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February 24, 1998

VIA HAND DELIVERY

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

Re: *Hyperion of Tennessee, L.P. Application*
Docket No: 98-00001

Dear Mr. Waddell:

Enclosed, please find the original and thirteen copies of the Reply Brief of AVR, L.P. d/b/a Hyperion of Tennessee, L.P.

Copies are being served on parties of record.

Yours very truly,

Val Sanford

VS/ghc

cc: T. G. Pappas and R. Dale Grimes
L. Vincent Williams
Robert C. Wiegand
Kemal Hawa

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re: ***AVR of Tennessee, L.P. d/b/a Hyperion 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

REPLY BRIEF OF AVR OF TENNESSEE, L.P. D/B/A HYPERION OF TENNESSEE, L.P.

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February 24, 1998

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BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In re: ***AVR of Tennessee, L.P. d/b/a Hyperion 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

REPLY BRIEF OF AVR OF TENNESSEE, L.P. D/B/A HYPERION OF TENNESSEE, L.P.

The Intervenors Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone Company and Humphreys County Telephone Company (collectively the "Intervenors") in their brief filed in the above-captioned matter raise three basic issues: (i) the power of this Authority to pass upon the preemption of T.C.A. §65-5-209(d) by 47 U.S.C. §253(a) as applied to the Application of Hyperion; (ii) the preemptive effect of 47 U.S.C §253(a) on T.C.A. §65-4-209(d) as applied to the Application of Hyperion; and (iii) the preclusion of Hyperion from requesting termination of Tennessee Telephone Company's claimed exemption under 47 U.S.C. §251(f). AVR, of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") in this reply will demonstrate that there is no merit in the contentions of the Intervenors as to each of these issues.

I. THE TRA HAS THE POWER AND JURISDICTION TO DETERMINE THE PREEMPTIVE EFFECT OF 47 U.S.C. §253(a) ON T.C.A. §65-4-209(d) AS APPLIED TO THE APPLICATION OF HYPERION; AND MUST MAKE THAT DETERMINATION IN THIS CASE.

A. The United States Constitution And The Laws Adopted Pursuant To It By The United States Congress Are The Laws Of This State, And Are Binding Upon The TRA.

Article VI, Clause 2 of the United States Constitution, the Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause makes clear that the United States Constitution and the laws passed pursuant to it are the "supreme Law of the Land," and are as much the laws of Tennessee as the laws passed by the Tennessee General Assembly; Howlett By and Through Howlett v. Rose, 496 U.S. 356, 367, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990). State officials are not free to ignore the mandates of that supreme law or to act as if no such law existed.

Indeed, the Tennessee Constitution, Article X, Section 1, itself makes clear the duty of the officers of this state[1] to support the Constitution of the United States, by requiring every person chosen or appointed to any office of trust to take an oath to support the Constitution of the United States.

When Congress, in the exertion of the powers conferred upon it by the Constitution, adopts a law, it speaks for all the people and all of the states, and thereby establishes a policy for all; Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 57, 32 S.Ct. 169, 56 L.Ed.

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[1] T.C.A. §65-1-201 makes the Directors of the TRA "State Officers."

327, 349 (1912).

It cannot be questioned that this Authority has a constitutional duty to obey the "supreme law of the land." 47 U.S.C. §253(a) is a statute unquestionably within the competence of Congress to enact, and its applicability to the State of Tennessee is clear, anything in the law of this State to the contrary notwithstanding.

B. In Order To Decide This Case, The TRA Must Decide The Question Of Federal Preemption As Applied To The Specific Circumstances Of This Case.

The Intervenors ask this Authority to deny Hyperion's Application on the ground that it is prohibited by T.C.A. §65-4-201(d). Hyperion contends that T.C.A. §65-4-201(d) is preempted by 47 U.S.C. §253(a) which is the supreme law of the land on the subject of removal of barriers to entry by providers of interstate or intrastate telecommunications services.

The two statutes are in direct conflict. Both cannot be applied. The TRA must choose to follow one or the other. The issue of preemption is, thus, squarely and inescapably presented for decision in this case.[2]

C. The TRA Has The Undoubted Power And Jurisdiction To Determine The Applicability of T.C.A. §65-4-201(d) to Hyperion's Application, In The Face Of 47 U.S.C. §253(a), Even Though, In So Doing, It Is Deciding A Question Under The Supremacy Clause Of The United States Constitution.

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[2] It has long been settled that preemption is clearly applicable in cases of direct conflict between federal and state statutes; see, e.g., McDermott v. Wisconsin, 228 U.S. 115, 33 S.Ct. 431, 57 L.Ed. 754 (1913).

