the meaning of section 253(d). We also decline **Silver Star's** request to "direct the Wyoming Public Service Commission to reverse its denial of a concurrent CPCN to **Silver Star....**" [FN117] Such action appears unnecessary at this time, especially because **Silver Star** observes in its comments that it is "confident that the PSC ... will quickly and completely abide by this Commission's preemption decision...." [FN118] We expect that the Wyoming Commission will promptly respond to any request by **Silver Star** to reconsider **Silver Star's** application for a concurrent CPCN to serve the Afton exchange consistent with the Communications Act and our decision to preempt the enforcement of the Denial Order and the Wyoming Act's rural incumbent protection provision. [FN119]

V. ORDERING CLAUSE

48. Accordingly, IT IS ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. s 253, that the Petition for Preemption and Declaratory Ruling filed by **Silver Star Telephone Company, Inc.** on January 16, 1997, as amended on April 22, 1997, IS GRANTED to the extent discussed herein, and in all other respects IS DENIED.

49. Accordingly, IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. s 253, that the enforcement of the Denial Order and the rural incumbent protection provision, Wyo. Stat. Ann. s 37-15-201(c), are preempted.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FN1. Application of **Silver Star Telephone Company, Inc.** for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification, Docket No. 70006-TA-96-24 (Wyoming Commission Dec. 4, 1996) (Denial Order).

FN2. In the parlance of the Wyoming Telecommunications Act of 1995, Wyo. Stat. Ann. ss 37-15-101 et seq., a "concurrent" CPCN is a CPCN granted to a LEC to provide service in an area already served by an incumbent LEC. Wyo. Stat. Ann. s 37-15-201.

FN3. 47 U.S.C. s 253(a). Section 253 was added to the Communications Act of 1934 (Communications Act or Act) by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. ss 151 et seq. All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

FN4. 47 U.S.C. s 253(b).

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FN5. 47 U.S.C. s 253(d).

FN6. Pleading Cycle Established on **Silver Star** Telephone Company, Inc.'s Petition for Preemption and Declaratory Ruling, Public Notice, File No. CCB Pol 97-1, DA 97-143 (rel. Jan. 21, 1997).

FN7. These are: the Lincoln County, Wyoming Board of County Commissioners (Lincoln County Commission), Lincoln County, Wyoming School District No. 2 (Lincoln County Schools), and the Mayor and Town Council of the Town of Afton, Wyoming (Afton Government).

FN8. These are Tenupah, Schwab Mortuary (Schwab), Polyguard and Co. (Polyguard), Maverik County Stores, Inc. (Maverik), and Star Valley Hospital (Hospital).

FN9. These are Dusty L. Skinner, Winston G. Allred, and Elmo H. Newswander.

FN10. Wyo. Stat. Ann. ss 37-15-101 et seq. (1996). The Amended Petition seeks preemption of ss 37-15-201(c) through (f).

FN11. Amended Petition at 2.

FN12. Supplemental Pleading Cycle Established for **Silver Star** Telephone Company, Inc.'s Amended Petition for Preemption and Declaratory Ruling, Public Notice, File No. CCB Pol 97-1, DA 97-875 (rel. Apr. 24, 1997).

FN13. See Letter dated May 30, 1997 from Dennis L. Sanderson, counsel for **Silver Star**, to William F. Caton, Secretary, Federal Communications Commission, CCB Pol 97-1 (filed June 3, 1997) and Attachment thereto (Attorney General Opinion).

FN14. See Petition at 2; U S WEST Comments at 2-3.

FN15. See Union Telephone Company, Inc. v. Wyoming Public Service Commission, 910 P.2d 1362, 1364 (Wyo. 1996); Inquiry of the Public Service Commission into Telecommunications Service Capabilities and Needs in Wyoming, Initial Report on Telecommunications Service in Wyoming with a View Toward Tomorrow, General Order No. 67 (Wyoming Commission Sept. 24, 1993) (General Order 67).

FN16. See Union v. Wyoming Commission, supra; General Order 67.

