

Rural Telephone Coalition

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter of )  
)  
Implementation of Infrastructure )  
Sharing Provisions in the )  
Telecommunications Act of 1996 )

Cc Docket No. 96-237

**REPLY COMMENTS**

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of the

**RURAL TELEPHONE COALITION**

January 3, 1997

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REPLY COMMENTS OF THE RURAL TELEPHONE COALITION

The Rural Telephone Coalition (RTC) submits these reply comments to respond to comments filed in the above-captioned proceeding on implementation of the infrastructure sharing provisions enacted as Section 259 of the Communications Act, as amended by the Telecommunications Act of 1996.<sup>1</sup> Fortunately, although some parties have made elaborate efforts to rewrite the law Congress adopted, virtually every contention can be laid to rest simply by reading the plain language of the statute and refraining from unwarranted assumptions that the Commission can or should ignore or rewrite statutory provisions not consistent with the commenting party's theory of what Congress should have done.

The RTC supports the reply comments to be filed today by the United States Telephone Association. Accordingly, we shall direct this reply to emphasizing issues of particular importance to the rural telephone companies comprising the membership of the three RTC associations

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<sup>1</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 stat. 56 (1996). (1996 Act) amending the Communications Act of 1934, 47 U.S.C. §151 et seq.

-- NRTA, NTCA and OPASTCO.

Sections 251-52 and 259 Have Distinct and Severable Purposes and Effects

MCI (pp. 11-12) attempts to support the FCC's tentative conclusion that the filing requirements in § 259(b)(7) refer only to agreements reached pursuant to § 259, on the ground that prior interconnection agreements will already be filed pursuant to § 252(e). And NCTA asserts that dealing with existing co-provision arrangements under Section 259 would be an illicit evasion of Section 252 (p. 7, footnote 24). The Act itself refutes their interpretations. The RTC has demonstrated (pp. 13-15), and Nynex further explains (pp. 8-9), that the plain language of Sections 251, 252 and 259, as well as the legislative history of Section 259, leave no doubt that (a) Congress meant existing infrastructure sharing arrangements could continue pursuant to Section 259, while (b) Section 251 requires filing and availability to competitors only of agreements made "pursuant to" Section 251.<sup>2</sup> MCI's presumption that preexisting co-provision arrangements between ILECs will be on file as made pursuant to §259, therefore, (a) assumes the conclusion it purports to support, (b) requires the irrational assumption that Congress enacted a pointless separate filing requirement for infrastructure sharing agreements, (c) attributes adoption "pursuant to" Sections 251 and 252 to carriers exempt from those requirements until after their

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<sup>2</sup>NYNEX even suggests (pp. 16-17) that harmonizing the § 259(c) and § 251 notice requirements is unnecessary given the very different nature of those Sections. ALTA is wrong to suggest (p. 4) that an agreement between two carriers implementing a Section 259 arrangement would, *per se*, violate the Sherman Act. Congress cannot have created a mechanism to encourage sharing on a condition of the qualifying carrier not competing, and then made it illegal to agree to the condition. It should also be noted that nothing in Section 259 prevents the providing LEC from competing with the qualifying LEC.

state commissions make specific, as yet unmade, findings and (d) subjects to common carrier requirements and likely termination the very class of arrangements Section 259 operates to preserve and exclude from common carrier treatment. The Commission should decline MCI's invitation to defy the language and intent of the statute.<sup>3</sup>

### Economies of Scale and Scope Are Not Dependent Upon Affiliation

AT&T argues (pp. 4-5) that determination of rural telephone company status should be applied at the holding company level for purposes of § 259(d) qualification. "Entities that hold multiple local telephone companies," it suggests, "can therefore recoup their investments in infrastructure, technology and information from those subsidiaries' customers," and, it contends, "clearly have exactly those opportunities for economies of scale and scope that § 259 reserves for 'qualifying carriers' that lack such capabilities." NYNEX also argues (p. 17) that lack of economies of scale or scope should be determined at the holding company level.