The jurisdiction and power of Tennessee administrative agencies to determine constitutional questions has been definitively settled by the Tennessee Supreme Court in the case of Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446 (Tenn. 1995). In that case, the Court distinguished between cases involving the facial constitutionality of a statute and cases involving the application of a statute to specific circumstances. The Court expressly held, at page 455:

> Therefore, an administrative body in a contested case proceeding may resolve questions of the unconstitutional application of a statute to the specific circumstances of the case or the constitutionality of a rule that the agency has adopted.

This case does not involve an issue as to the facial constitutionality of a statute. It is a contested case proceeding involving the unconstitutional application of a statute, T.C.A. §65-4-201(d) to the specific circumstances of this case. Therefore, the TRA unquestionably has the jurisdiction and power to determine the issue as to whether T.C.A. §65-4-201(d) is preempted by 47 U.S.C. §253(a).

Indeed, the determination of such issues of preemption has historically been a standard aspect of the functioning of the TRA and its predecessors, the Tennessee Public Service Commission and the Railroad and Public Utilities Commission. In the regulation of railroads, motor carriers, natural gas distribution companies, as well as telephone companies, Congress has chosen to establish dual regulatory systems, dividing regulatory power between federal and state authorities. Therefore, the state regulatory agency in these fields is continually required to determine whether federal or state law controls some specific issue. To hold that state administrative agencies have no power to make such determinations would bring their regulatory

efforts to a standstill awaiting judicial guidance as to how the agency should proceed.

There is no authority to support the argument that the TRA, or its predecessors, the Railroad and Public Utilities Commission, or the Tennessee Public Service Commission, lack or lacked, the power or jurisdiction to determine whether federal or state law controls decisions in specific cases.

Indeed, the Tennessee Court of Appeals in deciding the preemption issue raised by AT&T in the case of BellSouth Telecommunications, Inc. v. Greer, opinion entered October 1, 1997 (copy attached to Intervenors' brief), expressly held, at page 14:

> AT&T has already invoked the remedies before the Authority made available by 47 U.S.C.A. §252. In March 1996, it initiated interconnection negotiations with BellSouth. One month later, it requested BellSouth to provide information concerning BellSouth's costs for providing certain telecommunications services. After BellSouth declined to provide the information on the ground that it was not relevant to the interconnection negotiations, AT&T filed a petition in May 1996 requesting the Authority to resolve the dispute over the issue of access to the requested information. As far as this record shows, this proceeding remains before the Authority. This type of proceeding, and others like it, provide the parties with an appropriate forum to air out and resolve more clearly defined issues concerning the possible preemptive effect of specific provisions of the Telecommunications Act of 1996 or of the Federal Communications Commission's regulations.

Thus, the Court expressly recognized the power and jurisdiction of the TRA to make the initial determination as to the preemptive effect of "specific provisions of the *Telecommunications Act of 1996*."

The prior cases uniformly recognized the power and duty of a state agency to make the

initial determination[3] as to whether federal or state law controls a specific issue before it. For example, in Illinois Central Gulf R.R. v. TPSC, 736 S.W.2d 112 (Tenn.App. 1987) the TPSC issued an order alleging unsafe conditions in the railroad's yards and ordering the railroad to show cause why the railroad should not be required to remedy those conditions pursuant to T.C.A. §65-3-123 and the rules adopted pursuant thereto. The railroad contended that the State's safety standards had been preempted by federal law. The TPSC rejected the claim of preemption and applied the State law and its regulations. The Court of Appeals affirmed the order of the Commission. See also, Federal Express Corp. v. TPSC, 925 F.2d 962 (6th Cir. 1991) involving an order of the TPSC requiring Federal Express to obtain a Certificate of Convenience and Necessity for its motor carrier operations despite Federal Express' claim of preemption under the Airline Deregulation Act; and Con-Way Southern Express, Inc. v. Hewlett, 758 F.Supp. 464 (M.D. Tenn. 1991) involving an order of the TPSC requiring certain motor carriers to cease and desist from merging their operations despite a claim of federal preemption; and see Itel Containers International Corp. v. Cardwell, 814 S.W.2d 29 (Tenn. 1991), aff'd. 507 U.S. 60, 113 S.Ct., 1095, 122 L.Ed.2d 421 (1993), where the Tennessee Department of Revenue made the initial determination rejecting a claim of federal preemption.

Federal statutes are the law of this State. The TRA has no power to ignore the supreme law of the land. The TRA has the undoubted power and jurisdiction to determine whether T.C.A. §65-4-201(d) is preempted by 47 U.S.C. §253(a). Indeed, the TRA has the constitutional duty to make that initial determination.

