

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

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In the Matter of

Implementation of Infrastructure
Sharing Provisions in the
Telecommunications Act of 1996

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CC Docket No. 96-237

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Counsel

Lisa W. Schoenthaler
Director and Counsel
Office of Small System Operators

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

1724 Massachusetts Avenue, N.W.
Washington, DC 20036
202/775-3664

Its Attorneys

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SUMMARY

Section 259 must be read in conformity with the Act's overall objective of promoting telecommunications competition in all markets, including local markets in small towns and rural areas. The Commission must ensure that infrastructure sharing agreements do not become a mechanism for discouraging new entry into small and rural telephone markets by cable companies and other competitive local exchange carriers (CLECs).

Section 259 should be narrowly construed. Congress authorized infrastructure sharing agreements to enable small, rural carriers to obtain network capabilities that they cannot otherwise deploy themselves due to a lack of economies of scale or scope. The Commission therefore should establish a threshold eligibility test that effectuates Congress' intent to limit the circumstances under which network capabilities may be obtained under Section 259.

To prevent infrastructure sharing agreements from becoming a vehicle for thwarting competition, the Commission should specify that a qualifying carrier that obtains network capabilities to Section 259, must make those capabilities available to CLECs competing within its market pursuant to Section 251. Absent such a rule, qualifying carriers could frustrate competition and deter new entry by using Section 259 to obtain network features and functions, instead of deploying such capabilities themselves subject to unbundled access by competitors under Section 251.

The Act clearly provides the Commission with plenary jurisdiction to establish rules governing infrastructure sharing agreements entered into pursuant to Section 259. The Commission's implementing rules should specify that the network disclosure provisions of Section 259(c) are no broader than the similar provisions set forth in Section 251(c)(5).

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, submits its comments in response to the Notice of Proposed Rulemaking ("Notice") issued in the above-captioned proceeding.^{1/} NCTA is the principal trade association of the cable television industry.

I. THE COMMISSION SHOULD NARROWLY INTERPRET THE CIRCUMSTANCES UNDER WHICH A QUALIFYING CARRIER MAY OBTAIN FEATURES AND FUNCTIONS PURSUANT TO SECTION 259

Section 259 of the Telecommunications Act of 1996 ("Act") obligates an incumbent local exchange carrier (ILEC) to enter into infrastructure sharing agreements that provide qualifying telecommunications carriers with access to its network facilities and functionalities.^{2/} This provision is designed to offer small carriers the opportunity to obtain from larger ILECs in adjacent markets new telecommunications features and functions that would be otherwise unavailable to them because they "lack economies of scale or scope."^{3/}

^{1/} Notice of Proposed Rulemaking, CC Docket No. 96-237 (rel. November 22, 1996).

^{2/} See 47 U.S.C. § 259.

^{3/} 47 U.S.C. § 259(d). See also 47 U.S.C. § 259(b)(6) (providing that an ILEC need not enter into an infrastructure sharing agreement that enables a qualifying carrier to offer competing services within the ILEC's service area).

The Commission's critical task in this proceeding is to implement Section 259 in a manner that fully accords with the Act's central purpose of promoting competition in all telecommunications markets.^{4/} Section 259 should not become a mechanism to provide "qualifying carriers" with insurmountable infrastructure advantages over cable companies and other competitive local exchange carriers (CLECs) seeking to enter local telephone markets in small towns and rural areas. Thus, NCTA shares the Commission's view that "the requirements of Section 259 should be interpreted, wherever possible, as complementary to the Commission's implementation" of the Act's competition and universal service provisions.^{5/} In addition, NCTA concurs that the scope of Section 259 should be interpreted as "relatively narrow."^{6/}

Congress restricted the circumstances under which a "qualifying carrier" could obtain public switched network infrastructure, technology, features and functions under Section 259. Specifically, carriers must "lack economies of scale or scope" in order to be eligible to enter into infrastructure sharing agreements under Section 259 and must be providing telephone exchange, exchange access and other services encompassed within the definition of universal service.^{7/} Thus, Congress sought to limit infrastructure sharing agreements to instances in which a small

^{4/} H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (Jan. 31, 1996).

^{5/} Notice at ¶ 6.

^{6/} Id. at ¶ 12.

