

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
of 1996)

CC Docket No. 96-98

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OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
TO MOTION OF THE RURAL TELEPHONE COALITION
FOR STAY PENDING JUDICIAL REVIEW

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 2

ARGUMENT 3

I. RTC IS NOT LIKELY TO SUCCEED ON THE MERITS 3

II. RTC HAS NOT SHOWN THAT ITS MEMBERS WOULD SUFFER
IRREPARABLE HARM ABSENT A STAY 8

III. GRANT OF A STAY WILL HARM OTHER PARTIES INTERESTED IN
LOCAL COMPETITION AND WILL UNDERMINE THE PUBLIC
INTEREST IN ROBUST LOCAL COMPETITION IN RURAL AREAS 10

CONCLUSION 11

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**OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
TO MOTION OF THE RURAL TELEPHONE COALITION
FOR STAY PENDING JUDICIAL REVIEW**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby opposes the Motion for Stay Pending Judicial Review filed by the Rural Telephone Coalition ("RTC") in the above-captioned proceeding.^{1/} NCTA is the principal trade association of the cable television industry. Cable operators and their affiliates are already providing local exchange and competitive access services, and the cable industry is aggressively pursuing entry into the local telephony marketplace in numerous states. Small cable operators in particular are seeking to enter into new lines of business, including the provision of competitive local telecommunications services in rural areas.

^{1/} In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order").

INTRODUCTION AND SUMMARY

The Commission must deny RTC's motion, which fails to satisfy the well-established test for a stay. Contrary to RTC's charges, the Commission's rules implementing the rural exemption to the local competition provisions of the Telecommunications Act of 1996 ("the 1996 Act") are fully consistent with the language and intent of the law. What would violate the statute is the near-insuperable barrier to competition in rural areas that the RTC would erect.

Likewise, RTC's allegations of harm do not rise to the standard of "irreparable injury" necessary to justify a stay. Indeed, the RTC appears to premise its claim of harm on the argument that rural telephone companies ("rural telcos") would incur legal and other costs if they chose to resist a bona fide request for interconnection. This "harm" amounts to nothing more than the costs of complying with statutorily-established procedures.

Finally, RTC's argument that making agreements between incumbent local exchange carriers ("ILECs") available to competitors will establish a level playing field for the provision of extended area service proves precisely why competitors should be able to obtain interconnection under those agreements pursuant to section 252(i) of the Communications Act, as added by the 1996 Act. RTC's claim that the "infrastructure sharing" provisions of section 259 take precedence over the obligations of section 251 ignores unambiguous statutory language imposing those obligations on rural telcos upon receipt of a bona fide request.

If RTC prevails, consumers in rural areas will be the victims. Incumbent rural telcos are obviously in the best position to demonstrate the economic and technical effects of a bona

fide request. Potential new entrants, including small cable companies, who lack the necessary information about a rural telco will not be able to obtain interconnection if they must first prove that the request would not be unduly economically burdensome or technically infeasible for the telco. Under the result sought by RTC, competitors would effectively be deprived of interconnection with rural telcos under most circumstances. The public interest clearly favors rejecting RTC's motion.

ARGUMENT

To obtain a stay, the moving party must show that (1) it is likely to prevail on the merits; (2) it will be irreparably injured without a stay; (3) the issuance of the stay will not substantially harm other parties interested in the proceeding; and (4) the public interest will be served by the stay.^{2/} RTC's motion satisfies none of these four factors.

I. RTC IS NOT LIKELY TO SUCCEED ON THE MERITS

In its request for a stay of section 51.405 of the Commission's rules, which establishes the burden of proof applicable when a rural telco receives a bona fide interconnection request, RTC fundamentally mischaracterizes both the Local Competition Order and the 1996 Act.^{3/} Congress did not intend to insulate rural telcos from

^{2/} WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977).

^{3/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

competition.^{4/} Rather, as the Commission correctly found, section 251(f)(1) created a narrow, targeted exemption for certain rural telcos to the interconnection obligations imposed by section 251(c). Once a rural telco receives a bona fide request for interconnection, however, termination of the exemption is presumed to be appropriate except in certain limited circumstances. Specifically, the 1996 Act provides that a "State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible," and is consistent with the statute's universal service provisions.^{5/}

Far from "interject[ing]" itself into the exemption process,^{6/} the Commission declined to define a bona fide request for purposes of section 251(f) or take any action other than placing the burden of proof on the party most likely to have the necessary information.^{7/} Contrary to the RTC's suggestion, moreover, the Commission's assignment

^{4/} See, e.g., S. Rep. No. 104-23, at 61 (1995) (Additional Views of Sen. Burns) ("Through sound legislation, we have the opportunity to foster substantial new investment and domestic jobs creation, while expanding the competitive choices available to all Americans, including rural and small town residents."); 141 Cong. Rec. S7888-7889 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("[This bill] establishes a process that will make sure that rural and small-town America doesn't get left in the lurch."); *id.* at S8476 (daily ed. June 14, 1995) (statement of Sen. Pressler) ("[C]ompetition and deregulation will bring great benefits to South Dakota and other states with small cities."); *id.* at S8004 (daily ed. June 8, 1995) (statement of Sen. Dorgan) ("[A]nother part of this bill . . . are the protections . . . for rural America - not protections against competition, but protections to make sure we have the same benefits and opportunities in rural America for the build-out of infrastructure of this telecommunications revolution as we will see in Chicago, Los Angeles, New York, and elsewhere. Our citizens are no less worthy than citizens who live in the biggest cities . . .").