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[3] No doubt any decision by the TRA is likely to be appealed, and a final determination will be made by some higher authority; but that fact does not diminish the power and duty of the TRA to make the initial decision.

II. T.C.A. §65-4-201(d), AS APPLIED TO THE APPLICATION OF HYPERION, IS PREEMPTED BY 47 U.S.C. §253.

A. The Tennessee Statute Is Clearly Preempted by 47 U.S.C. §253(a)

Subsection (c) of T.C.A. §65-4-201 requires the TRA to issue a Certificate Of Convenience And Necessity to a competing telecommunications service provider if the criteria of that statute are met. Hyperion meets those criteria; and under that subsection is entitled to the granting of its Application in this case.

However, Subsection (d) of T.C.A. §65-4-201 provides:

> 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 June 6, 1995.

The obvious purpose of that provision is to prohibit competing telecommunications service providers from operating in the areas served by incumbent local exchange telephone companies, such as Tennessee Telephone Company, having less than 100,000 access lines in this state.[4] Subsection (d) is, thus, a clear, specific and express barrier to entry, prohibiting the ability of Hyperion to provide intrastate telecommunications services in the area it seeks to serve by this Application.

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[4] Tennessee Telephone Company is not a small entity serving only an isolated rural territory. It 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 excess of $1 Billion. TDS Telecom operates 105 telephone companies which serve approximately 493,000 access lines in 28 states, including the Intervenors in this case.

In furtherance of the Congressional policy favoring the development of competition in telecommunications services, Congress adopted 47 U.S.C. §253(a), which provides:

> **§253. Removal of barriers to entry**
>
> **(a) In General**
>
> No 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.

This is clearly, expressly, and unambiguously a preemption provision. The United States Supreme Court has developed well settled standards for determining the preemptive effect of federal law. Thus, in determining the preemptive effect of the Airline Deregulation Act in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the Court stated, 112 S.Ct. at 2036:

> As we have often observed, "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990) (internal quotation marks omitted); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2898-2899, 77 L.Ed. 2d 490 (1983). The question, at bottom, is one of statutory intent, and we accordingly " 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *Holliday, supra,* 498 U.S., at 57, 111 S.Ct., at 407; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 661-662, 83 L.Ed.2d 582 (1985).

Accordingly, it is necessary to begin with the language employed by Congress in 47 U.S.C. §253(a) with the assumption that the ordinary meaning of that language accurately reflects the legislative purpose.

The language of Subsection (a) leaves no room for interpretation. "No State or local statute or regulation ... may prohibit or have the effect of prohibiting" means what it says. States cannot prohibit entry by any entity to provide any interstate or intrastate telecommunications service. See e.g., Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n., 499 U.S. 117, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991) where "all other law" was construed to mean what it said; and Morales v. Trans World Airlines, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed. 2d 157 (1992) where the provisions of the Airline Deregulation Act prohibiting states from enforcing "any law" relating to rates, routes or services of any air carrier was similarly construed.

As the Tennessee Supreme Court held in Carson Creek Vacation Resorts, Inc. v. State of Tennessee, Department of Revenue, 865 S.W.2d 1 (Tenn. 1993), at page 2:

> The most basic rule of statutory construction is to ascertain and give effect to the intention and purpose of the legislature. *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977). Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66 (Tenn.199). Where the language contained within the four corners of a statute is plain, clear and unambiguous and the enactment is within legislative competency, "the duty of the courts is simple and obvious, namely, to say *sic lex scripta*, and obey it." *Miller v. Childress*, 21 Tenn. (2 Hum.) 319, 321-22 (1841).

The language of Subsection (a) is clear and unambiguous. It is the constitutional duty of this Authority to obey it.

Therefore, the TRA should hold that it is bound by the federal statute and the Supremacy Clause of the United States Constitution, and should recognize the preemption of T.C.A. §65-4-201(d) as that subsection would be applied to the Application of Hyperion. The TRA should

grant Hyperion's Application for authority to provide service in the territories served by Tennessee Telephone Company.[5]

B. T.C.A. §65-4-201(d) Does Not Come Within The Exceptions To 47 U.S.C. §253(a).

47 U.S.C. §253 contains three express exceptions to the preemptive scope of Subsection (a), Subsections (b), (c), and (e):

Subsection (b) is clearly not applicable to T.C.A. §65-4-201(d). The Tennessee statute is not competitively neutral, but rather favors certain incumbent local exchange telephone companies and is clearly designed to preserve their monopoly over local telecommunications service within their service areas; See, *The Silver Star* and *Texas* decisions cited in Hyperion's Initial Brief. Moreover, that statute is not necessary to preserve and advance universal service, or protect the public safety and welfare, or ensure the continued quality of telecommunications services, or safeguard the rights of consumers. To the contrary, its manifest purpose is simply to prevent the development of competition -- contrary to the express purpose of the 1996 Federal Act.