FN17. See Union v. Wyoming Commission, supra; Joint Application of U S WEST Communications, Inc., and Tri-County Telephone Association, Inc., et al., Final Order for the Sale of Telephone Exchanges at 13-14, Docket Nos. 70000-TA-93-150, 70000-TA-93-151, 70000-TA-93-152, 70000-TA-93-139, 70001-TA-93-7, 70006-TA-93-12, 70008-TA-93-10, 70011-TA-93-8 (Wyoming Commission Feb. 18, 1994) (Sale Order).

- FN18. See Sale Order at 12-15.
- FN19. See Sale Order at 14-15, 108-18.
- FN20. See Sale Order. Absent such approvals and amendments, the purchasing entities could not lawfully exercise any rights associated with the telephone exchanges to be purchased. See generally *Union v. Wyoming Commission*, 910 P.2d at 1364; Wyo. Stat. Ann. s 37-2-205 (Cum. Supp. 1995).
- FN21. See Sale Order.
- FN22. See Sale Order at 14-15, 108-18.
- FN23. See Sale Order.
- FN24. See Sale Order at 106-118, 137-38.
- FN25. Sale Order at 140. See *id.* at 106-07, 133. The "modern service level required by the Commission" included: (a) equal access, including 10-XXX, to all interexchange carriers, where cost effective; (b) single party service to all those who desire it; (c) flat rated or measured service options; (d) touch-tone dialing; (e) adequate Private Branch Exchange trunks(ing); (f) provision of 911; (g) available custom calling features, call waiting etc.; (h) minimum 2400 baud transmission capability; and (i) digital connectivity. *Id.* at 98-99.
- FN26. Sale Order at 98.
- FN27. See *Union v. Wyoming Commission*, *supra*.
- FN28. See *Union v. Wyoming Commission*, *supra*.
- FN29. See Joint Application of U S WEST Communications, Inc., and Tri-County Telephone Association, Inc., et al., Order on Remand, Docket Nos. 70000-TA-93-150, 70000-TA-93-152, 70006-TA-93-12, 70008-TA-93-10, 70011-TA-93-8 (Wyoming Commission March 27, 1996).
- FN30. See Denial Order at 2.
- FN31. See Wyo. Stat. Ann. s 37-15-201(c); Denial Order at 2, 6-10.
- FN32. See Part II(B), *infra*.
- FN33. See Wyo. Stat. Ann. s 37-15-201(c).
- FN34. See Denial Order at 6.
- FN35. See Denial Order at 10-14.
- FN36. Denial Order at 14 (emphasis added). See *id.* at 13-14.

FN37. Denial Order at 14.

FN38. See Petition, Exhibit B.

FN39. Wyo Stat. Ann. s 37-15-102.

FN40. See Part II(A)(2), supra.

FN41. Wyo. Stat. Ann. s 37-15-201(c) (emphasis added). The rural incumbent protection provision "appl[ies] only to telecommunications companies in existence prior to January 1, 1995, and which ... have fewer than thirty thousand (30,000) access lines in the state." Wyo. Stat. Ann. s 37-15-201(f).

FN42. Wyo. Stat. Ann. s 37-15-201(d).

FN43. Wyo. Stat. Ann. s 37-15-201(e).

FN44. S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (Conference Report).

FN45. Id.

FN46. 47 U.S.C. s 253(d). Section 253(d) states: "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." Id.

FN47. Section 253(c) also reserves certain authority to State and local governments. 47 U.S.C. s 253(c). That subsection provides: "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." Id. No party claims, however, that section 253(c) applies in this matter. Thus, this Memorandum Opinion and Order does not address section 253(c).

FN48. 47 U.S.C. s 253(a).

FN49. 47 U.S.C. s 253(b).

FN50. Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, File No. CCB Pol 96-10, 11 FCC Rcd 13082 (1996) (Classic Telephone Decision), petition for emergency relief, sanctions, and investigation pending (filed Dec. 6, 1996), petition for review held in abeyance, City of Bogue, Kansas and City of Hill City, Kansas v. FCC, No. 96-1432 (D.C. Cir. Jan. 14, 1997) (denying petitioner's motion for writ of prohibition and sua sponte holding petition in abeyance), petition for Copr. (C) West 1997 No Claim to Orig. U.S. Govt. Works

emergency relief, sanctions, and investigation denied, FCC 97-335, (rel. Sept. 24, 1997).

