

proposals for "prior consultation," a mandatory process of negotiations and pre-approvals involving carriers, JHTA, and waterfront unions.

(3) There are no written criteria for JHTA's decisions whether to permit or disallow carrier requests for operational changes, nor are there written explanations given for the decisions.

(4) JHTA uses and has threatened to use its prior consultation authority to punish and disrupt the business operations of its detractors.

(5) JHTA uses its authority over carrier operations through prior consultation as leverage to extract fees and impose operational restrictions, such as Sunday work limits.

(6) JHTA uses its prior consultation authority to allocate work among its member companies (whose rates and business plans are subject to MOT approval), by barring carriers and consortia from freely choosing or switching operators and by compelling shipping lines to hire additional, unneeded stevedore companies or contractors.

(7) The Government of Japan administers a restrictive licensing standard which blocks new entrants from entering into the stevedoring industry in Japan. Given that all currently licensed stevedores are Japanese companies, and all are JHTA members, this blocking of new entrants by the Government of Japan shields existing operators from competition, protects JHTA's dominant position, and ensures that the stevedoring market remains entirely Japanese.

(8) Because of the restrictive licensing requirement, U.S. carriers cannot perform stevedoring or terminal operating services for themselves or third parties in Japan. In contrast, Japanese carriers (or their related companies or subsidiaries) currently perform stevedoring and terminal operating services in Japan and the United States.

(b) *Definitions*—(1) *Japanese carrier* means Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd, and Nippon Yusen Kaisha.

(2) *Designated vessel* means any container-carrying liner vessel owned or operated by a Japanese carrier (or any subsidiary, related company, or parent company thereof).

(c) *Assessment of fees*. A fee of one hundred thousand dollars is assessed each time a designated vessel is entered in any port of the United States from any foreign port or place.

(d) *Report and payment*. Each Japanese carrier, on the fifteenth day of each month, shall file with the Secretary of the Federal Maritime Commission a

report listing each vessel for which fees were assessed under paragraph (c) during the preceding calendar month, and the date of each vessel's entry. Each report shall be accompanied by a cashier's check or certified check, payable to the Federal Maritime Commission, for the full amount of the fees owed for the month covered by the report. Each report shall be sworn to be true and complete, under oath, by the carrier official responsible for its execution.

(e) *Refusal of clearance by the collector of customs*. If any Japanese carrier subject to this section shall fail to pay any fee or to file any report required by paragraph (d) of this section within the prescribed period, the Commission may request the Chief, Carrier Rulings Branch of the U.S. Customs Service to direct the collectors of customs at U.S. ports to refuse the clearance required by 46 U.S.C. app. 91 to any designated vessel owned or operated by that carrier.

(f) *Denial of entry to or detention at United States ports by the Secretary of Transportation*. If any Japanese carrier subject to this section shall fail to pay any fee or to file any report required by paragraph (d) of this section within the prescribed period, the Commission may request the Secretary of Transportation to direct the Coast Guard to:

(1) Deny entry for purpose of oceanborne trade, of any designated vessel owned or operated by that carrier to any port or place in the United States or the navigable waters of the United States; or

(2) Detain that vessel at the port or place in the United States from which it is about to depart for another port or place in the United States.

(g) *Adjustment in fees to meet retaliatory measures*. Upon a finding by the Commission that U.S. carriers have been subject to discriminatory fees, restrictions, service disruptions, or other retaliatory measures by JHTA, the Government of Japan, or any agency, organization, or person under the authority or control thereof, the level of the fee set forth in paragraph (c) shall be increased. The level of the increase shall be equal to the economic harm to U.S. carriers on a per-voyage basis as a result of such retaliatory actions, provided that the total fee assessed under this section shall not exceed one million dollars per voyage.

By the Commission.

Joseph C. Polking,  
Secretary.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 59

[CC Docket 96-237, FCC 97-36]

### Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Final rule.

**SUMMARY:** On February 7, 1996, the Commission released *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket 96-237, FCC 97-36, to implement new section 259 of the Communications Act of 1934, as added by the Telecommunications Act of 1996. Section 259 generally requires incumbent local exchange carriers (incumbent LECs) to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to "qualifying carriers" that are eligible to receive federal universal service support but that lack economies of scale or scope. Wherever possible, the Commission adopts general rules that restate the statutory language. This approach, which relies in large part on private negotiations among parties to satisfy their unique requirements in each case, will help ensure that certain carriers who agree to fulfill universal service obligations pursuant to section 214(e) can implement evolving levels of technology to continue to fulfill those obligations.

**EFFECTIVE DATE:** The requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget (OMB) of the new information collection requirements adopted herein, but no sooner than April 3, 1997. The Commission will publish a document in the Federal Register announcing the effective date of these regulations following OMB's approval of the information collections in this decision.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Beers, Deputy Chief, Industry Analysis Division, Common Carrier Bureau, at (202) 418-0952, or Scott Bergmann, Industry Analysis Division, Common Carrier Bureau, at (202) 418-7102. For additional information concerning the information collections in the Report and Order contact Dorothy Conway, at (202) 418-0217, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report

and Order, *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996* adopted February 6, 1997 and released February 7, 1997 (CC Docket 96-237, FCC 97-36). The full text of this Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, Washington, D.C. 20554. This *Report and Order* contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed and/or modified information collections contained in this proceeding. The complete text also may be purchased from the Commission's copy contractor, International Transcription Service, Inc. (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

**PAPERWORK REDUCTION ACT:** As required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, the NPRM invited the general public and the Office of Management and Budget (OMB) to comment on proposed information collection requirements contained in the NPRM.<sup>1</sup> On January 22, 1997, OMB approved the proposed information collection requirements, as submitted to OMB, in accordance with the Paperwork Reduction Act.<sup>2</sup>

In this Report and Order, we adopt new or modified information collection requirements that are subject to OMB review. These requirements are contingent upon approval by OMB. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Order, as required by the PRA. Written comments by the public on the information collections are due 30 days after date of publication in the Federal Register. OMB

notification of action is due May 5, 1997. Comments should address: (1) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents including the use of automated collection techniques or other forms of information technology.

*OMB Approval Number:* 3060-0755.

*Title:* Policy and Rules Concerning the Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket 96-237.

*Form Number:* Not Applicable.

*Type of Review:* Revision.

*Respondents:* Business or other for profit, including small businesses.