Subsection (c) is clearly not applicable to T.C.A. §65-4-201(d), which has nothing to do with managing public rights-of-way.

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[5] 47 U.S.C. §253(d) provides that the FCC shall preempt the enforcement of any state statute which a state has permitted or imposed that violate subsection (a). The FCC has exercised its preemptive jurisdiction in the *Silver Star* and *Texas* cases discussed in Hyperion's Initial Brief. To be sure those decisions did not involve the Tennessee statutes, but they are highly persuasive authority with respect to the FCC's interpretation of the federal statute and closely analogous state statutes. Those decisions confirm the course to be followed by the TRA in this case. The issue here, however, is not dependent on the FCC's interpretation, but rests on the plain, unambiguous language of the governing statute and the duty of the TRA to follow it. The FCC's decisions support that interpretation.

Subsection (d) gives the FCC the power to preempt state actions violating Subsections (a) or (b); and, thus, gives the FCC the power to enforce the preemptive effect of the statute and provides the remedy if this Authority were to see fit to disregard its constitutional duty.

Subsection (e) deals with commercial mobile service providers and is not pertinent.

Subsection (f) does not limit the scope of Subsection (a), or authorize a state to limit entry by denying authority to operate. It deals with meeting the requirements of Section 214(e) governing eligibility for universal service support. It does not authorize the TRA to enforce T.C.A. §65-4-201(d) precluding entry and the granting of any authority.

Therefore, none of the Subsections of §253 provides a basis for the application of T.C.A. §65-4-201(d) to the Application of Hyperion. Subsection (a) of §253 requires that the TRA refuse to prohibit the ability of Hyperion to provide interstate or intrastate telecommunications services in the areas served by Tennessee Telephone Company.

III. THE TRA SHOULD NOT PURPORT TO PRECLUDE HYPERION FROM REQUESTING TERMINATION OF TENNESSEE TELEPHONE COMPANY'S EXEMPTION UNDER 47 U.S.C. §251(f)

The Intervenors in their brief argue that the TRA should preclude Hyperion from requesting termination of Tennessee Telephone Co.'s claimed rural exemption under 47 U.S.C. §251(f). That contention is based on erroneous conceptions as to: (i) the relationship between the removal of barriers to entry contained in 47 U.S.C. §253(a) and the nature of the rural exemption and the procedures for its termination in 47 U.S.C. §251(f); (ii) the nature and purpose of Hyperion's Application; and (iii) the power of the TRA to enter what would be, in effect, an injunction, and the propriety of such actions in this case.

A. 47 U.S.C. §251(f) Is Not A Limitation On, Or An Exception To, 47 U.S.C. §253.

47 U.S.C. §251 deals with "interconnection." Subsection (a) imposes general duties to interconnect on "each telecommunications carrier." Subsection (b) imposes duties on all local exchange carriers. Subsection (c) imposes "additional obligations" on incumbent local exchange telephone carriers. Subsection (f)(1)(A) deals with the exemption of certain rural telephone companies from Subsection (c) of §251. It provides:

> 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 (other than subsections (b) (7) and (c)(1)(D) thereof).

Subsection (f)(1)(B) deals with the procedures to be followed by State commissions with respect to the termination of the exemption provided in Subsection (f)(1)(A).

The exemption provided rural telephone companies is expressly limited to the "additional obligations" imposed on incumbent local exchange telephone carriers pursuant to Subsection (c). Neither Subsection (f) nor 47 U.S.C. §253, purports to exempt rural telephone companies from the preemption of barriers to entry. Nor does either provision give State commissions the power to preclude a party making a bona fide request for interconnection with a rural telephone company from seeking termination of the exemption from Subsection (c).

B. Hyperion Is Not Seeking In This Proceeding To Terminate The Exemption Of Tennessee Telephone Company From The Obligations Of 47 U.S.A. §251(c); And That Issue Is Not Properly Before The TRA.

In both its Application and its Initial Brief, Hyperion expressly stated that it is not seeking in this proceeding interconnection with Tennessee Telephone Company under §251(c). Rather, Hyperion is merely requesting that it be authorized to compete in Tennessee Telephone Company's service territory, and that both parties be bound by the obligations imposed on all local exchange carriers contained in §251(a) and §251(b).