^{7/} 47 U.S.C. § 259(d). In addition, qualifying carriers may not enter into infrastructure sharing agreements in order to providing competing telecommunications services within the furnishing ILEC's service area. 47 U.S.C. § 259(b)(6).

carrier lacks the economies of scale or scope needed to deploy a particular network capability, and therefore requires access to the network infrastructure of a larger, neighboring ILEC.^{8/}

In order to effectuate the intent of Section 259 and promote administrative efficiency, the Commission should establish a threshold eligibility test for carriers seeking to obtain network capabilities from neighboring ILECs pursuant to Section 259. The Commission should specify that a carrier may request network capabilities through an infrastructure sharing agreement only if it (i) is a rural telephone company, as defined in the Communications Act,^{9/} and (ii) serves, in combination with its affiliates, fewer than two percent of the Nation's subscriber lines installed in the aggregate nationwide.^{10/} Such carriers should also be required to show that because they lack economies of scale or scope, it is economically unreasonable for them to deploy the capability, feature or function sought in the agreement.^{11/}

II. NETWORK FEATURES AND FUNCTIONS OBTAINED BY QUALIFYING CARRIERS UNDER SECTION 259 SHOULD BE MADE AVAILABLE TO CLECs UNDER SECTION 251 TO ENSURE CONFORMITY WITH THE PRO-COMPETITIVE REQUIREMENTS OF THE 1996 ACT

The Commission's administration of Section 259 should in no way undermine implementation of the core local competition requirements of Section 251. Section 259 should not operate to provide rural telcos with special advantages over rural cable companies entering the telephony market with regard to access to advanced network capabilities.

^{8/} Section 259 does, however, permit both ILECs and CLECs to be "qualifying carriers," so long as the requirements of subsections (b) and (d) are met.

^{9/} 47 U.S.C. § 153(37).

^{10/} Thus, the Commission should not permit a carrier to be both a provider and a recipient of network features and functions under Section 259. Cf. Notice at ¶ 37.

^{11/} Cf. Notice at ¶ 37.

To ensure that Section 259 complements, rather than undermines, the Act's competitive purposes, the Commission should specify that network features and functions obtained by a qualifying carrier under an infrastructure sharing agreement must be made available to requesting CLECs competing within its market pursuant to the requirements of Section 251. This rule will prevent Section 259 from being transformed into a vehicle for thwarting the competition Congress sought to promote in small towns and rural areas.^{12/} Absent such a requirement, a qualifying carrier would have an incentive to obtain network capabilities from an adjacent ILEC under Section 259, rather than deploy its own features and functions that would be subject to unbundling under Section 251. Unless competitors have equal access to capabilities obtained by small or rural ILEC pursuant to Section 259, the qualifying carrier would enjoy exclusive access to such functionalities and wield market power with respect to the attendant services that could be furnished via such capabilities. Such a result would contravene the Act's purposes.^{13/}

^{12/} See S. Rep. No. 23, 104th Cong., 1st Sess. 61 (statement of Sen. Burns) ("Through sound legislation, we have jobs creation, while expanding the competitive choices available to all Americans, including rural and small town residents."); 141 Cong. Rec. S8476 (daily ed. June 15, 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.").

^{13/} At a minimum, the Commission should hold that the scope of the "public switched network infrastructure, technology, information, telecommunications features and functions" available to qualifying carriers under Section 259 is no broader than the scope of features, functions, services and information available to CLECs under Section 251. The breadth of the term "network element" used in Section 251 is at least coextensive with the scope of the term "public switched network infrastructure, technology, information, and telecommunications facilities and functions" used in Section 259. See 47 U.S.C. § 153(29) (defining network element as "a facility or equipment used in the provision of a telecommunications service. Such

If a qualifying carrier shows that it would be infeasible to provide a particular function obtained under Section 259 to a requesting CLEC,^{14/} the CLEC should then be permitted to obtain that function from the same ILEC that provided it to the qualifying carrier.^{15/} The CLECs right of access to network capabilities obtained by qualifying carriers under Section 259 should apply regardless of whether or not the qualifying carrier has obtained a waiver of, or exemption from, the Act's local competition requirements pursuant to Section 251(f).^{16/} The availability of the exemptions and waivers provided in the Act for small and rural carriers is predicated upon the economic unreasonableness or technical infeasibility of meeting a particular Section 251(c) obligation.^{17/} If a qualifying carrier has obtained a network capability under Section 259, however, it should be technically feasible to provide it to a requesting CLEC, since the capability already has been unbundled in connection with its provision to the qualifying

term also includes features, functions and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service") (emphasis added).