*Burden Estimate:*

| Section/title  | Respondents | Est. time per resp. (hrs.) | Frequency (per year) | Annual burden (hrs.) |
|--|-------------|----------------------------|----------------------|----------------------|
| (1) Section 259(b)(7) filing of tariffs, contracts or other arrangements                 | 75          | 1                          | 5                    | 375                  |
| (2) Section 259(c) information concerning deployment of new services and equipment ..... | 75          | 2                          | 12                   | 1800                 |
| (3) Sixty day notice before termination of agreement .....                               | 75          | 1                          | 5                    | 150                  |

*Total Annual Burden:* 2,325 total hours.

*Estimated Costs Per Respondent:* \$0.00.

*Needs and Uses:* The information collections for which approval is sought are contained in new section 259 ("Infrastructure Sharing") of the Communications Act of 1934 (the Act), as amended. First, the information collections adopted pursuant to section 259(c) in this *Report and Order* will provide notice to third parties (qualifying carriers) of changes in the incumbent local exchange carrier's network that might affect the parties' ability to fully benefit from section 259 agreements. Second, the information collected pursuant to section 259(b)(7) will make available for public inspection any tariffs, contracts or other arrangements showing the conditions

under which the incumbent LEC is making available public switched network infrastructure and functions pursuant to section 259. Third, the sixty day notice of termination requirement will ensure that third parties (qualifying carriers) will be able to anticipate service disruptions and to inform their customers accordingly. Fourth, placing the burden of proof on providing incumbent LECs to show that section 259 agreements have become economically unreasonable is appropriate because such providing incumbent LECs are seeking to terminate the agreement and are in control of the necessary information. Failing to collect the information would violate the language and the intent of the 1996 Act to ensure that access to the evolving, advanced telecommunications infrastructure would be made broadly

available in all regions of the nation at just, reasonable and affordable rates.

#### Summary of the Report and Order

1. In this Report and Order, part of the Commission's implementation of the Telecommunications Act of 1996,<sup>3</sup> we adopt rules implementing new section 259 of the Communications Act of 1934, as amended.<sup>4</sup> Section 259 generally requires an incumbent local exchange carrier (incumbent LEC)<sup>5</sup> to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to "qualifying carriers" that are eligible to receive federal universal service support but that lack economies of scale or scope.<sup>6</sup> In contrast to sections 251 and 252, which grant rights to requesting carriers irrespective of whether the requesting carrier intends

<sup>1</sup> NPRM at ¶ 55.

<sup>2</sup> Notice of Office of Management and Budget Action (OMB No. 3060-0755) (January 22, 1997).

<sup>3</sup> Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1996 Act).

<sup>4</sup> The Communications Act of 1934, as amended, 47 U.S.C. §§ 259, *et seq.* (1934 Act or Act).

<sup>5</sup> Section 251(h) of the Communications Act defines incumbent local exchange carriers as follows:

(1) DEFINITION—For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 CFR 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h).

<sup>6</sup> 47 U.S.C. § 259. See also 47 U.S.C. § 214(e).

to compete with the incumbent LEC, section 259 does not permit "qualifying carriers" to use an incumbent LEC's public switched network infrastructure, technology, information, and telecommunications facilities and functions obtained pursuant to section 259 to offer services or access to the incumbent LEC's customers in competition with the incumbent LEC. Section 259(a) directs the Commission to prescribe regulations that implement this requirement within one year after the date of enactment of the 1996 Act, i.e., by February 8, 1997.<sup>7</sup> Pursuant to the *Notice of Proposed Rulemaking* that initiated this proceeding,<sup>8</sup> we have elected, overall, to articulate general rules and guidelines to implement section 259.<sup>9</sup>

2. We determine that section 259 is complementary to the other sections of the 1996 Act and is a "limited and discrete" provision designed to promote universal service in areas that in many cases, at least initially, will be without competitive service providers, but without restricting the development of competition.<sup>10</sup> Essential differences in the language of sections 259 and 251 make clear that these provisions address fundamentally different situations. First, in accord with section 259(b)(6), section 259 applies only in instances where the qualifying carrier does not seek to use shared infrastructure to offer certain services within the incumbent LEC's telephone exchange area, whereas section 251 applies irrespective of whether new entrants seek to provide local exchange or exchange access service within the incumbent's telephone exchange area.<sup>11</sup> Second, section 259(a) establishes specific limitations on a qualifying carrier's use

of an incumbent LEC's infrastructure, i.e., a qualifying carrier may use section 259 only "for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e)." <sup>12</sup> Third, section 259, in contrast to section 251, limits the telecommunications carriers that may obtain access to an incumbent LEC's network by the inclusion of qualifying criteria in subsection 259(d).<sup>13</sup>

3. Thus, we conclude that while section 251 applies to all carriers in all situations—including, but not limited to, new entrants competing with the incumbent LEC—section 259 only applies in narrow circumstances, i.e., for the benefit of those carriers that are eligible to receive universal service support but lack economies of scale or scope and only to the extent that the qualifying carriers do not use section 259-obtained infrastructure to compete with the providing incumbent LEC. We conclude that a qualifying carrier that obtains, pursuant to section 259 arrangements, interconnection, unbundled network elements, and other telecommunications functionalities otherwise available pursuant to section 251, does not lose its section 251-derived obligation to provide interconnection to competitive LECs. We also find that section 259 arrangements can include additional functionalities that may be provided to qualifying carriers uniquely pursuant to section 259. Making clear that we will enforce the section 251-derived interconnection rights of competitive LECs, however, will help ensure that competitive entry into markets served by qualifying carriers markets is not hampered by the operation of otherwise valid section 259 arrangements. Moreover, we further promote competitive entry by finding that qualifying carriers may include *any* carrier that satisfies the requirements of section 259(d)—in other words, not just incumbent LECs, but competitive LECs and any other carrier that satisfies section 259(d) requirements.

4. In this Report and Order, we choose to implement section 259 by adopting rules that recognize the central role played by private negotiations in promoting the ability of qualifying

carriers to obtain access to "public switched network infrastructure, technology, information, and telecommunications facilities and functions" provided by other carriers. A negotiation-driven approach is appropriate because, inter alia, section 259, unlike section 251, contemplates situations where the requesting carrier is not using the incumbent LEC's facilities or functions to compete in the incumbent LEC's telephone exchange area. In such circumstances, we believe that the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage. Thus, wherever possible we adopt specific rules that restate the statutory language. The approach we adopt, which relies in large part on private negotiations among parties to satisfy their unique requirements in each case, will help ensure that certain carriers who agree to fulfill universal service obligations pursuant to section 214(e) can implement evolving levels of technology to continue to fulfill those obligations. Again, because we also affirm the rights of competitive LECs to secure interconnection pursuant to section 251 our approach to implementing section 259 does not discourage the development of competition in any local market.