47 U.S.C. §251(f)(1)(B) provides the procedure to be followed for "State Termination of Exemption and Implementation Schedule." It provides:

> The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

Thus, the party requesting interconnection under Subsection (c) initiates the proceeding by submitting a notice of its request for interconnection to the State commission and the State commission then conducts a proceeding to determine whether to terminate the exemption. Hyperion has not filed such a notice. Unless and until such a notice is filed, there is no basis for the TRA to consider whether to terminate Tennessee Telephone Company's exemption.

A proceeding involving termination of the exemption from the additional obligations imposed under Subsection (c) would raise issues not germane or relevant to the issues in this case. The determination of the issues under 47 U.S.C. §251(f)(1)(B) is not properly before the

TRA in this case; and such determination should await a proceeding properly brought for that purpose. The efforts of the Intervenors to confuse the issue in this proceeding should be rejected.

C. The TRA Has No Power To Preclude Hyperion From Seeking At Some Future Date The Relief Afforded By 47 U.S.C. §251(f)(1)(B); and, In Any Event, The Granting Of Such Relief Would Not Be Proper In This Case.

The Intervenors cite no authority giving the TRA the power to preclude Hyperion from seeking relief under 47 U.S.C. §251(f)(1)(B) at some future date in some other proceeding. No such authority exists. The powers of the TRA are limited to those provided expressly, or by necessary implication, by statute; Tennessee Cable Television Association v. Tennessee Public Service Commission, 844 S.W. 151, 159 (Tenn.App. 1992) and cases there cited.

Tennessee Telephone Company's request that the TRA issue an order precluding Hyperion from filing a petition requesting termination of its claimed rural exemption is not only unsupportable, but is also premature. Hyperion has not requested termination of any rural exemption that Tennessee Telephone Company may claim. Tennessee Telephone Company's concerns are premature and not ripe for consideration. If, at some time in the future, Hyperion or some other new entrant, should request that any rural exemption that Tennessee Telephone Company may claim be terminated, the TRA can then appropriately determine the merits of such petition at that time.

The Intervenors' speculations as to the institution of proceedings to terminate Tennessee Telephone Company's claimed exemption from §251(c) and to request arbitration of an interconnection agreement are unfounded. As a practical matter, Hyperion cannot seek an

interconnection agreement under 47 U.S.C. §252, unless, first, either Tennessee Telephone Company voluntarily enters into such an agreement and thereby waives any claim under T.C.A. §65-4-201(d) or T.C.A. §65-4-201(d) is held to have been preempted; and, second, Tennessee Telephone Company's claimed exemption from the obligations of 47 U.S.C. §251(c) has been terminated pursuant to 47 U.S.C. §251(f)(1)(B). Tennessee Telephone Company has refused voluntarily to agree to interconnection. Therefore, Hyperion has filed this Application. Hyperion cannot request arbitration, unless and until, Tennessee Telephone Company's claimed exemption is terminated and Hyperion is unsuccessful in reaching an interconnection agreement with Tennessee Telephone. The Intervenors' claims of some scheme to accomplish the completion of all this in some expedited manner are unrealistic and unfounded.

The *Federal Telecommunications Act of 1996* mandates the removal of barriers to entry into the territory of Tennessee Telephone Company; and that Act gives both Hyperion and Tennessee Telephone Company rights with respect to interconnection, and establishes procedures for the assertion and protection of those rights.

The Intervenors, however, have no right to preclude Hyperion from exercising the rights afforded it by federal statute, including the right to provide service in Tennessee Telephone Company's service area; and the TRA has no power, under the law, to order such preclusion. Certainly, the speculations and unfounded assertions of the Intervenors provide no basis for such preclusion.

CONCLUSION

47 U.S.C. §253(a) is a clear, express and unambiguous preemption of T.C.A. §65-4-

201(d). The federal statute is the supreme law of the land, including the State of Tennessee; and the TRA is bound to comply with it. The Intervenors' efforts to confuse and divert the TRA from its constitutional duties should be rejected.

T.C.A. §65-2-201(d) is preempted. Pursuant to T.C.A. §65-2-201(c) and the provisions of the *Federal Telecommunications Act of 1996,* the Application of Hyperion should be granted.

Respectfully submitted,

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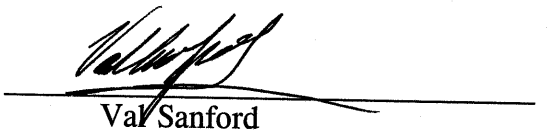
CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a true and exact copy of the foregoing Reply Brief of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. has been served via Hand-delivery the following parties of record, this **24th** day of **February, 1998**.



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