FN51. See Petition at 9, 11-13; **Silver Star** Reply at 4-5.

FN52. 47 U.S.C. s 152(b).

FN53. See Petition at 14.

FN54. See Petition at 10-11.

FN55. See Petition at 10-11; **Silver Star** Reply at 4-6.

FN56. See Petition at 10-11.

FN57. See **Silver Star** Reply at 4.

FN58. See **Silver Star** Reply at 1; **Silver Star** Supp. Reply at 1-3.

FN59. 47 U.S.C. ss 251(b), 251(c).

FN60. 47 U.S.C. s 254.

FN61. Attorney General Opinion at 6-8.

FN62. See Amended Petition; **Silver Star** Reply at 6-7. Before filing its Amended Petition, **Silver Star** argued that the Commission could preempt the rural incumbent protection provision pursuant to the "good cause" exception to 5 U.S.C. s 553, even though its Petition sought preemption only of the Denial Order. See **Silver Star** Reply at 6 n.14. The Amended Petition moots that argument, because it expressly seeks preemption of the rural incumbent protection provision.

FN63. See **Silver Star** Reply at 6 n.13.

FN64. See **Silver Star** Supp. Reply at 3-4.

FN65. 47 U.S.C. ss 214(e)(2), 251(f), 253(f).

FN66. See **Silver Star** Reply at 7-9.

FN67. See **Silver Star** Supp. Reply at 1-2.

FN68. See **Silver Star** Supp. Reply at 2-3.

FN69. See ALTS Comments at 1-4; AT&T Supp. Comments at 2-4.

FN70. ALTS Reply at 4.

FN71. See ALTS Reply at 1-4; AT&T Supp Comments at 2-4.

FN72. See Lincoln County Commission Comments; Lincoln County Schools Comments; Afton Government Comments; Tenupah Comments; Schwab Comments; Polyguard Comments; Maverik Comments; Hospital Comments; Skinner Comments; Allred Comments; Newswander Comments.

FN73. Afton Government Comments at 1. See, e.g., Lincoln County Commission Comments at 1 ("competition in the telecommunications business is good for us so [rural] areas such as our[s] can hopefully benefit from more enhanced services"); Lincoln County Schools Comments at 1 ("it is in the best interest for the public to provide all the options available for telecommunications in this area").

FN74. See U S WEST Comments at 1-7.

FN75. See Union Comments at 13-14, 16.

FN76. See Union Comments at 14 n.11.

FN77. See Union Comments at 14-17.

FN78. See Union Supp. Comments at 2-5.

FN79. Union Comments at 12.

FN80. Union Comments at 12.

FN81. Union Comments at 6. See id. at 11-13; Union Supp. Comments at 5-9.

FN82. 47 U.S.C. ss 153(37), 251(f).

FN83. See Union Comments at 8-11.

FN84. Union Comments at 3-4.

FN85. See Union Comments at 3-8; RTC Reply at 10-14, 16-17; TCT Reply at 10-16; Union Supp. Comments at 5-9.

FN86. Union Comments at 3. See RTC Reply at 12-14; TCT Reply at 12-14.

FN87. Union Comments at 7-8. See id. at 4-8, 11-13; RTC Reply at 2-17; TCT Reply at 2-16; Union Supp. Comments at 5-9.

FN88. See Union Comments at 4-8, 11-13; RTC Reply at 2-17; TCT Reply at 2-16.

FN89. See RTC Reply at 10-14; TCT Reply at 10-14.

FN90. 47 U.S.C. s 254(b).

FN91. 5 U.S.C. ss 551 et seq.