^{5/} 47 U.S.C. § 251(f)(1)(B) (emphasis supplied).

^{6/} Motion for Stay at 3.

^{7/} Local Competition Order at ¶ 1263.

of the burden of proof to the incumbent telco is not without precedent. In other recent proceedings to implement the 1996 Act, the Commission has placed the burden of proof on the party with access to the information necessary to resolve the issue in question.^{8/} The Commission's failure to include references to the other statutory factors in its rules reflects only the limited scope of the Commission's involvement with the exemption and not, as RTC argues, an effort by the Commission to "mold interconnection relief to its own preferences."^{9/}

Finally, RTC's argument that the Commission "contrived a markedly different economic-impact standard from what Congress enacted" ignores the explicit language of the 1996 Act. Section 251(f)(1)(B) states that the exemption will terminate for a rural carrier if

^{8/} See Local Competition Order, *supra* note 1, at ¶¶ 1222-25 (placing burden of proof on person denying access to poles, ducts, conduits and rights-of-way once complainant establishes *prima facie* case of discriminatory denial of access); In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CC Docket No. 96-46, Second Report and Order, FCC 96-249, at ¶ 72 (rel. June 3, 1996) (placing burden of proof on OVS operator, who possesses relevant information regarding allocation method, when aggrieved video programming operator files complaint alleging discrimination in allocation process); In the Matter of Implementation of the Non-Accounting Safeguards of Section 271-272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LECs Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, at ¶¶ 101-02 (rel. July 18, 1996) (proposing to shift burden of proof to BOCs for complaints alleging that a BOC has ceased to meet the requisite conditions of § 271(d)(3) for provision of interLATA services because BOC possesses relevant information); see also 47 U.S.C. § 159(c) (placing burden of proof on licensee in enforcement proceedings to revoke an existing license for nonpayment of a regulatory fee); see also Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 266 (D.C. Cir. 1974) (finding that Commission should have placed burden of proof on party with access to relevant information).

^{9/} Motion for Stay at 5.

the request is not "unduly economically burdensome."^{10/} By requiring rural telcos to comply with section 251(c) if the economic burden is not "undue," Congress sought to prevent a rural telco from perpetuating the exemption merely because compliance would impose some economic burden. In using the phrase "beyond the economic burdens typically associated with competitive entry," the Commission has simply provided a common-sense gloss on the statutory term "undue." RTC's real complaint is with the inclusion of that term in the statute, not with the Commission's rule interpreting that term in a common-sense manner.

RTC's arguments against sections 51.303 and 51.809 of the Commission's rules are also likely to fail on the merits. The Commission correctly rejected arguments by ILECs that the terms of existing agreements between non-competing ILECs need not be made available to other telecommunications carriers under section 252(i). Contrary to RTC's suggestions,^{11/} the Act is not concerned solely with arrangements between competing LECs. Rather, the duty under section 251(c)(2) to interconnect encompasses arrangements with "any telecommunications carrier" requesting interconnection "for the transmission and routing of telephone exchange service."^{12/} Likewise, the 1996 Act requires ILECs to submit for State approval any "binding agreement" for interconnection, services, or network elements, regardless of whether the agreement satisfies the checklist in section 251.^{13/}

^{10/} 47 U.S.C. § 251(f)(1)(B) (emphasis supplied).

^{11/} Motion for Stay at 16.

^{12/} 47 U.S.C. § 251(c)(2)(A) (emphasis supplied).

^{13/} Id. § 252(a).

Agreements between adjacent ILECs represent the outcome of negotiations between two non-competing carriers with even bargaining power. As such, they provide the best evidence of what is technically feasible. For instance, despite the protestations of ILECs, they routinely interconnect with other ILECs at agreed-upon "meet points."^{14/} Notably, adjacent carriers also traditionally use bill and keep. The Act itself recognizes the relevance of agreements between ILECs in assessing the reasonableness of interconnection arrangements with other requesting carriers: it directs ILECs to provide interconnection in a manner that is "at least equal in quality to that provided by the [LEC] to itself or . . . any other party to which the carrier provides interconnection."^{15/} Indeed, the Commission has historically looked to arrangements between non-competing ILECs to determine what is reasonable for a competing carrier to expect from an incumbent.^{16/}

RTC is also wrong in suggesting that section 259 of the Communications Act somehow supersedes section 251 with respect to the relationship between rural telcos and other incumbent LECs.^{17/} Section 259 enables "qualifying carriers" that lack economies of

^{14/} Comments of NYNEX in CC Docket No. 96-98 (May 16, 1996) at 25; Comments of United States Telephone Association in CC Docket No. 96-98 (May 16, 1996) at 68, n.60.

