

**BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION**

ORDER NO. U-23899

**LOUISIANA PUBLIC SERVICE COMMISSION,
EX PARTE.**

Docket No. U-23899 - In re: Review of Small ILEC Exemption pursuant to the Louisiana Public Service Commission Local Competition Regulations as amended August 6, 1998, Section 202(G).

(Decided at Open Session November 17, 1999)

Introduction

By General Order dated March 15, 1996, the Louisiana Public Service Commission (“LPSC” or “Commission”) adopted its Regulations for Competition in the Local Telecommunications Market (“Regulations” or “Local Competition Regulations”) “to foster the transition from monopoly to competitive local telecommunications markets in Louisiana” and “to encourage competitive entry, preserve and advance universal service, protect the public safety and welfare [...]”.¹

As a limited exception to competitive entry, under Section 202 of the Regulations for Competition in the Local Telecommunications Market (“Regulations” or “Local Competition Regulations”) of the Louisiana Public Service Commission (“LPSC” or “Commission”), Small Incumbent Local Exchange Carriers² (“Small ILECs”) are exempted from competition in their respective service areas, and from the obligations of Resale, Unbundling, Number Portability and Interconnection.³ A Small ILEC’s exemption from competition in its respective service area, and the exemption from obligations of resale, number portability, interconnection and unbundling is lost where the Small ILEC provides telecommunications service in the historically designated service area(s) of a non-exempted ILEC;⁴ the exemption from competition within the Small ILEC’s service area is lost if the Small ILEC opts, under Section 701 of the Regulations, to be regulated under a price cap plan;⁵ to preserve the exemption from competition within its service area, a Small ILEC must form a subsidiary and/or other affiliate to provide telecommunications services outside its service area.⁶

On February 19, 1999, the Louisiana Public Service Commission (“LPSC”) initiated this proceeding through a Notice of Proposed Rule-Making pursuant to Section 202(G) of the Local Competition Regulations which provides that the exemptions granted to Small ILECs will be evaluated three years from the effective date of these Regulations to determine whether the exemption will be terminated, continued and/or modified. Many telecommunications service providers in Louisiana intervened in the proceeding.

¹Preamble to the Local Competition Regulations

²Small Incumbent Local Exchange Carriers defined in Section 202(A) of the Commission’s Local Competition Regulations as “ILECs with 100,000 access lines or less statewide”

³Section 202 (C) of the Local Competition Regulations

⁴Section 202 (B) and (C) of the Local Competition Regulations

⁵Section 202(D) of the Local Competition Regulations

⁶Section 202(F) of the Local Competition Regulations

On April 27, 1999, Staff issued a notice inviting comments from all parties on the issue of whether the various exemptions granted to the Small ILECs under Section 202 of the Local Competition Regulations should be continued, terminated or modified and why; additionally Staff invited the parties to this proceeding to submit comments on (a) whether any other issues should be addressed in this docket; (b) whether §251(f) of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*) is applicable to this proceeding; (c) whether this Commission must use the same standard of proof as set forth in the Federal Communication Commission's *First Report and Order* dated August 1996, pursuant to its authority to implement the Local Competition provisions of the Telecommunications Act of 1996.⁷

Of the parties of record in this proceeding, the following four intervenors filed comments on June 7, 1999: East Ascension Telephone Company, Inc. ("EATEL"), AT&T Communications of the South Central States, Inc. ("AT&T"), BellSouth Telecommunications Inc. ("BellSouth") and Small Company Committee of the Louisiana Telephone Association ("Small Company Committee"). A technical conference was held on September 8, 1999 at which Staff discussed with the parties the comments filed into the record in this proceeding. A consensus was reached among all the parties in attendance at that technical conference that Section 202 of the Local Competition Regulations needs to be amended so as to remove all inconsistency with applicable federal law, namely, Section 251(f) of the Telecommunications Act of 1996 and FCC's *First Report & Order implementing the local-competition provisions. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("First Report & Order").

Staff prepared a Draft Order reflecting the parties' consensus at the September 8, 1999 technical conference. The Draft Order was reviewed by the parties, and no exceptions were filed to the Draft Order. The Commission, by a vote of 4-0 (with Commissioner Owen absent), adopted the Draft Order at its Business & Executive Meeting on November 17, 1999.