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FN92. See 5 U.S.C. s 555. Indeed, with respect to informal adjudication, the APA only requires that prompt notice be given of the denial of a written petition, and that such notice be accompanied by a brief statement of the grounds for denial. See 5 U.S.C. s 555(e); Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990). In contrast, the APA prescribes specific notice procedures applicable to agency rulemaking (5 U.S.C. s 553) and agency formal adjudication (5 U.S.C. s 554).

FN93. 47 U.S.C. s 253(d).

FN94. See Section I, supra.

FN95. See 5 U.S.C. ss 553 (establishing procedures for informal rulemaking), 554 (establishing procedures for formal adjudication).

FN96. See generally Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. at 655-56 (holding that APA does not require notice and opportunity to be heard in informal agency adjudications); Dr. Pepper/Seven-Up Companies, Inc. v. Federal Trade Commission, 991 F.2d 859, 862-63 (D.C. Cir 1993) (holding that APA permitted FTC's use of certain "informal notice and comment procedures" in informal adjudication). We note that **Silver Star's** Amended Petition and the Commission's Public Notice pertaining thereto moot Union's argument that the Commission cannot preempt the Denial Order because **Silver Star** had not also sought preemption of the Wyoming Act.

FN97. 47 U.S.C. s 253(a).

FN98. Accord Classic Telephone Decision, 11 FCC Rcd at 13095-97, 13101-04, PP 25-28, 35-42; New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order at PP 16-19, 25, FCC 96-470, File No. CCB Pol 96-11 (rel. Dec. 10, 1996) (New England Decision), recon. denied, Memorandum Opinion and Order, FCC 97-143 (rel. April 18, 1997). Congress reserved certain authority for State and local governments in section 253(c) of the Act, as well, but no party argues that either the Denial Order or the rural incumbent protection provision falls within that authority.

FN99. Wyo. Stat. Ann. s 37-15-201(c) ("in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state, the commission shall ... issue a concurrent [CPCN] ... only if ... the incumbent local exchange provider: (i) Consents to a concurrent certificate; or ... (iii) Fails to protest the [CPCN] application....") (emphasis added).

FN100. For purposes of this Memorandum Opinion and Order, we assume, without deciding, that the Wyoming Commission's determination under state law that Union is the incumbent is correct.

FN101. The Wyoming Commission expressly declined to "express any opinion of the
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rights which any party may have or come to have under the federal Telecommunications Act of 1996." Denial Order at 14.

FN102. Classic Telephone Decision, 11 FCC Rcd at 13095, P 25.

FN103. The 1996 Act contains numerous deadlines requiring the Commission and state commissions to complete with dispatch various tasks implementing the 1996 Act. See, e.g., 47 U.S.C ss 251(d)(1); 251(f)(1)(B); 252(e)(4); 254(a); 257(a); 271(d)(3); 276(b). By requiring relatively swift administrative implementation of the pro-competitive provisions of the 1996 Act, these deadlines highlight the substantial extent to which Wyoming's statutory delay of competition conflicts with Congressional intent.

FN104. Accord Classic Telephone Decision, 11 FCC Rcd at 13096-97, P 27; New England Decision at P 18 ("This prohibition on competitive entry against a particular class of potential competitors is inconsistent with the pro-competitive policies of the 1996 Act and violates section 253(a)").

FN105. 47 U.S.C. s 253(b).

FN106. Accord Federal-State Joint Board on Universal Service, Report and Order, FCC 97-157, at P 47 (rel. May 8, 1997) (Universal Service Order) ("competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another"). See generally Federal-State Joint Board on Universal Service, Recommended Decision, FCC 96J-3, at P 345 (rel. Nov. 8, 1996) ("We recommend that any competitive bidding system be competitively neutral and not favor either the incumbent or new entrants"); Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488, at P 206 (rel. Dec. 24, 1996) ("If in practice only incumbent LECs can receive universal service support, then the disbursement mechanism is not competitively neutral").

FN107. We note that the Attorney General Opinion filed by **Silver Star** as an attachment to an ex parte submission appears to reach the same conclusion. Attorney General Opinion at 7 ("Section 37-15-201(c)(i) of the [Wyoming Act] would not fit within the parameters of 'competitively neutral.' ... The ten year competition restriction placed on newcomers to the rural markets may be questionable for the same reasons").