5. Regarding the scope of section 259(a), we allow the parties to section 259 agreements to negotiate what "public switched network infrastructure, technology, information, and telecommunications facilities and functions" will be made available, without per se exclusions. We also decide that, whenever it is the *only means* to gain access to facilities or functions subject to sharing requirements, section 259(a) requires the providing incumbent LEC to seek to obtain and to provide necessary licensing of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment, subject to the reimbursement for or the payment of reasonable royalties. We decide that it shall be the responsibility of the providing incumbent LEC to find a way to negotiate and implement section 259 agreements that do not unnecessarily burden qualifying carriers with licensing requirements. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC must secure such licensing by

<sup>7</sup> 47 U.S.C. § 259(a).

<sup>8</sup> *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket 96-237, FCC 96-456, (released November 22, 1996) (NPRM) 61 FR 63774 (December 2, 1996).

<sup>9</sup> Twenty parties filed comments in this proceeding and fourteen of these parties filed reply comments. Two additional parties filed comments to the Commission which were subsequently transferred to the universal service proceeding in CC Docket 96-45. The parties, along with the shorthand forms of identification used in the Report and Order, are listed in Appendix A of the Report and Order.

<sup>10</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶¶ 165 (released August 8, 1996), 61 FR 45476 (August 29, 1996) (*Local Competition First Report and Order*). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Circuit, October 15, 1996).

<sup>11</sup> 47 U.S.C. § 259(b)(6). See also Discussion at Section III. C. 6. of the Report and Order.

<sup>12</sup> 47 U.S.C. § 259(a) (emphasis added). See also Discussion at Section III. A. 1. of the Report and Order.

<sup>13</sup> 47 U.S.C. § 259(d). See also Discussion at Section III. E. of the Report and Order.

negotiating with the relevant third party directly.

6. Regarding the implementation of section 259, we conclude that section 259(a) grants the Commission authority to promulgate rules concerning any section 259 agreement to share public switched network infrastructure, technology, information, and telecommunications facilities and functions, regardless of whether they are used to provide interstate or intrastate services. At the same time, we make clear that nothing in our analysis of section 259 indicates an intent to regulate intrastate services, as opposed to regulating agreements regarding the sharing of infrastructure. We also note that section 259 dictates two discrete roles for the states with respect to section 259: states may accept for public inspection the filings of section 259 agreements that are required by section 259(b)(7); and states must designate a carrier as an "eligible telecommunications carrier" pursuant to section 214(e)(2)-(3). We further conclude that it is unnecessary to adopt any particular rules to govern disputes between parties to section 259 agreements that may be brought before the Commission. Finally, we decide that it would be inappropriate to further construe the requirements of section 259(d)(2) in this proceeding because issues materially relating to section 259(d)(2) will be decided by the Commission in the universal service proceeding scheduled to be concluded by May 8, 1997.

7. We require that providing incumbent LECs may recover their costs associated with infrastructure sharing arrangements, and we conclude that incentives already exist to encourage providing and qualifying carriers to reach negotiated agreements that do so (section 259(b)(1)). We decide that no incumbent LEC should be required to develop, purchase, or install network infrastructure, technology, and telecommunications facilities and functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired, such elements. We also decide that a providing incumbent LEC may withdraw from a section 259 infrastructure sharing agreement upon an appropriate showing to the Commission that the arrangement has become economically unreasonable or is otherwise not in the public interest.

8. We permit but do not require providing incumbent LECs and qualifying carriers to develop through negotiation terms and conditions for

joint ownership or operation of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" (section 259(b)(2)). We decide that joint owners will be treated as providing incumbent LECs for purposes of section 259 regulations. We also decide that it is not necessary for the Commission to consider, at this time, the accounting and jurisdictional separations implications of joint ownership arrangements pursuant to section 259.

9. We conclude that infrastructure sharing does not subject providing incumbent LECs to common carrier obligations, including a nondiscrimination requirement, because such a result would be contrary to the clear mandate of section 259(b)(3). In the NPRM we asked whether an "implied nondiscrimination requirement" should be inferred based on the "just and reasonable" requirement included in Section 259(b)(4). We conclude that Section 259(b)(4) includes no nondiscrimination requirement, but we also conclude that the "just and reasonable" requirement will serve to ensure that all qualifying carriers receive the benefits of section 259. We reaffirm that, to the extent that requesting carriers seek access to elements pursuant to section 251, sections 201 and 251 expressly require rates set pursuant to those provisions not only to be just and reasonable, but also non-discriminatory or not unreasonably discriminatory.<sup>14</sup>

10. We decide that, although the Commission may have pricing authority to prescribe guidelines to ensure that qualifying carriers "fully benefit from the economies of scale and scope of [the providing incumbent LEC]," it is not necessary at this time to exercise this authority (section 259(b)(4)). We anticipate that, in this negotiation-driven approach, qualifying carriers and providing incumbent LECs will face economic incentives that will allow them to reach mutually satisfactory terms for infrastructure sharing. In particular, we note that, because section 259 contemplates situations where requesting carriers are not using the incumbent LEC's facilities or functions to compete in the incumbent LEC's telephone exchange area, the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage

vis-a-vis a non-competing qualifying LEC. We further decide that availability, timeliness, functionality, suitability, and other operational aspects of infrastructure sharing also are relevant to determining whether the qualifying carrier receives the benefits mandated by section 259(b)(4). We conclude that the negotiation process, along with the available dispute resolution, arbitration, and complaint processes available from the Commission, will ensure that qualifying carriers fully benefit from the economies of scale and scope of providing incumbent LECs. We note that non-qualifying competitive LECs may avail themselves of these same processes to prevent unlawful anticompetitive outcomes resulting from section 259-negotiated arrangements. Further, we note that any anticompetitive outcomes may be proscribed by operation of the antitrust laws from which Congress has granted no exemption to parties negotiating section 259 agreements. We further note that the Commission has ample authority pursuant to Title II to set aside any intercarrier agreements found to be contrary to the public interest.

