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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Competitive Telecommunication Association,)
Florida Competitive Carriers Association,)
and Southeastern Competitive Carriers)
Association)

Petition On Defining Certain Incumbent)
LEC Affiliates As Successors, Assigns,)
or Comparable Carriers Under)
Section 251(h) of the Communications Act)
_____)

CC Docket No. 98-39

REPLY COMMENTS OF THE

UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

Based on the record in this proceeding, the Commission should deny the petition, filed by three CLEC trade associations, that seeks improperly to impose onerous "incumbent LEC" regulation on certain affiliates of incumbent LECs. Granting the petition would wrongly benefit a group of competitors -- the CLECs -- at the expense of the consumer, while distorting the competitive process.

The comments on the petition demonstrate its anticompetitive intent. None of the "doomsday" scenarios that the petition's supporters use to justify it are based in reality. In truth, the driving force behind the petition appears to be some CLECs' fear that they will face increased competition from the incumbent LECs' affiliates. Such competition, which the petition seeks to limit, can only benefit consumers.

The record in this proceeding provides no support for a declaration that any affiliates of incumbent LECs should be presumed to be "successors or assigns" of those LECs. Supporters of this part of the petition fail to recognize that as a matter of law, an affiliate does not replace an incumbent LEC that remains active in its service territory. Nor is there any reason to treat an incumbent LEC and its affiliate as the same legal entity.

The Commission should also reject the petition's alternative request for a rulemaking to define a standard for when an affiliate should be construed as a "comparable carrier." The record clearly shows that the affiliates at issue do not satisfy the statutory criteria for "comparable carrier" status. As importantly, the record fails to show how granting the petition will provide improved services, lower rates, or other competitive benefits to U.S. consumers.

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**REPLY COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

I. INTRODUCTION

The United States Telephone Association ("USTA") respectfully files these reply comments opposing the petition in the above-captioned proceeding.^{1/} Considered as a whole, the comments demonstrate that the Commission should promptly deny the petition, which improperly seeks imposition of "incumbent LEC" status on affiliates of incumbent LECs, subjecting these affiliates to burdensome regulation. USTA, which filed initial comments opposing the petition, believes that the petition is an attempt by CLECs to

^{1/} See Petition For Declaratory Ruling Or, In The Alternative, For Rulemaking of the Competitive Telecommunications Association, *et al.* (filed Mar. 23, 1998) (the "petition").

handicap incumbent LECs and their affiliates by preventing them from efficiently structuring their operations.^{2/}

The petition's request to establish a presumption regarding treatment of certain affiliates as "successors or assigns" of incumbent LECs under section 251(h)(1) of the Communications Act (the "Act") is legally unsound as well as anticompetitive. Nor should the Commission initiate the proposed rulemaking regarding the "comparable carrier" provision of section 251(h)(2).

II. THE ANTICOMPETITIVE INTENT OF THE PETITION IS CLEAR

The record shows that CLECs and others view the petition as a vehicle for preventing the affiliates of incumbent LECs from competing successfully for customers. Some commenters claim that granting the petition would increase "certainty" in the local marketplace.^{3/} These arguments are thinly-veiled attempts to benefit a group of competitors -- the CLECs -- rather than the competitive process. A basic fear of these CLECs is that they would be "forced to meet or beat the competitive affiliate's lower rates."^{4/} The only certain effect of such an event would be to benefit consumers, as competition is supposed to do. In contrast, granting the petition would harm consumers by unnecessarily burdening competitive affiliates.

^{2/} See comments of USTA at 2-4 (filed May 1, 1998). All references herein to comments of a party mean comments filed on or about May 1, 1998, in CC Docket No. 98-39.

^{3/} See comments of AT&T Corp. ("AT&T") at 4-5; ICG Telecom Group ("ICG") at 6.

^{4/} See comments of NEXTLINK Communications, Inc. ("NEXTLINK") at 4.

The Commission should not countenance such attempts to "game" the regulatory process for anticompetitive purposes. As USTA has noted, adoption of a broad presumption or rule that imposes "incumbent LEC" status on a wide variety of affiliates is inconsistent with the biennial regulatory review that must be conducted in 1998 pursuant to section 11 of the Act.^{5/} The Commission should deny the petition.