FN108. Classic Telephone Decision, 11 FCC Rcd at 13102, P 38. See New England Decision at P 20 (holding that legal requirement at issue was not competitively neutral under section 253(b) because "the prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers)").

FN109. Section 251(f)(1) exempts a "rural telephone company" (as defined by section 3(37), 47 U.S.C. s 153(37), from the obligations of section 251(c) until it receives a "bona fide request for interconnection, services, or network elements" that the applicable State commission determines is (i) not
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unduly economically burdensome, (ii) technically feasible, and (iii) consistent with statutory universal service requirements. 47 U.S.C. s 251(f)(1). Section 251(f)(2) allows a LEC with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide to petition a State commission for a suspension or modification of the application of the obligations of sections 251(b) or (c). 47 U.S.C. s 251(f)(2).

FN110. See 47 U.S.C. ss 251(a), (b), (c). These duties concern interconnection, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, access to unbundled network elements, notice of interoperability changes, collocation, and good faith negotiation. Id.

FN111. See 47 U.S.C. ss 253(f), 214(e)(2).

FN112. 47 U.S.C. s 253(f). See 47 U.S.C. ss 214(e)(1), 254(c).

FN113. 47 U.S.C. s 214(e)(2).

FN114. Our construction and application of section 253(b)'s competitive neutrality standard in this matter comports with our Universal Service Order, which states, in pertinent part: "Commenters who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commenters present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254." Universal Service Order at P 50 (footnote omitted).

FN115. We note that the Attorney General Opinion filed by **Silver Star** as an attachment to an ex parte submission seems to find that the rural incumbent protection provision is not "necessary" within the meaning of section 253(b). Attorney General Opinion at 8 ("Wyoming would still not lose the ability to protect both the rights of the consumers and the investments made by the rural service provider by adhering to the provisions of the [Communications Act], even taking into consideration that section 37-15-201(c)(i) and the ten year restriction may be preempted").

FN116. Compare New England Decision, supra at PP 21-25 (finding that prohibition on competitive entry by non-LEC payphone service providers was not "necessary" within the meaning of section 253(b)).

FN117. Petition at 15.

FN118. Petition at 14.

FN119. Given our disposition of the Petition on the bases discussed in the text, we need not and do not address the merits of other arguments raised by the parties.

1997 WL 591969 (F.C.C.)

END OF DOCUMENT

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October 1, 1997

Fredrick W. Weston, Hearing Officer
Public Service Board
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Re: Docket 5713

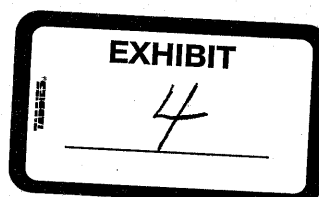
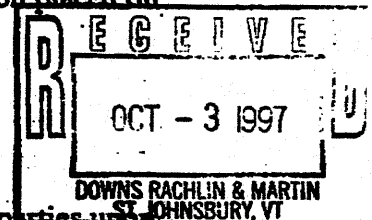
Dear Mr. Weston:

A recently issued precedential decision directly addresses one of the issues currently pending before you in the above-referenced docket. The Department did not cite this decision in its initial or reply memoranda because it was released on September 24, 1997 and published on September 30, 1997, well after the Department's memoranda were filed. However, the Department submits that it is appropriate at this time to bring this decision to your attention because it constitutes a binding precedent with respect to an issue pending before you.

The decision bears generally on the issue of new entrant service areas and specifically on the Department's recommendation that new entrant certificates of public good ("CPG") be issued on a statewide basis, providing all telephone subscribers in the state the opportunity to seek alternative carriers. Raymond pf. at 6-7. The decision, *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol. 97-1, Memorandum Opinion and Order, FCC 97-336 (rel. Sept. 24, 1997) ("*Silver Star*"),¹ supports the Department's recommendation over the protectionism proposed by the independent telephone companies.

