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EXECUTIVE SECRETARY

March 10, 2000

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

In Re: **Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)**
Docket No. 99-00613

Dear David.

Please accept for filing the original and thirteen copies of the Reply of SECCA, US LEC, and Hyperion in the above-captioned proceeding.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker
Henry Walker

HW/nl
Attachment
c: Parties

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

Re: Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)
Docket No. 99-00613

REPLY OF SECCA, US LEC AND HYPERION TO MOTION TO COMPEL

The Tennessee Small Exchange Company Coalition ("Petitioners") have filed a Motion to Compel responses to discovery requests filed by the Coalition on January 28, 2000.

The Southeast Competitive Carriers Association ("SECCA"), Hyperion of Tennessee, L.P. ("Hyperion") and US LEC of Tennessee, Inc. ("US LEC") (collectively, the "Intervenors") oppose the motion.

In declining to respond to the requests for discovery, the Intervenors set forth at some length the reasons why the Coalition's discovery questions are irrelevant to this proceeding. The main reason is this: The outcome of this proceeding has nothing to do with the business plans of potential competitors. The issue, rather, is the impact on the Coalition's members and their customers of "efficient competitive entry." That is a hypothetical standard and has nothing to do with particular competitors. That's why the FCC held that the incumbent LEC "is in control of the relevant information necessary for the state to make a determination" of this case and why the FCC placed the burden of proof in this proceeding upon the incumbent carriers. See *Responses to Discovery* filed by SECCA, US LEC and Hyperion (copy attached).

The Motion to Compel simply does not respond to these arguments other than to demand that the TRA either compel the Intervenors to respond to discovery or announce that the TRA acknowledges that "warm skimming" will occur if the Coalition members face competition. The TRA is not obligated to do either one.

The Coalition is not entitled to discovery because their questions are irrelevant. Whether "efficient competitive entry" is synonymous with "cream skimming" or whether either is grounds for granting relief to the Coalition are matters for the parties to argue at the hearing.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 10th day of March, 2000.

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February 10, 2000

David Waddell
Executive Secretary
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Nashville, TN 37243-0505

Re: Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)
Docket No. 99-00613

Dear David.

Enclosed herewith are the original and thirteen copies of the Objections of SECCA, Hyperion and US LEC to Discovery Requests in the above-referenced docket.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:
Henry Walker, attorney for US LEC Corp.

HW/nl
Enclosure
cc: Parties

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

Re: Petition of The Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. §251(b) and 251(c) Pursuant to 47 U.S.C. §251(f) and 47 U.S.C. §253(b)
Docket No. 99-00613

OBJECTIONS OF SECCA, HYPERION AND US LEC TO DISCOVERY REQUESTS

The Southeast Competitive Carriers Association ("SECCA"), AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), and US LEC of Tennessee, Inc. ("US LEC") file the following objections to "Petitioner's Request for Data and Production of Documents" issued in the above-captioned proceeding.

OBJECTIONS OF SECCA

SECCA objects to answering Petitioner's Data Requests 1-9 and Requests for Production of Documents 1-3 because the questions seek information, not from SECCA as an organization, but from SECCA's individual members.

SECCA is a trade association whose members are competing, local exchange carriers. Other trade associations, like the U.S. Telephone Association or the Tennessee Telecommunications Association, typically intervene and participate in state and federal regulatory proceedings. In those cases, the association itself is a party and, as such, has a position which may or may not reflect the position of each member of the association. While the Petitioner (the Tennessee Small Local Exchange Telephone Company Coalition) may properly take discovery of any party to this case, the association's individual members are not parties to this proceeding

except as they may have individually chosen to intervene. Petitioner may not, therefore, demand answers from SECCA members who are not otherwise parties to this proceeding.

For these reasons, the Authority has previously held that SECCA cannot be required to respond to discovery " on behalf of each individual member." *In Re: Proceeding for the Purpose of Addressing Competitive Effects of CSAs by BellSouth*, Docket 98-00559, Initial Order of Pre-Hearing Officer, Richard Collier, March 25, 1999, p. 3. In that case, BellSouth Telecommunications, Inc. asked SECCA to produce copies of any contract service arrangements ("CSAs") involving members of SECCA. Judge Collier held that, while SECCA may be required to respond to discovery as an organization, SECCA was not required to "produce or respond regarding the CSAs of the individual members of that organization." Docket 98-00559, *Third Report and Recommendation of Pre-Hearing Officer*, June 1, 1999, at p. 3.