^{14/} For example, if a qualifying carrier decides to obtain SS7 capabilities from an adjacent ILEC, rather than deploy them itself, it may only be feasible for a CLEC competing with that qualifying carrier to obtain access to those capabilities directly from the adjacent ILEC.

^{15/} Such a requirement would not contravene Section 259(b)(3), which restricts the Commission's ability to accord common carrier treatment to an ILEC's furnishing of infrastructure, technology, information or network features and functions under Section 259. 47 U.S.C. § 259(b)(3). The rule suggested here would only apply in limited instances in which a qualifying carrier could not itself fulfill its Section 251 obligations by providing CLECs with access to network features and functions used in connection with its provision of telephone exchange services.

^{16/} 47 U.S.C. § 251(f).

^{17/} See *id.*

carrier. Likewise, there is no issue as to economic unreasonableness,^{18/} since the CLEC will only be permitted to obtain it from the qualifying carrier in accordance with the Commission's cost-based rate requirements.^{19/}

Consistent with the goal of ensuring fair competition, carriers that are eligible to enter into infrastructure sharing agreements under Section 259 should be required to demonstrate that the requested capability cannot otherwise be obtained from the adjacent ILEC under Section 251.^{20/} This requirement would prevent ILECs from using Section 259 to evade obligations under Section 251.

Small and rural ILECs already have manifested their intention to use Section 259 agreements as a means of denying their competitors access to favorable interconnection terms and conditions.^{21/} They argue that Section 259 "expressly provides that carriers entering into § 259 arrangements cannot be compelled to offer those arrangements to other competing carriers on the same terms."^{22/} In their view, "agreements between small LECs and their neighbors

^{18/} Cf. 47 U.S.C. § 259(b)(1) (Commission rules under Section 259 "shall not require a local exchange carrier . . . to take any action that is economically unreasonable").

^{19/} If a qualifying carrier relieved from a Section 251 obligation pursuant to subsection (f) can nonetheless show that furnishing a capability obtained under Section 259 to a competitor in its market would be economically burdensome or technically infeasible, the CLEC should be permitted to obtain the capability from the ILEC that furnished it to the qualifying carrier. If it is viable for the ILEC to furnish a particular capability to a qualifying carrier, it should be no more burdensome to provide that same capability to a CLEC serving the same geographic area.

^{20/} Notice at ¶ 13.

^{21/} See Iowa Utilities Board v. Federal Communications Commission, Case No. 96-3321, United States Court of Appeals for the Eighth Circuit, Brief for Petitioners United States Telephone Association and the Rural Telephone Coalition, November 18, 1996 ("USTA/RTC Brief").

^{22/} USTA/RTC Brief at 16.

concerning non-competing services fall within the scope of § 259," and therefore are not encompassed within §§ 251 and 252.^{23/} The Commission should reiterate in this proceeding that Section 259 cannot be used to shield agreements between neighboring ILECs from the requirements of Section 252(i).^{24/} In addition, by permitting small and rural carriers to proceed under Section 259 only where they can show that the requested capabilities cannot be obtained under Section 251, the Commission would promote competitive parity between qualifying carriers and CLECs.

III. THE COMMISSION HAS PLENARY JURISDICTION TO IMPLEMENT SECTION 259

NCTA agrees that the Act "grants the Commission sole authority to create rules to implement" Section 259 and that such rules would pertain to "both interstate and intrastate communications."^{25/} Section 259 authorizes the establishment of infrastructure sharing agreements, subject to Federal rules, between carriers providing telephone exchange service, an

^{23/} Id. at 40.

^{24/} See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("Local Competition Order") at ¶ 169. Likewise, the Commission should reaffirm that neighboring ILECs may not avoid the requirements of Section 252 by characterizing their pre-Act agreements as Section 259 agreements. See id.; see also USTA/RTC Brief at 4 ("Many voluntary pre-Act agreements between Regional Bell Operating Companies and independent small or rural telephone companies cover arrangements that now fall within the scope of the 'infrastructure sharing' provisions of § 259").