11. We conclude that it is unnecessary at this time for the Commission to establish detailed national rules to promote cooperation (section 259(b)(5)). We conclude that, because there is a requirement that infrastructure sharing arrangements not be used to compete with the providing incumbent LEC, and because a providing incumbent LEC is permitted to recover its costs incurred in providing shared infrastructure pursuant to section 259, sufficient incentives exist to encourage lawful cooperation among carriers. We also decide that the adoption of a good faith negotiation standard would promote cooperation between providing incumbent LECs and qualifying carriers.

12. We conclude that, for any services and facilities otherwise available pursuant to section 251, carriers that do not intend to compete using those services and facilities may request those services and facilities pursuant to either section 251 or 259, and carriers that do intend to compete using those services and facilities must request them pursuant to section 251. We decide that, with respect to facilities and information that are within the scope of section 259 but beyond the scope of section 251, carriers that do not intend to compete using those facilities and information may pursue agreements with incumbent LECs pursuant to section 259. We conclude that a providing incumbent LEC is not required to share services or access used to compete against it, and that an

<sup>14</sup> 47 U.S.C. §§ 201 (not unreasonably discriminatory), 251 (nondiscriminatory).

incumbent LEC's right to deny or terminate sharing arrangements extends to the full breadth of section 259. We also conclude that a qualifying carrier may not make available any information, infrastructure, or facilities it obtained from a providing incumbent LEC to any party that intends to use such information, infrastructure, or facilities to compete with the providing incumbent LEC. We emphasize that this will not otherwise affect the interconnection obligations of carriers pursuant to section 251. Moreover, competitive carriers, i.e., regardless of whether they qualify for infrastructure sharing pursuant to section 259(d), that require the use of information or facilities to compete with the providing incumbent LEC may request the necessary facilities pursuant to sections 251 and 252. We also find that nothing in section 259 permits a providing incumbent LEC to refuse to enter into a section 259 agreement simply because the qualifying carrier is competing with the providing incumbent LEC, provided that the qualifying carrier is not using any shared infrastructure obtained from the providing incumbent LEC pursuant to a section 259 agreement to compete.

13. We decide that section 259 agreements must be filed with the appropriate state commission, or with the Commission if the state commission is unwilling to accept the filing; must be made available for public inspection; and must include the rates, terms, and conditions under which an incumbent LEC is making available all "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that are the subject of the negotiated agreement (section 259(b)(7)). We decide that this filing requirement refers only to agreements negotiated pursuant to section 259 and affirm that all previous interconnection agreements must be filed pursuant to section 252 as mandated by the Commission's *Local Competition First Report and Order*.<sup>15</sup>

14. We decide that section 259(c) requires notice to qualifying carriers of changes in the incumbent LECs' network that might affect qualifying carriers' ability to utilize the shared public switched network infrastructure, technology, information and telecommunications facilities and

functions; that section 259(c) requires timely information disclosure by each providing incumbent LEC for each of its section 259-derived agreements; and that such notice and disclosure, provided pursuant to a section 259 agreement, are only for the benefit of the parties to a section 259-derived agreement. We also decide that section 259(c) does not include a requirement that providing incumbent LECs provide information on planned deployments of telecommunications and services prior to the make/buy point.

15. We decide that no incumbent LEC is excused, per se, from sharing its infrastructure because of the size of the requesting carrier, its geographic location, or its affiliation with a holding company. A carrier qualifying under section 259(d) therefore may be entitled to request and share certain infrastructure and, at the same time, be obligated to share the same or other infrastructure. We conclude that parties to section 259 negotiations can and will make the necessarily fact-based evaluations of their relative economies of scale and scope pertaining to the infrastructure that is requested to be shared. To facilitate such negotiations, we adopt a presumption that a telecommunication carrier falling within the definition of "rural telephone company" in section 3(37) lacks economies of scale or scope under section 259(d)(1), but we decide to exclude no class of carriers from attempting to demonstrate to a providing incumbent LEC that they qualify under section 259(d)(1). In negotiations with a requesting carrier or in response to a complaint arising from a refusal to enter into a section 259 agreement, a providing incumbent LEC may rebut the presumption that a "rural telephone company" lacks economies of scale or scope.

#### Final Regulatory Flexibility Act Analysis

16. As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996.<sup>16</sup> The Commission sought written public comments on the proposals in the *Infrastructure Sharing NPRM* including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of

1996 (SBREFA), Public Law 104-121, 110 Stat. 847 (1996).<sup>17</sup>

#### A. Need for and Objectives of This Report and Order and the Rules Adopted Herein

17. The Commission, in compliance with section 259(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, promulgates the rules in this Report and Order to ensure the prompt implementation of the infrastructure sharing provisions in section 259 of the 1996 Act. Section 259 directs the Commission, within one year after the date of enactment of the 1996 Act, to prescribe regulations that require incumbent LECs to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier in the service area in which the qualifying carrier has requested and obtained designation as an eligible carrier under section 214(e).<sup>18</sup>

#### B. Summary and Analysis of the Significant Issues Raised by the Public Comments in Response to the IRFA

18. The only party to comment on our IRFA, the Rural Telephone Coalition (RTC), essentially argues that the Commission violated the RFA when we declined to include small incumbent LECs in our definition of the class of entities protected by the RFA.<sup>19</sup> RTC argues that small incumbent LECs that meet the SBA definition of "small entities" are among the class of carriers that will be affected by these rules either as providing incumbent LECs or as qualifying carriers.<sup>20</sup> RTC argues that the Commission has engaged in a "meaningless exercise" despite the fact that our IRFA included estimates of the number of small incumbent LECs potentially affected by the proposed rules and presented alternatives for comment by the public.

19. We disagree. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."<sup>21</sup>

<sup>17</sup> SBREFA was codified as Title II of the Contract With America Advancement Act of 1996 (CWAAA), 5 U.S.C. § 601 et seq.

<sup>18</sup> 47 U.S.C. § 259. See also 47 U.S.C. § 214(e)(1).

<sup>19</sup> RTC Comments at 631.

<sup>20</sup> *Id.*

<sup>21</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶¶ 1328-30, 1342

<sup>15</sup> *Local Competition First Report and Order* at ¶¶ 165-171. We note that section 252(a) requires all interconnection agreements, "including any interconnection agreements negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the appropriate state commission for approval. In contrast, we note that section 259 does not include a comparable provision.

<sup>16</sup> NPRM at ¶ 55.

Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we did consider small incumbent LECs within the IRFA and used the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."<sup>22</sup> We find nothing in this record to persuade us that our prior practice of treating all LECs as dominant is incorrect. Thus, we conclude that we have fully satisfied the requirements and objectives of the RFA.

*C. Description and Estimate of the Number of Small Entities to Which the Rules Adopted in the Report and Order in CC Docket 96-237 Will Apply*

20. Section 259 of the 1934 Act, as added by the 1996 Act, establishes a variety of infrastructure sharing obligations.<sup>23</sup> Many of the obligations adopted in this Report and Order will apply solely to providing incumbent LECs which may include small business concerns.<sup>24</sup> The beneficiaries of section 259 infrastructure sharing agreements—also affected by the rules adopted herein—are the class of carriers designated as "qualifying carriers" under section 259(d).<sup>25</sup> Such qualifying carriers must be telecommunications carriers, which, as defined in section 3(44) of the act, may include LECs, non-LEC wireline carriers, and various types of wireless carriers.<sup>26</sup> Because section 259(d)(1) limits qualifying carriers to those carriers that "lack economies of scale or scope," it is likely that there will be small business concerns affected by the rules proposed in this NPRM. We note, however, that section 259(d)(2) makes the definition of "qualifying carriers" dependent on the Commission's decisions in the universal service proceeding.<sup>27</sup> Until the Commission issues an order pursuant to the *Universal Service NPRM* that addresses related issues, it is not

feasible to define precisely the number of "qualifying carriers" that may be "small business concerns" or, derivatively, the number of incumbent LECs that may be "small business concerns."<sup>28</sup> With that caveat, we attempt to estimate the number of small entities—both providing incumbent LECs and qualifying carriers—that may be affected by the rules included in this Report and Order.

21. For the purposes of this analysis, we examined the relevant definition of "small entity" or "small business" and applied this definition to identify those entities that may be affected by the rules adopted in this Report and Order. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.<sup>29</sup> Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>30</sup> Moreover, the SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.<sup>31</sup> We first discuss generally the total number of small telephone companies falling within both of those categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

22. As discussed supra, and consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this IRFA. Because the small incumbent LECs subject to these rules are either

dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."<sup>32</sup> Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."<sup>33</sup>

21. Telephone Companies (SIC 481)

23. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.<sup>34</sup> This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."<sup>35</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

24. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except

(released August 8, 1996), 61 FR 45476 (August 29, 1996) (*Local Competition First Report and Order*). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Circuit, October 15, 1996).

<sup>22</sup> See *id.*

<sup>23</sup> 47 U.S.C. § 259.

<sup>24</sup> See, e.g., 47 U.S.C. § 259(a).

<sup>25</sup> 47 U.S.C. § 259(a), (d).

<sup>26</sup> 47 U.S.C. § 259(d). See also 47 U.S.C. § 3(44).

<sup>27</sup> 47 U.S.C. § 259(d)(2). See *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket 96-45, FCC 96-93 (released March 8, 1996), 61 FR 10499 (March 14, 1996) ("Universal Service NPRM").

<sup>28</sup> See *Universal Service NPRM*; see also Joint Board Recommendation on Universal Service, Recommended Decision, CC Docket 96-45, FCC 96J-3 (released November 8, 1996), 61 FR 63778 (December 2, 1996) (*Joint Board Recommendation on Universal Service*) (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

<sup>29</sup> See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

<sup>30</sup> 15 U.S.C. § 632.

<sup>31</sup> 13 C.F.R. § 121.201.

<sup>32</sup> See *Local Competition First Report and Order* at ¶¶ 1328-30, 1342.

<sup>33</sup> See *id.*

<sup>34</sup> United States Department of Census, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123* (1995) ("1992 Census").

<sup>35</sup> 15 U.S.C. § 632(a)(1).

Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>36</sup> According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.<sup>37</sup> Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but 26) were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA's definition. Consequently, we estimate using this methodology that there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules and we seek comment on this conclusion.

25. *Local Exchange Carriers.* Although neither the Commission nor the SBA has developed a definition of small providers of local exchange services, we have two methodologies available to us for making these estimates. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813) (Telephone Communications, Except Radiotelephone) as previously detailed, supra. Our alternative method for estimation utilizes the data that we collect annually in connection with the Telecommunications Relay Service (TRS). This data provides us with the most reliable source of information of which we are aware regarding the number of LECs nationwide. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.<sup>38</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with

greater precision the number of incumbent LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions proposed in this *NPRM*.

26. Our remaining comments are directed solely to non-LEC entities that may eventually be designated as "qualifying carriers." Section 259(d)(2) requires qualifying carriers, inter alia, to offer "telephone exchange service, exchange access, and any other service that is included in universal service" within the carrier's service area per universal service obligations imposed pursuant to section 214(e). As addressed supra, because section 259(d)(2) makes the scope of potential "qualifying carriers" contingent upon the Commission's decisions in the universal service proceeding, we are unable to define the scope of small entities that might eventually be designated as "qualifying carriers."<sup>39</sup> Thus, the remaining estimates of the number of small entities affected by our rules—based on the most reliable data for the non-LEC wireline and non-wireline carriers—may be overinclusive depending on how many such entities otherwise qualify pursuant to section 259(d)(2).

27. *Non-LEC wireline carriers.* We next estimate the number of non-LEC wireline carriers, including interexchange carriers (IXCs), competitive access providers (CAPs), Operator Service Providers (OSPs), Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 130 companies reported that they are engaged in the provision of interexchange services; 57 companies reported that they are engaged in the provision of competitive access services;

25 companies reported that they are engaged in the provision of operator services; 271 companies reported that they are engaged in the provision of pay telephone services; and 260 companies reported that they are engaged in the resale of telephone services and 30 reported being "other" toll carriers.<sup>40</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSPs, some as "other," and some simply as IXCs. Consequently, we estimate that there are fewer than 130 small entity IXCs; 57 small entity CAPs; 25 small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and 30 "other" toll carriers that might be affected by the actions and rules adopted in this *Report and Order*.

28. *Radiotelephone (Wireless) Carriers:* The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.<sup>41</sup> According to the SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.<sup>42</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, and, we are unable to estimate with greater precision the number of radiotelephone carriers and service providers that would both qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that might be affected by the

<sup>36</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>37</sup> 13 CFR § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>38</sup> Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (December 1996) ("TRS Worksheet").