Some CLEC commenters attempt to justify the petition by wrongly describing hypothetical "doomsday" scenarios in which incumbent LECs "shift everything" into their affiliates, "leaving the ILEC a shell of its former self."^{6/} However, nothing of the sort has occurred, or could reasonably be expected to occur. Sprint acknowledges as much, stating that the petition "does not point to any specific abusive behavior that is occurring today."^{7/} CLECs also digress by fallaciously -- and irrelevantly -- attacking BOC petitions to offer advanced data services pursuant to section 706 of the Act.^{8/}

Other CLECs urge the Commission to go beyond the petition and impose incumbent carrier status on even broader classes of affiliates of incumbent LECs than the petition

^{5/} See comments of USTA at 9.

^{6/} See comments of ICG at 10; comments of the Association for Local Telecommunications Services ("ALTS") at 5 (stating that any "in-region ILEC affiliate providing local wireline services could engage in considerable mischief"); LCI International Telecom Corp. ("ITL") at 5.

^{7/} See comments of Sprint Corporation ("Sprint") at 4.

^{8/} See comments of ALTS at 2-5; Teleport Communications Group Inc. ("TCG") at 1-2. Cf., comments of LCI at 3-6 (arguing that the petition is consistent with LCI's separate petition regarding separation of BOC local network and retail service operations).

proposes.^{9/} These further attempts to limit competition from affiliates of incumbent LECs should be rejected. In this regard, at least one CLEC, Sprint, recognizes the overbroad nature of the petition's attempt to base incumbent LEC status on whether an affiliate uses the same brand names as an incumbent LEC.^{10/} However, as an alternative to the petition, Sprint proposes several other tests "[t]o guide the Commission's consideration of how to prevent abuses by an ILEC of an affiliated CLEC."^{11/} The Commission also should decline to adopt these proposals, which are designed to (i) limit affiliates' ability to construct any new facilities; (ii) prevent affiliates of incumbent LECs from offering new common carrier services in the incumbent LEC's service region; and (iii) limit transfers of customer contracts between incumbent LECs and affiliates. Sprint's proposed tests, while undoubtedly tailored to advance Sprint's competitive interests, would do nothing but limit the potential efficiencies that affiliates of incumbent LECs could realize in the current market and regulatory environment.

In supporting the petition's anticompetitive proposals, CLECs ignore the fundamental fact that in all cases where an affiliate of an incumbent LEC exists in the LEC's service territory, the incumbent LEC, by definition, will remain in that service area. The incumbent LEC thus will remain subject to the obligations of incumbent LECs established by the Act.

^{9/} See, e.g., comments of e.spire Communications, Inc. ("e.spire") at 1, 5 (calling for imposition of incumbent LEC regulation "any time an ILEC transfers *any* of its resources to an in-territory CLEC affiliate"); ALTS at 5-6. See also comments of TCG at 6-7 (stating that RBOC affiliates subject to section 251(h) should be prohibited from providing in-region interLATA service).

^{10/} See, e.g., comments of Sprint at 2-3.

^{11/} See *id.* at 4-7.

As a result, the CLECs' "public policy" reasons in favor of the petition in fact only advance their competitive self-interest. For example, when CLECs express concern that an affiliate allegedly could "violate" or "circumvent" the resale requirement of section 251(c)(4),^{12/} they fail to recognize that the affiliate itself would be obtaining resold services from the incumbent LEC. The incumbent LEC, of course, is bound by the requirements of sections 251(a)-(c), as well as the nondiscrimination provision of section 252(i). Similarly, contrary to the claims of CLECs, no harm would result if an affiliate obtains access to unbundled network elements ("UNEs") provided by the incumbent LEC pursuant to its regulatory obligations. In a different context, the Commission has refused to find under section 251(h)(1) that a BOC affiliate taking UNEs from the BOC is a "successor or assign" of the BOC.^{13/} NEXTLINK wrongly claims that competition would be harmed if an affiliate were able to recombine UNEs obtained from the incumbent LEC.^{14/} Such a result would promote, not limit, the benefits of competition. Although MCI raises the specter of "price squeezes" associated with over-priced UNEs,^{15/} its concern appears to be focused on the UNEs provided by the incumbent LEC, which is already subject to extensive regulation under sections 251(a)-(c), section 252, and other sections of the Act.

^{12/} See, e.g., comments of KMC Telecom Inc. ("KMC") at 4-5; Intermedia Communications Inc. ("Intermedia") at 3; NEXTLINK at 5.