Silver Star holds that absolute prohibitions on new entry into areas of a state served by rural telephone companies ("RTCs"), such as the current prohibition placed on

¹ A copy of *Silver Star* is enclosed. Copies will be made available to parties upon request.



Hyperion barring its entry into areas served by Vermont RTCs² until one year after it provides notice of its intent to do so,³ violate the federal Telecommunications Act of 1996. *Silver Star* arose when the Silver Star Telephone Company ("Silver Star") applied to the Wyoming Public Service Commission for certification to provide local exchange service in the Afton, Wyoming exchange in competition with the incumbent certificated local exchange company ("LEC"). *Silver Star* at ¶ 11. Under the Wyoming Telecommunications Act ("Wyoming Act"), incumbent LECs with 30,000 access lines or fewer may block for several years⁴ the certification of a LEC seeking to provide local exchange service in competition with an incumbent LEC. *Id.* Based on the Wyoming Act, the Wyoming Commission denied Silver Star the requested certificate. *Id.* at ¶ 13. In doing so, the Wyoming Commission did "not express any opinion of the rights which any party may have or come to have" under the federal Act. *Id.*

On Silver Star's petition, the Federal Communications Commission ("FCC") held that § 253 of the Act preempts both the rural incumbent protection provision of the Wyoming Act and the Wyoming Commission's denial of Silver Star's application for a certificate based on it. The FCC explained that § 253 "at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality." *Id.* at ¶ 38. Since Congress intended for competitive markets to determine which entrants will provide services

² In this docket, incumbent LECs other than NYNEX have been referred to independent telephone companies, or ITCs. To conform to the terminology used in the Act and in the *Silver Star* order, the term rural telephone company, or RTC, is used in this letter. The Department does not waive, however, the right to argue that one or more of the independents do not qualify for the exemption available to RTCs under § 251(f) of the Act.

³ This prohibition may be contemplated for other new entrants.

⁴ The Wyoming Act blocks certification for new entrant service in RTC service areas until at least January 1, 2005. While quantitatively different from Wyoming Act's rural incumbent protection, the prohibition placed on Hyperion and contemplated for other new entrants is qualitatively indistinguishable. Like the Wyoming Act, the Hyperion prohibition is an absolute barrier to entry for a period of time. Nothing in the *Silver Star* order indicates that a shorter period of protectionism may comport with the Act. Rather, the order suggests that the Act does not tolerate absolute barriers to entry of any duration.

demanding by consumers,⁵ the FCC determined that an absolute ban on competitive entry, even a temporary one, is "precisely the type of action Congress intended to proscribe under section 253(a)."⁶

The FCC then reviewed the incumbents' claim that Wyoming had authority to exclude Silver Star from independent service areas by virtue of § 253(b), which preserves state authority to regulate to advance universal service, to protect public safety and welfare, to ensure service quality, and to protect consumer rights, but only "on a competitively neutral basis." As the FCC observed, to come within the § 253(b) exception to the prohibition on state-imposed entry barriers, a state regulation must meet a three-pronged test: (i) it must be "competitively neutral"; (ii) it must be consistent with the Act's universal service provisions; and (iii) it must be "necessary" to accomplish the objectives enumerated in § 253(b). *Id.* at ¶ 40. To be consistent with the Act, the state regulation must meet all three prongs of the test. *Id.*

The incumbent argued — as the Vermont RTCs have argued in the instant docket — that rural incumbent protection meets the second and third prongs of the test, but the FCC did not need to reach those prongs, *id.* at ¶ 45, because it found that prohibitions on entry violate the first prong of the test under § 253(b) — "competitive neutrality." *Id.* at ¶¶ 42, 45 ("[t]he lack of competitive neutrality is, in any event, dispositive standing alone"). The FCC explained that an absolute bar on entry cannot be competitively neutral:

The rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage — preservation of monopoly status — and saddles potential new entrants with the ultimate competitive disadvantage —

⁵ This statement bears on another issue pending before the Board, service area requirements. Such requirements are contrary to the Congress's intention that competitive markets — not regulations — determine which entrants will provide services demanded by consumers. Accordingly, *Silver Star* supports not only abolition of rural incumbent protectionism, but also the Department's recommendation that the Act does not permit states to impose service area requirements on new entrants.