While it is possible that some economies of scale from affiliation could make particular infrastructure sharing arrangements unnecessary, it is not likely that an affiliated ILEC would

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<sup>3</sup>Equally in conflict with the provision Congress enacted is Alltel's proposal pp. 3-4 to sunset the infrastructure provision when either the qualifying LEC's service territory becomes subject to competition or the qualifying LEC uses § 259 facilities to compete outside its service territory with the providing LEC. The law is quite specific about what competition is incompatible with infrastructure sharing, and the grounds for forbearing from application of the Act derive exclusively from Section 10, 47 U.S.C. §10. There is simply no basis for rewriting the law to repeal Section 259 whenever competition in small and rural markets emerges, let alone to require both the qualifying LEC and its competitor to obtain network elements pursuant to § 251 in lieu of § 259.

request a less efficient arrangement under the control of another carrier. Even if such a request were made, the assertion that assumed economies from affiliation automatically rule out increased efficiency from sharing with a non-affiliated ILEC is overblown. The rational position is the one advanced by MCI and GTE. GTE argues (p. 10) that when determining whether a carrier lacks economies of scale or scope, the FCC should look at each specific service area individually rather than at the holding company level. Similarly, MCI states (p. 15) that

it will be hard to justify excluding any size company on a prior basis from becoming a qualifying § 259 carrier. A telecommunications holding company may achieve financing economies, but these economies may [be] dwarf[ed] in comparison to the diseconomies it might face if it were to serve an isolated, small, rural community.

Infrastructure sharing requested by any statutorily-eligible carrier to promote efficiency and infrastructure advances cannot be carved out of the broad sweep of the statute because of a baseless general assumption about the effects of affiliation.<sup>4</sup>

Nor can NCTA succeed in its attempt to rewrite the statutory eligibility and standards for qualifying LECs to rule out holding companies indirectly. While the RTC and others (USTA, pp. 12-13, Ameritech, pp. 7-8, BellSouth, pp. 6-7, Minnesota Independent Coalition, pp. 10-12, ALLTEL, p. 2) agree that a rebuttable presumption of eligibility as a QLEC should extend to “rural telephone companies,” as defined in Section 153 (37) of the amended Act, the additional hurdles to sharing NCTA would impose (pp. 3-6) are at odds with what Congress intends. A carrier may request network capabilities through an infrastructure sharing agreement if it is a

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<sup>4</sup>See, Alltel Corp. v. FCC, 838 F.2d 551 (D.C. Cir. 1988).

state-designated eligible telecommunications carrier (ETC) and lacks economies of scale or scope for what it requests, regardless of how many lines its affiliates serve. Such carriers need not show that it is “economically unreasonable” for them to deploy the infrastructure sought in the agreement (NCTA, p. 3) or that the requested capability cannot otherwise be obtained from the adjacent ILEC under § 251 (NCTA , p. 6).

It is simply not true, as NCTA claims (pp. 6-7), that the RTC seeks to use Section 259 agreements to deny competitors access to favorable interconnection terms. NCTA purports to support this claim by quoting from the USTA/RTC brief before the Eighth Circuit, in which we pointed out that Section 259(b)(3) of the 1996 Act requires that “carriers entering into Section 259 arrangements cannot be compelled to offer those arrangements to other competing carriers on the same terms.”<sup>5</sup> NCTA does not challenge the accuracy of this statement of the law; it simply wants the Commission to disregard the intent of Congress to establish a separate and parallel set of permissible arrangements. Its proposal that qualifying LECs be prohibited from reaching agreements under Section 259 except where capabilities could not be obtained under Section 251 is wholly inconsistent with the statutory scheme. Since adoption of this proposal would also disadvantage any cable company which became a “qualifying LEC,” it appears that all the hyperbole about the cable industry chomping at the bit to enter rural telephone markets as

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<sup>5</sup>Brief of USTA/RTC, filed November 18, 1996, Iowa Utilities Board v. Federal Communications Commission, United States Court of Appeals for the Eighth Circuit, Case No. 96-3321 and consolidated cases.

universal service providers is really just “hype.”<sup>6</sup>

The Act seeks to allow arrangements that are more efficient, as long as the request does not require the providing ILEC to act uneconomically; and it is the sharing arrangement that may not be economically unreasonable, not the circumstances of the QLEC in the event that it cannot share. Infrastructure sharing must be evaluated in the light of its universal service purpose.