^{13/} See 47 C.F.R. § 53.207, which states in part:

A BOC affiliate shall not be deemed a "successor or assign" of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act.

^{14/} See, e.g., *id.* at 5.

^{15/} See comments of MCI at 4-5.

MCI and some CLECs also attempt to bolster their anticompetitive positions by hypothesizing a variety of potential forms of discrimination by an incumbent LEC working in concert with its affiliate.^{16/} In cataloging this imaginary parade of horrors, proponents of the petition provide no indication that such behavior either has occurred or would remain undetected if it did occur. Such commenters consistently ignore the extensive regulations that the Commission, the states, and the Act itself have already imposed on incumbent LECs' relationships with other carriers to address this issue.

Indeed, it is unclear how imposition of "incumbent carrier" status on affiliates would even address the speculative forms of discrimination that the CLECs hypothesize. It is more than clear that burdensome "incumbent carrier" regulation of affiliates would restrict their ability to compete while benefitting other CLECs.

III. AFFILIATES OF INCUMBENT LECs ARE NOT "SUCCESSORS OR ASSIGNS" UNDER SECTION 251(h)(1) OF THE ACT

The record in this proceeding provides no basis for the Commission to declare that certain affiliates of incumbent LECs should be presumed to be "successors or assigns" of their affiliated incumbent LECs, and thus subject to the extensive regulations that section 251(c) of the Act imposes on incumbent carriers.

The petition's supporters understandably have little to say about the petition's failure to show that such an affiliate meets the legal standards for being considered a "successor or

^{16/} See, e.g., comments of MCI at 5-6, 10-13; NEXTLINK at 5.

assign" under section 251(h).^{17/} TCG argues generally that under the circumstances presented in the petition,

[A]n affiliate essentially steps into the shoes of the ILEC in terms of brand name familiarity and available financial and personnel resources, and thus, should be treated as a successor or assign under Section 251(h).^{18/}

TCG's claim is out of touch with reality. No affiliate can be presumed to "fill the shoes" of the incumbent LEC that remains active in its service territory. As Ameritech notes, a successor is an entity that has "substantially *replaced* a predecessor,"^{19/} something that simply does not occur when an affiliate operates in the same service territory as the related incumbent LEC.^{20/}

^{17/} For example, WorldCom limits its legal analysis to the conclusory, and incorrect, claim that BellSouth's affiliate in three states "is a 'successor' or 'assign' of BellSouth." See comments of WorldCom, Inc. ("WorldCom") at 8. BellSouth compellingly refutes WorldCom's claims. See comments of BellSouth at 14-19.

^{18/} Comments of TCG at 6.

^{19/} Comments of Ameritech at 13 (emphasis in original).

^{20/} See comments of GTE Service Corporation and GTE Communications Corporation ("GTE") at 6; Frontier Corporation ("Frontier") at 6. TCG also attempts to analogize the Commission's holdings in the Non-Accounting Safeguards Order to the petition's proposals. See comments of TCG at 5-6, citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22054 (1996). In doing so, TCG neglects to note the Commission's ruling on the next page of that order that:

[A] BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).

Id. at 22055.

The Commission should also reject MCI's recommendation that it take the extraordinary step of "ignoring" the distinction between an incumbent LEC and its affiliate," nominally to prevent violations of the Act.^{21/} The courts and the Commission ordinarily disregard an entity's corporate structure only under narrow conditions.^{22/} There is no statutory prohibition on any of the activities by affiliates that the petition seeks to encumber with burdensome regulation.^{23/} Moreover, there is no policy reason for creating such prohibitions. As noted above, there is no evidence in the record of any anticompetitive conduct or evasion of the Act related to the affiliates of incumbent LECs that would warrant such extreme regulatory intrusion into the business organization of the incumbent LECs and their affiliates.

Moreover, MCI fails to recognize that pervasive regulation already differentiates affiliates from the related incumbent LECs. As SNET points out, the detailed regulatory safeguards now imposed on incumbent LECs prohibit them from favoring an affiliated entity

^{21/} Comments of MCI at 13-14.