Parties' Positions:

Of the four intervenors who filed comments in this proceeding, AT&T and BellSouth argued that the exemption granted to all small ILECs under Section 202 of the Louisiana Public Service Commission's Local Competition Regulations is inconsistent with Section 251(f) of the Act, and, as such, could constitute a violation of Section 253(a). Both AT&T and BellSouth viewed the exemptions granted to Small ILECs under Section 202 of the Local Competition Regulations as exceeding the authority granted to states under Section 253(b) "to impose, on a competitively neutral basis and consistent with section 254 [of the 1996 Act] requirements necessary to preserve and advance universal service ...". BellSouth stated that the Small ILEC exemption is not necessary to preserve and advance universal service, and will not impair the Commission's ability to do so.

AT&T further argued that the requirements of Section 202 of the Louisiana Local Competition Regulation shield the incumbent LEC from competition by other LECs, and are similar to the provisions of a Tennessee statute found by the FCC to be in violation of Section 253(a).⁸ In particular, AT&T viewed as dispositive FCC's conclusion in that docket that "because these state and local legal requirements shield the incumbent LEC from competition by other

⁷Under the FCC's First Report and Order, in order for a rural or small LEC to be entitled to exemptions/modifications of the duties imposed on ILECs, the rural/small LEC has the burden to demonstrate that its compliance with the Act's local competition provisions would cause it to suffer an "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry".

⁸*In the Matter of AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, CC Docket No. 98-92 Memorandum and Order dated May 27, 1999.

LECs, the requirements are not competitively neutral, and therefore do not fall within the reservation of state authority set forth in Section 253(a) and do not fall within the boundaries of Section 253(b), [the FCC] must preempt the enforcement of Tenn. Code Ann. Section 65-201(d) and the *Denial Order*, as directed by Section 253(d)”.

The Small Company Committee stated at the outset that each of the incumbent carriers joining in the Small Company Committee’s comments is a “Small ILEC” as defined in Section 101(37) of the Local Competition Regulations, and also a “Rural Telephone Company” (“RTC”) as defined in Section 153(37) of the 1996 Telecommunications Act. The Small Company Committee suggested that the Local Competition Regulations be amended to remove the difference between the 1996 Telecommunications Act and the Local Competition Regulations in the terminology and definition employed to refer to entities such as the Small Company Committee joining in its comments. More specifically, the Small Company Committee suggested that the definition of Small ILEC in Section 101(37) of the Local Competition Regulations be amended to read: “Small ILEC – an incumbent local exchange carrier that meets the definition of a “rural telephone company” contained in the Communications Act of 1934 as amended”.

The Small Company Committee further suggested that Section 202 of the Local Competition Regulations and other Small ILEC provisions be replaced with Section 251(f) of the 1996 Telecommunications Act, to achieve conformity with applicable federal law. The Small Company Committee stated that such an amendment would be in the public interest and consistent with the goals of the 1996 Act and the Local Competition Regulations. It also argued that the twin goals of the Louisiana Public Service Commission of promoting competition and preserving and advancing universal service will not be impaired, and indeed will be furthered by such amendment due to the balancing of the Act’s pro-competitive goals with advancement of universal service in the provisions of Section 251(f).

Lastly, EATEL adopted the Small Company Committee’s comments, in addition to advancing the following suggested modifications to the Local Competition Regulations: first, EATEL suggested that Section 202(f) should be deleted, as the operation of a CLEC affiliate should have no impact on a small ILEC’s request for an exemption, and the requirement that an affiliate be formed deters competition in the historically designated service areas of Regional Bell Operating Companies such as BellSouth; second, EATEL stated that any other issue to be raised in this proceeding should be addressed at the time EATEL files for relief pursuant to Section 251(f) of the Act.

At the Technical Conference held on September 8, 1999, Staff raised, as an issue not adequately addressed by the parties, the applicability to the instant proceeding of the standard of proof set forth in Paragraph 1262 of the Federal Communication Commission’s *First Report and Order* dated August 1996,⁹ as upheld by the U.S. Supreme Court as a proper exercise of the FCC’s authority to implement the Local Competition provisions of the Telecommunications Act of 1996.¹⁰ Under the FCC’s *First Report and Order*, in order for a Rural Telephone Company to be entitled to exemptions or modifications of the duties imposed on ILECs, the rural/small LEC has the burden to demonstrate that its compliance with the Act’s local competition provisions would cause it to suffer an “undue economic burden beyond the economic burden that is typically associated with efficient competitive entry”.¹¹ The parties in attendance at the Technical Conference reached a consensus that Section 202 should be amended to allow for the incorporation of all final Orders of the FCC implementing the Local Competition provisions of the Act that are applicable to the Small ILEC provisions of the LPSC’s Local Competition Regulations.