^{15/} 47 U.S.C. § 251(c)(2)(C) (emphasis added); see also H.R. Rep. No. 104-458, at 120 (1996) ("Conference Report").

^{16/} See e.g., In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 RR 2d 1275, 1278 (1986) (discussing interconnection agreements between ILECs and cellular carriers), citing 89 FCC 2d 58, 81-82 (1982) ("Cellular Reconsideration") and 86 FCC 2d 469, 495-96 (1981) ("Cellular Report and Order"); In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2915-16 (1987).

^{17/} Motion for Stay at 16.

scale or scope to obtain network infrastructure, technology, information, and telecommunications facilities and functions from ILECs. It is a specialized provision that serves a discrete purpose: to ensure that small telephone companies have access to functionalities that they may not otherwise be able to build, purchase, or obtain through interconnection negotiations under section 252.

The Local Competition Order does not deprive small telcos of their rights under section 259. Contrary to RTC's arguments, however, section 259 was not intended to exempt rural telcos from the generally-applicable local competition provisions of the 1996 Act. It supplements -- but does not supplant -- those provisions.

II. RTC HAS NOT SHOWN THAT ITS MEMBERS WOULD SUFFER IRREPARABLE HARM ABSENT A STAY

A party requesting a stay must make a showing that it will be irreparably injured absent the issuance of the stay. RTC utterly fails this test. Its allegations of "harm" are wholly speculative. The supposedly exceptional burdens it offers as proof of harm are nothing more than the normal expenses that must be incurred by carriers in connection with the 1996 Act.

Apparently, the most RTC can say is that the Commission's limited clarification of the statutory exemption "substantially increase[s] the probability that the exemption will be terminated."^{18/} As a threshold matter, Congress explicitly provided for the termination of the exemption upon a finding that a bona fide interconnection request satisfied the criteria set

^{18/} Id. at 11.

forth in section 251(f)(1). Action consistent with Congressional expectations can hardly be considered "irreparable harm."

RTC also expresses concern that its members will have to prepare "immediately" for "challenges to their exemptions."^{19/} Presumably, however, RTC's members have had to prepare themselves to address requests for interconnection since February 8, 1996, when section 251(c) became effective. This preparation -- including hiring "attorneys, cost consultants, and economists" as may be necessary to address the statutory factors relevant to the consideration of an interconnection request^{20/} -- is inherent in the statutory scheme in which rural telcos receive and respond to such requests. It is not evidence of irreparable harm. In any event, a rural telco need not undertake such expenses until it receives a bona fide request for interconnection.

The evidence of harm offered by RTC in support of its request to stay sections 51.303 and 51.809 is likewise insufficient. Remarkably, the showing of "harm" consists of an argument that the rules might actually subject rural telcos to competition: if ILEC-rural telco arrangements are subject to these rules, rural telcos will no longer be the only local carrier in an area able to provide extended area service.^{21/} In fact, enhancing local competition is the

^{19/} Id. at 12 (emphasis in original). It is noteworthy that RTC regards bona fide interconnection requests as "challenges" -- apparently to a protected monopoly status for its members that finds no support in the statute.

^{20/} See id.

^{21/} Id. at 17.

core objective of the 1996 Act.^{22/} Apart from the wholly speculative nature of RTC's claims, fulfillment of the statutory goal can hardly be considered irreparable harm.

III. GRANT OF A STAY WILL HARM OTHER PARTIES INTERESTED IN LOCAL COMPETITION AND WILL UNDERMINE THE PUBLIC INTEREST IN ROBUST LOCAL COMPETITION IN RURAL AREAS

The grant of a stay can only complicate and delay the efforts of small cable operators and other competitors to negotiate interconnection agreements with rural telcos. Disputes over whether an economic burden is "undue" or over who bears the burden of proof -- with the possibility that some States may assign that burden to competitors that lack the information necessary to meet that burden -- will impede efforts to bring local competition to rural areas. While this might be RTC's goal, it is not the purpose of the statute.

Likewise, the public interest in fostering local competition will be disserved if rural telcos can retain their monopoly over extended area service ("EAS"). As RTC notes, "customers value EAS arrangements."^{23/} Depriving competitors of access to EAS arrangements by putting agreements between rural telcos and ILECs beyond the reach of section 252(i) will serve only to further entrench the incumbent rural telco against potential competitors.

^{22/} Conference Report at 1.

^{23/} Motion for Stay at 19.

CONCLUSION

RTC's motion for stay is little more than an effort to prevent the implementation of the Local Competition Order. In support of the specific relief it seeks, RTC has failed to satisfy the test applicable to stay requests. For the reasons set forth above, the Commission must deny RTC's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Staci Pittman, do hereby certify that a copy of the foregoing NCTA Opposition to RTC's Motion for Stay was sent to the following by either first class mail, postage pre-paid, or by hand delivery, this 9th day of October, 1996.


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