The Commission Should Not Narrow the Broad Parameters Congress Enacted for Infrastructure Sharing

The Commission should also reject proposals to remove arrangements from the broad sweep of sharing contemplated by Section 259(2).<sup>7</sup> PacTel (p. 8), BellSouth (pp. 9-10) and GTE (p. 4) argue that § 259(a) does not encompass resale of “services.” NYNEX apparently disagrees only in part, stating (p. 14) that while § 259 does not include services per se, there could be instances where an ILEC has a tariffed offering which could serve to satisfy a § 259 request. Both arguments rely too heavily on semantics, since the same arrangement is often classifiable either as a service or as a network element or joint provision vehicle. The

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<sup>6</sup>See, Wall Street Journal, “Malone says TCI Push Into Phones, Internet Isn’t Working for Now,” January 2, 1996, p. 1, col. 6.

<sup>7</sup>Frontier is mistaken in urging (p. 4, footnote 9) the Commission to limit the types of facilities and services available pursuant to § 259 to advanced network facilities and services, such as SS7 interconnection, database access, AIN features, and the like. The statute sets out the reach of the covered services generally and flexibly. Flexibility is key to future fostering of nationwide infrastructure advancements. The Commission lacks authority to narrow that reach or otherwise ignore the statutory standards.

Commission should recognize that sharing may be requested for any arrangement that satisfies the statutory language -- “public switched infrastructure, technology, information, and telecommunications facilities and functions.” That it may be called a “service,” “element” or anything else for purposes of common carrier regulation of competitors’ interconnection agreements is simply not germane under the non-common carrier treatment mandated by Section 259.<sup>8</sup>

The Commission should also dismiss GTE’s contention (p. 11) that ILECs should not be required to share with qualifying carriers which are not reasonably near the providing LEC’s service area, particularly when doing so would be economically burdensome. Indeed, GTE’s own argument that economically burdensome sharing is not desirable proves that a proximity requirement is not necessary: Congress has already excused ILECs from sharing that is “economically unreasonable” in Section 259(b)(1).

The US West argument (pp. 5-6) that the prohibition against a qualifying carrier using § 259 facilities to compete against the providing LEC must apply beyond the geographic area in which the provider is the ILEC also squarely collides with the statutory language. The infrastructure sharing requirement applies by its terms to “incumbent LECs.” That term is geographically limited in Section 251(h)(1), where it is defined, to the “area” in which a LEC provides service and is a member of the association described in Section 69.601(b) of the

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<sup>8</sup>For the same reason, NCTA is wrong 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 § 251 (pp. 4-6). This interpretation seeks to apply common carrier requirements governing interconnection by competitors to sharing for non-competitive co-provision between universal service providers.

Commission's regulations on the "date of enactment." New territory the sharing LEC serves after enactment as a non-incumbent competitor can hardly fall within the specified "incumbent LEC" classification as of enactment, unless the Commission later affirmatively classifies the new operations as an additional incumbent pursuant to Section 251(h)(2). In short, the statute already provides all that is necessary to determine the extent to which an ILEC's operations are subject to sharing or excused by reason of competition by the QLEC in the ILEC's area.

### Conclusion

Many comments supported the tentative conclusion that § 259 arrangements should be largely the product of negotiations and that the FCC need only implement general guidelines.<sup>9</sup> None of the comments have justified adopting any of the proposed departures from what Congress ordained in the Act or substituting reliance on Section 251 instead of or in preference to Section 259. Consequently, the Commission should adhere to the Act to implement infrastructure sharing to foster and preserve flexible opportunities for universal service providers to

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<sup>9</sup>See, eg., USTA, pp. 3-4; PacTel, pp. 4-5; SWBT, p. 2; GTE, pp. 2-3; BellSouth, p. 2; Ameritech, p. 3; Oregon Public Utility Commission, p. 2; Minnesota Independent Coalition, pp. 7-8; Jackson Thorton, pp. 3-4.

improve their efficiency and provide advanced network capabilities through sharing arrangements with incumbent LECs.

Respectfully submitted,

**THE RURAL TELEPHONE COALITION**

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## CERTIFICATE OF SERVICE

I, Weldrena Jones-Bean, a legal secretary in the law firm of Koteen & Naftalin, L.L.P., do certify that on this 3rd day of January, 1997, a true and correct copy of the foregoing "Reply Comments of the Rural Telephone Coalition" was served by United States First Class Mail, postage prepaid, on the following:

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