⁹Paragraph 1262, Section XII of the First Report and Order

¹⁰*AT&T Corp. v. Iowa Utilities Board*, 142 L.Ed. 2d 834, 119 S.Ct. 721 (1999)

¹¹Paragraph 1251 of Section XII Exemptions, Suspensions and Modifications of Section 251 Requirements of FCC’s *First Report and Order* provides that “[the FCC] may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the [FCC] is warranted.

Legal Analysis:

Section 251(f)(1) of the Telecommunications Act of 1996 sets forth the criteria that States must use to grant, to a rural carrier as defined in Section 153(37), exemption from obligations of ILECs under Section 251(c); Section 251(f)(2) establishes the criteria that States must use to grant a rural carrier's petition for modifications or suspensions of obligations under Section 251(b) or (c). The provisions of Section 251(f) do not contemplate a blanket grant to all rural carriers an exemption from, and suspension or modification of, otherwise applicable obligations under subsections (b) and (c). Instead, the provisions of Section 251(f) clearly require the States to apply specific criteria to the facts in determining whether the rural carrier meets the requirements for an exemption or suspension or modification of the obligations of the rural carrier under subsections (b) and (c).

Under Section 251(f)(1), no exemption can be granted to a rural carrier who has received a bona fide request for interconnection, services or unbundled elements unless the state commission makes the requisite "inquiry for the purpose of determining whether to terminate the exemption" concerning whether "the request is unduly economically burdensome, is technically feasible and is consistent with Section 254 of the Act (other than subsections (b)(7) and (c)(1)(D))". Similarly, under Section 251(f)(2), a rural carrier's petition for modifications or suspensions of the obligations can only be granted by the state commission if the state commission determines (within 180 days of receiving the petition) that such "a suspension or modification:

(A) is necessary

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or
- (iii) to avoid imposing a requirement that is technically infeasible;

And

(B) is consistent with the public interest, convenience, and necessity."¹²

Section 253(a) of the Act further provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Under Section 253(d) of the Act, the determination by the Federal Communications Commission ("FCC") that a state or local government has permitted or imposed any statute, regulation or legal requirement that violates Section 253 (a) or (b) is preemptive to the extent necessary to correct such violation or inconsistency.

The generalized exemptions granted to Small ILECs under Section 202 of the Local Competition Regulations are not consistent with the requirements under Section 251(f) of the Act that a state commission only grant exemptions, suspensions or modifications from the obligations of a LEC upon making the requisite inquiry and findings under 251(f)(1) and (2). As such, they could be preempted under Section 253(d) as violating Section 253(a) or (b) on the grounds stated in *In the Matter of AVR, L.P. d/b/a/ Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, CC Docket No. 98-92 Memorandum and Order dated May 27, 1999.

¹²Section 251(f) of the Telecommunications Act of 1996. 47 U.S.C. §251

Conclusion

In view of this possibility of preemption, and of the parties' unanimous position that the Small ILEC provisions be amended to conform to federal law, the definition of a Small ILEC in Section 101(37) and the Small ILEC provisions in Section 202 of the Local Competition Regulations should be amended to closely track Section 153(37) and Section 251(f) of the Act respectively.

IT IS THEREFORE ORDERED

That the Local Competition Regulations be revised to read as follows:¹³

Revised Section 101(37) – Definition of Small ILEC

Small ILEC – an incumbent local exchange carrier that meets the definition of a “rural telephone company” contained in the Communications Act of 1934, as amended [].

Revised Section 202

(A) TSPs are permitted to provide telecommunications services in all designated ILEC service areas as described in existing Commission orders as of the effective dates of these Regulations, or in maps, tariffs and rate schedules reviewed and approved by the Commission prior to the effective dates of the Regulations except as provided for in Section 202 (B) with respect to the service areas served by Small ILECs. []

(B) 1. All requests for interconnection made of a Small ILEC for interconnection described in Section 251 (c) of the Communications Act of 1934, as amended (the “Act”) shall be made and addressed in accordance with the requirements stated in Section 251 (f)(1) of the Act, and with final Orders of the Federal Communications Commission.