<sup>39</sup> See *Universal Service NPRM*; see also *Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

<sup>40</sup> *TRS Worksheet*, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

<sup>41</sup> 1992 Census, supra, at Firm Size 1-123.

<sup>42</sup> 13 CFR § 121.201, (SIC Code 4812).



actions and rules adopted in this *Report and Order*.

29. *Cellular and Mobile Service Carriers.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 138 companies reported that they are engaged in the provision of mobile services.<sup>43</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this *Report and Order*.

30. *Broadband PCS Licensees.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the category of radiotelephone carriers, Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 CFR § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.<sup>44</sup> The Commission has auctioned

broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 183 winning bidders that qualified as small entities in the Blocks C, D, E, and F auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in the *Infrastructure Sharing Report & Order* includes, at a minimum, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

*D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements and Steps Taken To Minimize the Significant Economic of This Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected*

31. In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs, and we mention some of the skills needed to meet these new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected. Overall, we anticipate that the impact of these rules will be beneficial to small businesses since they may be able to share infrastructure with larger incumbent LECs, in certain circumstances, enabling small carriers to provide telecommunication services or information services that they otherwise might not be able to provide without building or buying their own facilities.<sup>45</sup>

Section 259(a)

32. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* Regarding the scope of section 259(a), we allow the parties to section 259 agreements to negotiate what "public switched network infrastructure, technology, information, and telecommunications facilities and functions" will be made available, without *per se* exclusions.<sup>46</sup> In addition, we conclude that qualifying carriers should be able to obtain network facilities and functionalities available under section 251—including lease arrangements and resale—alternatively

pursuant to section 251 or pursuant to section 259 (subject to the limitations in section 259(b)(6)), or pursuant to both if they so choose.<sup>47</sup>

33. To the extent that there are small businesses that are providing incumbent LECs, they will be required to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to defined qualifying carriers. We anticipate that compliance with such requests for infrastructure sharing may require the use of legal, engineering, technical, operational, and administrative skills. At the same time, these rules should create opportunities for small businesses that are qualifying carriers to utilize infrastructure that might not otherwise be available. To obtain access to infrastructure from a providing incumbent LEC, a qualifying carrier is required to pay the costs associated with the shared infrastructure.

34. *Steps Taken To Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* We reject proposals offered by those parties who would assert limitations that remove whole classes or categories of "public switched network infrastructure, technology, information and telecommunications facilities and functions"—e.g., resale services and classes of non-network information—from the scope of section 259(a).<sup>48</sup> Similarly, we declined to exclude section 251-provided interconnection elements from section 259 arrangements.<sup>49</sup> We believe that the flexible approach that we adopt will give parties the ability to negotiate unique agreements that will vary based on individual requirements of parties in each case. Such an approach is particularly important because as technology continues to evolve, definitions based on present network requirements seem likely to limit qualifying carriers' opportunities to

<sup>47</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. B. 1. of the Report and Order.

<sup>48</sup> See, e.g., GTE Comments at 4 ("Section 259 requires only the sharing of infrastructure, not services. When Congress intended to include services, it did so specifically . . ."); Southwestern Bell Comments at i, 5; Sprint Comments at 4 ("section 259 establishes requirements for the sharing of infrastructure, not the provision of service"); NCTA Comments at 4 n.13 (scope of section 259(a) should be no broader than section 251). But see RTC Comments at 7. See also *Infrastructure Sharing Report and Order* Discussion at Section III. B. 1. of the Report and Order.

<sup>49</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. B. 1. of the Report and Order.

<sup>43</sup> TRS Worksheet, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

<sup>44</sup> See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket 93-253, Fifth Report & Order, 9 FCC Rcd 5532, 5581-84, 59 FR 37566 (July 22, 1994).

<sup>45</sup> 47 U.S.C. § 259(a).

<sup>46</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. A. of the Report and Order.



obtain infrastructure unnecessarily. Further, we found no clear evidence of Congressional intent to limit the broad parameters of section 259(a).

35. Overall, we believe that there will be a significant positive economic impact on small entity carriers that—as a result of section 259 agreements—will be able to provide advanced telecommunications and information services in the most efficient manner possible by taking advantage of the economies of scale and scope of incumbent LECs. With regard to any small incumbent LECs that might receive requests for infrastructure sharing from qualifying carriers, we believe that the statutory scheme imposed by Congress and adopted in our rules will promote small business interests. First, we note that section 259(b)(1) protects providing incumbent LECs—small and large, alike—from having to take any actions that are economically unreasonable.<sup>50</sup> Second, we note that, under our rules, an incumbent LEC may demonstrate that the requesting carrier does not lack economies of scale and scope, relative to itself, with respect to the requested infrastructure and, thus, may avoid infrastructure sharing obligations in certain situations.<sup>51</sup>

#### Section 259(b) Terms and Conditions of Infrastructure Sharing

36. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* We require that providing LECs can recover their costs associated with infrastructure sharing arrangements, and we conclude that market incentives already exist to encourage providing and qualifying carriers to reach negotiated agreements that do so (section 259(b)(1)).<sup>52</sup> Congress directed in section 259(b)(4) that providing incumbent LECs make section 259 agreements available to qualifying carriers on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such providing incumbent local exchange carriers. We decide that, although the Commission has pricing authority to prescribe guidelines to ensure that qualifying carriers “fully benefit from the economies of scale and scope of [the providing incumbent LEC],” it is not necessary at this time to

exercise this authority (section 259(b)(4)).<sup>53</sup>

37. We decide that section 259 agreements must be filed with the appropriate state commission, or with the Commission if the state commission is unwilling to accept the filing, and must be made available for public inspection (section 259(b)(7)). Compliance with this rule will require legal and administrative skills.

38. *Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* We generally reject proposals that incumbent LECs should be required to develop, purchase, or install network infrastructure, technology, and telecommunications facilities and functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired, and does not intend to build or acquire, such elements.<sup>54</sup> Because the record did not indicate that there would exist any scale and scope benefits in situations where the providing incumbent LEC did not also use the facilities, we concluded that such a result would be inappropriate. We believe that the approach that we adopt will enable small entity qualifying carriers to enjoy the benefits of section 259 sharing agreements without imposing undue burdens on providing incumbent LECs.