⁶ Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local requirements, may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."

an insurmountable barrier to entry. Such disparity in the treatment of classes of providers violates the requirements of competitive neutrality and undermines the pro-competitive purpose of the 1996 Act.

Id. at ¶ 42. Plainly stated, Congress envisioned that the objectives enumerated in § 253(b) would be achieved "though means other than absolute prohibitions on entry." *Id.* quoting *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, File No, CCB Pol. 96-10, 11 FCC Rcd. 13082 (1996) at ¶ 38.

The FCC rejected another argument which was also raised by Vermont RTCs in the instant docket, that § 251(f) supports a prohibition on entry into RTC service areas. In point of fact, however, the terms of § 251(f) "bolster rather than contradict" the conclusion that the absolute entry barriers are forbidden. *Id.* Section 251(f) affords rural and small LECs relief from certain LEC obligations. The FCC concluded that by granting rural and small LECs this limited relief instead of an outright prohibition on competition, "Congress demonstrated its intent to open all markets to potential competitors — even markets served by rural or small LECs that may qualify for interconnection relief." *Id.* By choosing a less competitively restrictive means of protecting rural and small LECs, "Congress revealed its intent to preclude States from imposing the far more competitively restrictive protection of an absolute ban on competition." *Id.*

The FCC found additional support in §§ 253(f) and 214(e)(2) for its holding that state-imposed absolute entry barriers contravene the Act. Section 253(f) allows states to meet certain universal service requirements as a condition for competing with an RTC. Section 214(e)(2) permits states to decline to designate for an area served by an RTC more than one carrier as eligible for federal universal service support. These "accommodations" to RTCs, the FCC concluded, "indicate that Congress did not contemplate that States could 'protect' rural telephone companies with the much more competitively restrictive method of a categorical ban on entry." *Id.* at ¶ 44.

The FCC held that the Act preempted not only the order denying Silver Star permission to compete in the Afton exchange but also the rural incumbent protection provision of the Wyoming Act. *Id.* at ¶ 46. This holding is pertinent to the instant docket because the issue in the instant docket is not only whether the current prohibition on Hyperion's certificate should be removed but whether the Board should refrain from

Fredrick W. Weston, Hearing Officer
Docket 5713, Phase II
Letter of October 1, 1997
Page 5

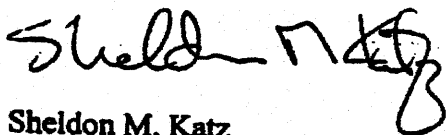
placing similar prohibitions on the certificates issued to other new entrants. *Silver Star* resoundingly answers that question in the affirmative. The Board should therefore refrain from prohibiting or delaying competition by new entrants in RTC service areas. Instead, the Board should adopt the Department's recommendation that CPGs be issued on a statewide basis. Raymond pf. at 6.

It is crucial that the Board make this determination in this generic docket. While continued regulation of entry is appropriate, requirements for certification should be consistent with § 253 and certification procedures should be simplified. Applicants should know in advance that once certified, they will be permitted to offer service anywhere in the state without the need to request amendment of their certificates. Applicants should also know in advance that they will not be bogged down in needless and expensive litigation over rural incumbent protectionism. The Board should announce a policy of issuing statewide certifications so that all parties — new entrants, the Board, the Department, and Vermont's RTCs — will not expend their scarce resources in further litigation over this issue. New entrants and incumbents alike can then devote their resources to serving the needs of consumers. A conclusive announcement on this will benefit all parties, and more importantly, consumers.

Finally, other preemption petitions may be pending before the FCC. The Department will keep you abreast of all developments in this area as they break so that the proposal for decision can accurately reflect the most recent state of the law.

Thank you for your consideration.

Sincerely,



Sheldon M. Katz
Special Counsel

encl

cc: Service Lists, Dockets 5713, 5988, 5989, 5990, 5991, 5992, 5993, 5994 (w/o encl.)
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