^{25/} Notice at ¶ 18.

intrastate service.^{26/} The statutory language therefore evidences a clear intention to displace State authority in this area.^{27/}

IV. THE NOTICE AND INFORMATION REQUIREMENTS OF SECTION 259(c) SHOULD BE NO BROADER THAN SIMILAR REQUIREMENTS SET FORTH IN SECTION 251(c)(5)

The Notice correctly states that the information disclosure provision contained in Section 259 is "similar to the network disclosure requirement of Section 251(c)(5)."^{28/} NCTA agrees that the Commission should focus on "harmonizing the disclosure requirements under Sections 259 and 251" to reduce duplicative administrative requirements and ensure competitive parity.^{29/} Congress did not intend to provide neighboring incumbents with an advantage over CLECs in connection with access to information regarding the functionality and interoperability of, or planned changes to, an ILEC's network. While Section 259(c) may require slightly different requirements with respect to the process of providing notice thereunder,^{30/} the contents of the disclosures should be the same.

^{26/} See 47 U.S.C. § 259(a)-(d).

^{27/} See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 374 (1986); Hines v. Davidowitz 312 U.S. 52, 66-67 (1941).

^{28/} Notice at ¶ 29.

^{29/} Id. at ¶ 30.

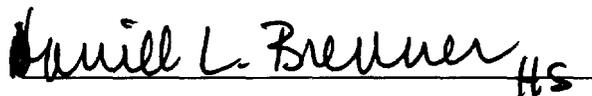
^{30/} Compare 47 U.S.C. § 251(c)(5) (requiring "reasonable public notice" of network changes) with id. 47 U.S.C. § 259(c) (requiring notice "to each party" to an infrastructure sharing agreement). Accord Notice at ¶ 35 ("We tentatively conclude that the public notice provisions of Section 251(c)(5) do not suffice to meet the requirements of Section 259(c) that incumbent LECs provide notice to the parties to Section 259 agreements").

CONCLUSION

For the foregoing reasons, the Commission should ensure that the rules promulgated under Section 259 preserve and promote the Act's core competitive purposes. Consistent with those purposes, the Commission should narrowly construe Section 259. Any network capability, feature or function obtained by a qualifying carrier under Section 259 should be made available to CLECs pursuant to the requirements of Section 251.

Respectfully submitted,

THE NATIONAL CABLE TELEVISION
ASSOCIATION, INC.

Handwritten signature of Daniel L. Brenner in black ink, with the initials "HS" written at the end of the signature.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Counsel

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

December 20, 1996

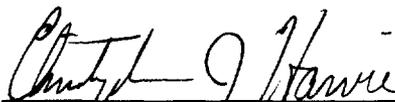
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Lisa W. Schoenthaler
Director and Counsel
Office of Small System Operators

1724 Massachusetts Avenue, N.W.
Washington, DC 20036
202/775-3664

CERTIFICATE OF SERVICE

I, Christopher J. Harvie, do hereby certify that a copy of the foregoing Comments of The National Cable Television Association was hand delivered to each of the following this 20th day of December, 1996.


Christopher J. Harvie

Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

A. Richard Metzger, Jr.
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Kathleen Levitz
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Larry Atlas
Associate Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Gregory Rosston
Chief Economist
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Regina M. Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Comments of The National Cable Television Association (Dec. 20, 1996)

Richard Welch, Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, DC 20554

James Schlichting
Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, DC 20554

Meredith Jones
Chief, Cable Service Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, DC 20554

Robert Pepper
Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

Elliot Maxwell
Deputy Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

Joseph Farrell
Chief Economist
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

Thomas J. Beers
Common Carrier Bureau
Industry Analysis Division
Federal Communications Commission
2033 M Street, N.W., Room 500
Washington, DC 20554

Scott K. Bergmann
Common Carrier Bureau
Industry Analysis Division
Federal Communications Commission
2033 M Street, N.W., Room 500
Washington, DC 20554

Kalpak Gude
Common Carrier Bureau
Policy and Program Planning Division
1919 M Street, N.W., Room 544
Washington, DC 20554

International Transcription Services, Inc.
2100 M Street, N.W., Suite 140
Washington, D.C. 20037