In the instant case, every request for data and every request for the production of documents seeks information about an individual company, its existing markets, business plans, and the economic impact of "your entry" into the market of rural carriers. None applies to SECCA as an organization. Since SECCA cannot be required to respond on behalf of its individual members, SECCA objects to each of Petitioner's requests.

OBJECTIONS OF US LEC AND HYPERION

For different reasons, US LEC and Hyperion also object to Petitioner's Data Requests 1-9 and Requests for Production of Documents 1-3.

Under the federal Telecommunications Act, the only necessary parties to this proceeding are those incumbent, local exchange carriers which seek relief under Section 251(f). No one else is required to participate. This is not, for example, a lawsuit against US LEC or Hyperion, nor

is it a TRA investigation of the impact of competition by US LEC and Hyperion on Tennessee's rural local exchange companies. If US LEC, Hyperion, and the other intervenors decide to withdraw from this case today, the Petitioner's burden of proof under the Act would not change, nor would the Authority's statutory obligations be affected. The only issues presented in this case are whether the Petitioners can "offer evidence" that compliance with the interconnection obligations of the Act would not be "technically feasible," or cause "undue economic burdens beyond the economic burdens typically associated with efficient competitive entry."[1] The members of the Coalition must make that showing whether or not there are any other parties in the case.

Put another way, the FCC rules under which the Coalition seeks relief presume that LEC compliance with the interconnection requirements of the Act will result in "efficient market entry" and that such entry will create "economic burdens" on the LECs and some LEC customers. Each LEC must then answer the following question: is there something unique about the incumbent LEC

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[1] *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial mobile Radio Service Providers; Report and Order*, CC Docket Nos. 96-98 and 95-185, FCC 96-325 (August 8, 1996) (Interconnection Order), paragraph 1262.

The federal Act, Section 251(f)(2), actually prescribes a four-part test. TDS must show that interconnection is (1) "technically infeasible,"(2) "unduly economically burdensome" or (3) likely to have a "significant adverse economic impact" on users. Moreover, TDS must demonstrate that perpetuating its monopoly status is "consistent with the public interest, convenience and necessity." However, the FCC's rules and the agency's Interconnection Order reformulate the test and appears to combine parts two and three, which relate to the economic impact of competition, into one standard. As the FCC interprets the Act, a LEC seeking suspension or modification of its interconnection obligations "must offer evidence that application of those [interconnection] requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry." Interconnection Order, paragraph 1262. *See* 47 CFR §51.405(d). That formulation would also presumably encompass the "public interest" criteria.

which would cause the "economic burdens" of competition to be unusually severe? The answer to that question depends upon the operations of the incumbent LEC and has nothing to do with US LEC, Hyperion, or any other intervenor. As the FCC explained in the Interconnection Order, paragraph 1263, the incumbent LEC "is in control of the relevant information necessary for the state to make a determination" under Section 251(f). If TDS controls the "relevant information" necessary for the TRA to decide this case, information about the operations of US LEC and Hyperion is necessarily irrelevant to that decision.

For example, if US LEC and Hyperion produced data showing that they are poorly run, inefficient competitors, that would not prove that the Coalition is more or less entitled to relief. Similarly, if the evidence indicates that US LEC and Hyperion are aggressive "cream skimmers," that also would have no bearing on this case. "Efficient market entry" necessarily presumes that the competitive entrant would behave, in Petitioner's own words, like "any rational business entity" and target the most "economically lucrative customers." Petitioner's Brief in Support, 8. Efficient market entry, in other words, presumes "cream skimming" will occur. But that does not mean that the Coalition is entitled to relief, nor does it mean that the business plans of individual competitors are relevant to this proceeding.

In sum, the FCC has declared that the Coalition must make its case based on the assumption of "efficient market entry" and its natural consequences. Based on that assumption and upon "relevant information" provided by the incumbent LECs, the TRA must weigh the statutory criteria and make its decision without regard to the operations of any actual or potential competitor. No other conclusion can be fairly drawn from the plain words of the federal Act and the FCC's Order.

For these reasons, the Petitioner's Data Request 1-9 and Requests for Production of Documents 1-3, all of which request company-specific information about US LEC and Hyperion, have no bearing on the Coalition's right to relief. Therefore, the Coalition's discovery requests are irrelevant to this proceeding.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 10th day of February, 2000.

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