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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-237
	)	

OPPOSITION AND COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION

Pursuant to Section 1.429(f) of the Commission's rules, the United States Telephone Association ("USTA") respectfully submits its Opposition to the Petition for Reconsideration filed by MCI Telecommunications Corporation ("MCI") in the above-referenced proceeding,[1] and comments on the Petitions for Reconsideration filed by BellSouth Corporation ("BellSouth"), Southwestern Bell Telephone Company ("Southwestern Bell"), GTE Service Corporation ("GTE"), and Octel Communications Corporation ("Octel").

I. The Negotiating Framework Established by the Commission in the Infrastructure Sharing Order Does Fulfill Congressional Intent

In its Petition for Reconsideration, MCI advances two inter-related arguments. MCI first argues that infrastructure sharing arrangements arrived at through mutually satisfactory negotiations violate Congressional intent. MCI then proceeds to state that Congressional intent

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[1] In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-237, FCC 97-36 (released February 7, 1997) ("Infrastructure Sharing Order").

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can only be fulfilled by setting prices equal to incremental cost.[2] Neither argument is correct.

MCI's argument against open negotiations centers on its position that a providing local exchange carrier ("PLEC") cannot benefit in any manner from an infrastructure sharing arrangement with a qualifying local exchange carrier ("QLEC"). Neither the statutory language nor its accompanying legislative history remotely support MCI's argument, nor has MCI alleged that any such authority exists. MCI's position relies upon a zero-sum outlook that precludes Congress' true intent in crafting Section 259: establishing a framework for negotiating "win-win" infrastructure sharing arrangements that benefit both PLECs and QLECs as they advance universal service.

Petitions for Reconsideration must provide the Commission with new arguments on which to modify an Order. MCI's petition is nothing more than a thinly veiled rephrasing of the position advanced in its original comments and which the Commission properly rejected. The Commission correctly stated in its Order that, "nothing in either the express statutory language of Section 259 or its legislative history persuades us that Congress intended any particular price outcome at all pursuant to the negotiation-driven regime contemplated by section 259."[3] The Commission should reaffirm its finding.

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[2] MCI Petition for Reconsideration at pp. 2, 3.

[3] Infrastructure Sharing Order at ¶ 60.

II. The Statutory Construction of Section 259 Does Not Require the Commission to Establish Incremental Cost Pricing Guidelines.

If Congress had specifically intended for the Commission to set incremental cost guidelines with respect to infrastructure sharing arrangements, the statutory language of Section 259 would explicitly state such intent. It does not. Section 259 does not even contain language that could be construed to provide any intent regarding price levels.[4] Thus, it is evident that Congress intended for the Commission to determine how best to ensure that QLECs fully benefit from PLECs' economies of scale or scope on just and reasonable terms without resorting to the use of pricing guidelines.

In its Infrastructure Sharing Order, the Commission correctly chose to allow the marketplace to determine just and reasonable rates and terms via negotiations.[5] Qualifying LECs are certainly in the best position to determine whether a particular Section 259 arrangement fully benefits them. Consequently, QLECs should be allowed to negotiate the deal that best suits their respective needs. If a QLEC feels that it is not fully benefitting from a negotiated Section 259 arrangement, the QLEC is free to avail itself of the already existing declaratory ruling procedure and complaint process. Thus, the open negotiation framework established by the Commission already contains adequate safeguards to ensure that Congressional intent is fulfilled. Moreover, it should be noted that Section 259 prohibits the competitive use of shared infrastructure against

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[4] In other sections of the Telecommunications Act of 1996, Congress made specific reference to general pricing guidelines. For example, in Section 251 Congress referred to undefined wholesale and retail rates, and in Section 252 Congress established pricing standards for use by the States in setting rates.

[5] See, e.g., Infrastructure Sharing Order at ¶ 26.

the PLEC. Clearly, there is no incentive for a PLEC not to provide shared infrastructure to a QLEC on terms which are economically reasonable for the PLEC and which the QLEC feels satisfy its rights to fully benefit under Section 259.

Finally, MCI interprets the term "fully benefit" as limited to the price charged by the PLEC for shared infrastructure, ignoring the benefits the QLEC achieves by avoiding having to make the uneconomical infrastructure investment it would otherwise need to make on its own. The Congressional intent of the term "fully benefit" is clear: to enable subscribers of companies lacking economies of scale or scope to obtain services at affordable rates by sharing in the economies of scale or scope of other LECs. The negotiating framework established by the Commission in the Infrastructure Sharing Order accomplishes this intent. Accordingly, the Commission should affirm this finding.

III. The Commission Should Not Compel Providing LECs to Interpose Themselves Between Third Party Intellectual Property Owners and Qualifying LECs by Requiring Them to Negotiate on Behalf of Qualifying LECs for Right-to-Use Licenses.

Reaffirming its previously filed comments in this proceeding, USTA does not believe that Section 259 applies to third party intellectual property rights.[6] Accordingly, the Commission should not require PLECs to negotiate directly with third party intellectual property owners ("IPOs") on behalf of QLECs. There is no evidence to suggest that a PLEC would be able to negotiate for a QLEC a licensing arrangement with terms equal to or better than its own. As

[6] USTA Comments (filed December 20, 1996) at p. 5.

pointed out, a QLEC may, in fact, be dissatisfied with an arrangement undertaken by a PLEC on its behalf.[7] Moreover, the Commission lacks the authority to compel an IPO to enter into such a negotiating arrangement.[8] Indeed, an IPO could very well balk at extending its licensing rights at all under the arrangement presently envisioned by the Commission, thereby precluding infrastructure sharing. Additionally, forcing a PLEC to share infrastructure with a QLEC that has not obtained the necessary licensing agreements could expose the PLEC to civil liability. Such exposure would most certainly not encourage cooperation between PLECs and QLECs, as the Act requires.[9]

The Commission should adopt a procedure similar to that advocated by Southwestern Bell and BellSouth in this proceeding.[10] The PLEC should be required to work with the QLEC to identify in a timely manner those parts of the infrastructure to be shared that require separate licensing arrangements. The PLEC should then be required to provide this information to the QLEC to assist it in negotiating directly with the IPO separately. This arrangement will ensure that PLECs fulfill their obligations in a manner that is economically reasonable. Moreover, by obtaining this information from the PLEC, the QLEC will be able to retain maximum control over its own operations. However, a QLEC should not be required to negotiate separate licensing arrangements with a third party IPO for intellectual property used by a PLEC that

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[7] See, e.g., Southwestern Bell Petition for Reconsideration at pp. 2-3

[8] See, e.g., GTE Petition for Reconsideration at p. 2

[9] Section 259(b)(5)

[10] Southwestern Bell Petition for Reconsideration at pp. 6-7, BellSouth Petition for Reconsideration at pp. 7-9.

could, in fact, be shared by that PLEC under its existing licensing arrangement with the IPO. In short, a QLEC should have to negotiate directly with a third party IPO only when the PLEC's licensing arrangement for the necessary intellectual property is strictly exclusive to the PLEC and the IPO and cannot accommodate additional users.

CONCLUSION

For the above-stated reasons, USTA respectfully requests that the Commission affirm its finding that it should refrain from issuing any pricing guidelines with respect to Section 259 arrangements. Furthermore, USTA respectfully requests that the Commission not compel PLECs to interpose themselves in negotiations that should properly take place solely between QLECs and IPOs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on April 30, 1997 copies of the Opposition and Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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