39. Further, we decline to accept various proposals that the Commission adopt pricing schemes for infrastructure shared per section 259.<sup>55</sup> Instead, we conclude that the negotiation process, along with the available dispute resolution, arbitration, and formal complaint processes available from the states and the Commission, will ensure that qualifying carriers fully benefit from the economies of scale and scope of providing LECs. We believe that allowing providing incumbent LECs—including any small business—to recover the costs associated with infrastructure sharing will encourage and facilitate infrastructure sharing agreements. We believe that such agreements will lead to mutual benefits

for both qualifying carriers and providing incumbent LECs.

#### Section 259(c) Information Disclosure Requirements

40. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* The statute also requires incumbent LECs to provide “timely information on the planned deployment of telecommunications services and equipment” to any parties to infrastructure sharing agreements.<sup>56</sup> The rules we adopt herein require disclosure by each providing incumbent LEC for each of its section 259-derived agreements and require that such notice and disclosure are only for the benefit of the parties to a section 259-derived agreement. Under our rules, providing incumbent LECs must provide notice of changes in their networks that might affect qualifying carriers’ ability to utilize the shared infrastructure. Should a small incumbent LEC be subject to this requirement, we anticipate that it will require use of engineering, technical, operational, and administrative skills.

41. *Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* A number of parties suggest that the Commission need not adopt any new disclosure rules pursuant to section 259(c) because other network disclosure provisions provide similar notice of changes in the network.<sup>57</sup> We conclude that specific notice of changes to an incumbent LEC’s network that affect a qualifying carrier’s ability to utilize the shared infrastructure, a qualifying carrier—including small businesses—will enable qualifying carriers, including small entities, to maintain a high level of interoperability between its network and that of the providing incumbent LEC.

42. We also decide that section 259(c) does not include a requirement that providing incumbent LECs provide information on planned deployments of telecommunications and services prior to the make/buy point. We conclude that section 259 does not require such mandatory joint planning, but we note that providing incumbent LECs may have obligations to coordinate network planning and design under sections 251(a), 256, 273(e)(3) and other provisions.

<sup>50</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. C. of the Report and Order.

<sup>51</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. E. of the Report and Order.

<sup>52</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. C. 1. of the Report and Order.

<sup>53</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. C. 4. of the Report and Order.

<sup>54</sup> MCI Comments at 7. *Contra* NYNEX Reply Comments at 10. See *Infrastructure Sharing Report and Order* Discussion at Section III. C. 1. of the Report and Order.

<sup>55</sup> See, e.g., MCI Comments at 7. *Contra* RTC Comments at 11. See *Infrastructure Sharing Report and Order* Discussion at Section III. C. 1. and 4. of the Report and Order.

<sup>56</sup> See *Infrastructure Sharing Report and Order* at Section III. D. of the Report and Order.

<sup>57</sup> See, e.g., NYNEX Comments at 16–17; GTE Comments at 12.

## Section 259(d) Definition of Qualifying Carriers

43. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* We adopt a rebuttable presumption that carriers satisfying the statutory definition of "rural telephone company" in section 3(37) also satisfy the qualifying criteria in section 259(d)(1) of lacking "economies of scale or scope," but we decide to exclude no class of carriers from attempting to show that they qualify under section 259(d)(1).<sup>58</sup> A carrier otherwise qualifying under section 259(d) therefore may be entitled to request and share certain infrastructure and, at the same time, be obligated to share the same or other infrastructure. We conclude that parties to section 259 negotiations can and will make the necessarily fact-based evaluations of their relative economies of scale and scope pertaining to the infrastructure that is requested to be shared. Complying with the section 259 process set out in our rules may require small incumbent LECs and requesting small entities to use legal and negotiation skills.

44. *Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* We believe that the approach we take will facilitate negotiations between requesting carriers and incumbent LECs. We expect that many if not most requests for infrastructure sharing agreements will be made by carriers whose customers reside predominantly, if not exclusively, in rural, sparsely-populated areas.<sup>59</sup> At the same time, there is nothing in the statutory language or legislative history to persuade us that Congress intended such a per se restriction on who can qualify under section 259(d). Thus, we rejected proposals that we limit qualifying carriers to those who meet the requirements of section 3(37).<sup>60</sup> We opposed these proposals because they would unduly limit the opportunities to engage in section 259 sharing agreements to those qualifying carriers located in particular geographic areas. We believe that the approach that we have adopted will enable all small entity qualifying carriers to enjoy the benefits of section 259 sharing

agreements without regard to their geographic location.

## F. Report to Congress

45. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801 (a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

## Ordering Clauses

46. Accordingly, *It is ordered* That, pursuant to sections 4(i), 4(j), 201–205, 259, 303(r), 403 of the Communications Act of 1934, as amended by the 1996 Act, 47 U.S.C. §§ 154(i), 154(j), 201–205, 259, 303(r), 403, the rules, requirements and policies discussed in this Report and Order *are adopted* and §§ 59.1 through 59.4 of the Commission's rules, 47 CFR §§ 59.1 through 59.4, *are adopted* as set forth below.

47. *It is further ordered* That the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than April 3, 1997. The Commission will publish a notice in the Federal Register announcing OMB's approval of the information collections in this decision.

## List of Subjects in 47 CFR Part 59

Antitrust, Communications common carriers, Communications equipment, Reporting and recordkeeping requirements, Rural areas, Telegraph, Telephone.

Federal Communications Commission.  
William F. Caton,  
*Acting Secretary.*

## Rule Changes

Part 59 of Title 47 of the Code of Federal Regulations is added to read as follows:

## PART 59—INFRASTRUCTURE SHARING

### Sec.

59.1 General duty.

59.2 Terms and conditions of infrastructure sharing.

59.3 Information concerning deployment of new services and equipment.

59.4 Definition of "qualifying carrier".

Authority: 47 U.S.C. 154(i), 154(j), 201–205, 259, 303(r), 403.

### § 59.1 General duty.

Incumbent local exchange carriers (as defined in 47 U.S.C. section 251(h)) shall make available to any qualifying

carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has obtained designation as an eligible telecommunications carrier under section 214(e) of 47 U.S.C.

### § 59.2 Terms and conditions of infrastructure sharing.

(a) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be required to take any action that is economically unreasonable or that is contrary to the public interest.

(b) An incumbent local exchange carrier subject to the requirements of section 59.1 may, but shall not be required to, enter into joint ownership or operation of public switched network infrastructure, technology, information and telecommunications facilities and functions and services with a qualifying carrier as a method of fulfilling its obligations under section 59.1.

(c) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any public switched network infrastructure, technology, information, or telecommunications facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section.