^{22/} See, e.g., *Thomson-CSF, S.A. v. American Arbitration Association et al.*, 64 F.3d 773, 777-778 (2d Cir. 1995) (declining to bind a parent corporation to a subsidiary's arbitration agreement even though the parent had common ownership with the subsidiary, actually controlled the subsidiary, and had incorporated the subsidiary in to its organizational and decision-making structure). Although MCI cited two court decisions regarding the Commission's authority in this area, neither of the underlying Commission actions is more recent than 1972. In those actions, the Commission only looked past corporate structures to prevent or remedy specific violations of its spectrum licensing and pole attachment policies. No such violations are at issue in this proceeding.

^{23/} Of course, the mere fact that incumbent LECs have affiliates does not itself violate the Act. As SNET points out, the Act "repeatedly refers to 'affiliates' of 'local exchange carriers.'" Comments of SNET at 7, citing 47 U.S.C. §§ 251(c)(2)(C), 153(15), 543(l)(1)(D). Nor does the Act impose incumbent carrier status if an affiliate uses any given brand name, provides local service, or operates in the service territory of a related carrier or any other entity.

that offers local exchange services.^{24/} Nor can the types of affiliates discussed in the petition be considered "assigns" of an incumbent LEC. For an assignment to occur, an assignor must be divested of all rights to or control over the things being assigned.^{25/}

As discussed in USTA's initial comments, the petition incorrectly attempts to reconcile its burdensome regulatory proposals regarding the meaning of "successor or assign" with other areas of law. Under the corporate law of successorship, the presumption is that even if a corporation transfers all of its assets, the transferee is not liable as a "successor" for the obligations or debts of the transferor. Applying this standard, an affiliate should be presumed not to be a "successor or assign" for purposes of incurring the broad regulatory obligations already imposed on the incumbent LEC.^{26/} As the record shows, the petition's attempt to rely on the specialized successorship doctrine under labor law is misplaced. Even under the labor law cases cited in the petition, the affiliates at issue would not be considered successors of the related incumbent LECs.^{27/}

IV. AFFILIATES OF INCUMBENT LECS ARE NOT COMPARABLE CARRIERS UNDER SECTION 251(h)(2)

There is no policy or legal reason for the Commission to begin a rulemaking to clarify the criteria under which affiliates of incumbent LECs should be considered "comparable"

^{24/} See comments of Southern New England Telephone Company ("SNET") at 9.

^{25/} See comments of GTE at 7-8; Bell Atlantic at 5.

^{26/} See comments of USTA at 5-7.

^{27/} See *id.* at 7-8; comments of SBC at 6-7.

carriers under section 251(h)(2) of the Act, as the petition requests in the alternative.^{28/} The proposed criteria are the same as those proposed regarding "successor and assign" status,^{29/} and proponents of this alternative make the same types of flawed arguments as they did regarding such status.^{30/} The proposed rulemaking should be rejected because of their inherent anticompetitive nature.

As a legal matter, the types of affiliates at issue in the petition do not satisfy the statutory standards for a "comparable carrier" finding in section 251(h)(2). As Frontier notes, an affiliate that shares only brand names, sources of financing, and personnel with an incumbent LEC does not hold "a position in the market for telephone exchange service that is comparable to the position occupied by [an incumbent LEC]."^{31/} Nor, as discussed above, has such an affiliate "substantially replaced an incumbent local exchange carrier...."^{32/} And, as USTA and others have shown, the proposed treatment of affiliates is inconsistent with the public interest.^{33/} The petition should be denied with respect to the proposed rulemaking.

^{28/} See petition at 13-14.

^{29/} The petition proposes that an affiliate be treated as a "comparable carrier" if (i) the affiliate provides local service in the incumbent LEC's service area, and (ii) the incumbent LEC has transferred anything of value, including brand names, to the affiliate. *Id.* at 13.

^{30/} See, e.g., comments of Sprint at 9; e.spire at 9.

^{31/} Comments of Frontier at 6-7, *citing* 47 U.S.C. § 251(h)(2)(A). See also comments of SBC at 8-9.

^{32/} See *id.* at 9; 47 U.S.C. § 251(h)(2)(B).

^{33/} See *id.* § 251(h)(2)(C).

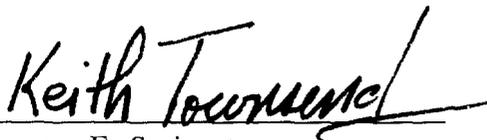
V. CONCLUSION

The Commission should promptly deny the petition, to avoid the imposition of wasteful, anticompetitive, and unlawful regulation on affiliates of incumbent LECs.

Respectfully submitted,

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