(d) An incumbent local exchange carrier subject to the requirements of section 59.1 shall make such public switched network infrastructure, technology, information, and telecommunications facilities, or functions available to a qualifying carrier on just and reasonable terms and pursuant to conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier. An incumbent local exchange carrier that has entered into an infrastructure sharing agreement pursuant to section 59.1 must give notice to the qualifying carrier at least sixty days before terminating such infrastructure sharing agreement.

(e) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be required to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to

<sup>58</sup> See *Infrastructure Sharing Report and Order* Discussion at Section III. E. of the Report and Order.

<sup>59</sup> See RTC Comments at 19–20 (urging the Commission to adopt a rebuttable presumption in favor of "rural telephone companies").

<sup>60</sup> See NCTA Comments at 3.

consumers by the qualifying carrier in such local exchange carrier's telephone exchange area.

(f) An incumbent local exchange carrier subject to the requirements of section 59.1 shall file with the State, or, if the State has made no provision to accept such filings, with the Commission, for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure, technology, information and telecommunications facilities and functions pursuant to this part.

#### **§ 59.3 Information concerning deployment of new services and equipment.**

An incumbent local exchange carrier subject to the requirements of section 59.1 that has entered into an infrastructure sharing agreement under section 59.1 shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment.

#### **§ 59.4 Definition of "qualifying carrier".**

For purposes of this part, the term "qualifying carrier" means a telecommunications carrier that:

(a) Lacks economies of scale or scope; and

(b) Offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e) of 47 U.S.C.

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## **DEPARTMENT OF TRANSPORTATION**

### **Surface Transportation Board**

#### **49 CFR Parts 1002 and 1180**

[STB Ex Parte No. 556]

#### **Railroad Consolidation Procedures—Modification of Fee Policy**

**AGENCY:** Surface Transportation Board (Board), DOT.

**ACTION:** Interim rules with a request for comments.

**SUMMARY:** In this proceeding the Board adopts interim rules relating to the fee policy for proceedings involving major railroad consolidations under the

Board's regulations at 49 CFR part 1180 and corresponding modifications in the Board's fee regulations at part 1002. The Board also adopts technical amendments to conform part 1180 to the ICC Termination Act of 1995.

**DATES:** Interim rules are effective on March 4, 1997; comments must be filed by April 3, 1997.

**ADDRESSES:** Send comments (an original and 10 copies) referring to STB Ex Parte No. 556 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1201 Constitution Avenue, NW., Washington, DC 20423-0001.<sup>1</sup>

#### **FOR FURTHER INFORMATION CONTACT:**

Kathleen M. King, (202) 927-5249 or David T. Groves, (202) 927-6395 [after March 16, 1997, (202) 565-1551]. [TDD for the hearing impaired: (202) 927-5721. (after March 16, 1997, (202) 565-1695).]

**SUPPLEMENTARY INFORMATION:** The Independent Office Appropriation Act of 1952, 31 U.S.C. 9701 (IOAA), is the basis for user fees charged by federal government agencies, including this one. Under the IOAA, agencies are required to ensure that "... each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." 31 U.S.C. 9701(a). Administrative guidance for implementation of the IOAA is provided in the Office of Management and Budget Circular A-25 User Fees, as revised July 8, 1993 (Circular A-25). Circular A-25 states that the general policy of the federal government is as follows: "A reasonable charge should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."

According to our current user fee policy, the filer of a primary application under our merger and consolidation regulations at 49 CFR part 1180 is not required to pay additional filing fees for directly related proceedings that are filed along with the primary application. Recently, in *Union Pacific Corporation, et al.—Control and Merger—Southern Pacific Rail Corporation, et al.*, Finance Docket No. 32760 (*UP-SP Merger*), there were 30 directly related proceedings filed concurrently with the application. Of the 30 transactions, 21 were railroad abandonment or discontinuance of

service applications, petitions for exemption, and notices of exemption.<sup>2</sup> The directly related proceedings in *UP-SP Merger* engendered substantial additional staff work, such as the environmental review process that was required for each abandonment or discontinuance proceeding. Under our current fee policy, no additional filing fees were assessed for those proceedings at the time of the their filing.<sup>3</sup>

The current railroad consolidation fees understate the costs associated with processing directly related proceedings filed by the primary applicant(s). Therefore, to ensure that the costs associated with these directly related proceedings are borne by the primary applicant (the direct beneficiary of the Board's action), we are modifying our fee policy to require a separate fee for each and every directly related application, petition and/or notice that is filed with the primary application. The fee for a directly related proceeding will be the same as it would be if the directly related application, petition and/or notice were filed separately. For example, if the directly related proceeding involves a petition for exemption for abandonment or discontinuance of a rail line, the \$3,800 fee currently set forth at fee item (21)(iii), would be assessed for that proceeding. Appropriate modifications are being made at 49 CFR 1002.2(d) and 1180.4(c) to reflect this fee policy change.

In addition, under the Board's existing fee policy regulations, the same fee of \$4,700 is applied to any type of responsive application, including an inconsistent application. This policy, however, does not allow us to recover the full cost of handling an inconsistent application. The additional staff work required to review and analyze an

<sup>2</sup>In *Regulations Governing Fees For Services*, 1 I.C.C.2d 60 (1984), two proceedings, *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982) (*Union Pacific*), and *Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co.*, 366 I.C.C. 171 (1982) (*Norfolk Southern*), formed the basis for computing the original fees for railroad consolidation proceedings. Those cases did not include nearly as many directly related proceedings as *UP-SP Merger*. In the *Norfolk Southern* proceeding, there were only eight directly related transactions filed concurrently with the primary application. They involved four construction and operation transactions, two railroad abandonments, one issuance of common stock, and one acquisition of a motor carrier. The *Union Pacific* proceeding included thirteen directly related transactions that entailed five trackage rights requests, three poolings of operations, three issuances of common stock, and two motor carrier acquisitions.

<sup>3</sup>Subsequently, however, the Secretary of the Board requested payment from the applicants of filing fees for the 21 abandonment or discontinuance of service proposals in *UP-SP Merger*, and the applicants paid those fees.

<sup>1</sup>The Board is scheduled to relocate its offices over the weekend of March 15-16, 1997. Its new address will be: Surface Transportation Board, 1925 K Street NW., Washington, DC 20423-0001. We note that mail will not be received from March 13-18, 1997 (mail delivery will resume thereafter at the new location).