2. Notwithstanding Section 202(B)(1), above, a Small ILEC may petition the Commission for a suspension or modification of the application of a requirement or requirements found in Sections 251(b) and 251(c) of the Act. The Commission shall consider and grant any such petition in accordance with the requirements of Section 251(f)(2) of the Act.

C. For Commission regulatory purposes, a Small ILEC that chooses to provision telecommunications services outside of its historically designated service area(s) shall segregate the assets, liabilities, revenues and expenses relating to services provisioned in its historically designated service area(s) from those relating to services offered or provided outside its historically designated area(s). Such Small ILEC's revenues not derived, and expenses not incurred from the Small ILEC's historically designated service area(s) shall not be considered by the Commission for purposes of applying Order No. U-21181, including LECAF funding. Such Small ILEC's traditional ILEC operations shall not cross-subsidize its competitive ventures.

D. If a Small ILEC forms a subsidiary and/or other affiliate entity to provision telecommunications services outside its historically designated service area(s), [] for Commission regulatory purposes, including the application of Order No. 21181 and LECAF funding, the Small ILEC shall maintain separate books and accounts which

¹³The revised language is underlined; deletions are noted by “[]”.

segregate the assets, liabilities, revenues and expenses of the Small ILEC from those of the subsidiary and/or other affiliate entity. The Small ILEC's traditional ILEC operations shall not cross-subsidize the operations of any subsidiary and/or other affiliate entity providing telecommunications services outside the Small ILEC's historically designated service area(s). The Small ILEC shall apply all Commission imputation rules when dealing with its statutory and/or other affiliate.

E. An exclusive franchise, license or certificate shall not be issued to any TSP to provide telecommunications services for a particular service or geographic area by the Commission.

Revised Section 701(A)(2):

A "Small ILEC" as defined in Section 101(37) may petition the Commission to be regulated under the terms and conditions of a price cap plan in lieu of continuing to be regulated pursuant to Order No. U-21181, dated June 30, 1995. If a Small ILEC fails to petition the Commission before April 1, 1996, then the ILEC has the opportunity to elect into a price cap plan by December 1, 1996 for the year 1997 and thereafter, or on the same date in each subsequent year. Once a Small ILEC elects into a price cap plan, it will remain in the plan for a period of five years unless earlier terminated by the Commission. No Small ILEC opting into a price cap plan may receive compensation from the Louisiana Exchange Carrier Association Fund ("LECAF").

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA**

November 23, 1999

/S/ C. DALE SITTIG
DISTRICT IV
CHAIRMAN C. DALE SITTIG

/S/ JACK "JAY" A. BLOSSMAN, JR.
DISTRICT I
VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, JR.

DON OWEN ABSENT
DISTRICT V
COMMISSIONER DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

SECRETARY
LAWRENCE C. ST. BLANC

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

Service List
U-23899

All Commissioners

Uma Subramanian - Staff Attorney

Farhad Niami - Economics Division

Arnold Chauviere - Utilities Division

Stanley Perkins - Auditing Division

I - Michael Lamers, Gordon, Arata, McCollam, Duplantris & Eagan, 1420 One American Place,
Baton Rouge, LA 70825 (Rep.Cox Louisiana Telcom, II, Actel Integrated Commun.)
(Fax - 336-9763) (P - 381-9643)

I - David L. Guerry, Long Law Firm, Two United Plaza, Suite 800, 8550 United Plaza Blvd., Baton
Rouge, LA 70809-7013 (Fax - 922-5105) (P - 922-5110)

I - Janet S. Boles, Boles, Boles & Ryan, 7809 Jefferson Hwy., Suite D3, Baton Rouge, LA 70809
(Rep. Small Company Committee of the LTA) (Fax - 926-5425) (P - 924-2686)

I - Janet S. Britton, EATEL, 913 S. Burnside Ave., Gonzales, LA 70737-4258

I - William R. Atkinson, Sprint, 3100 Cumberland Circle, Atlanta, GA 30339

I - T. Michael Twomey, Jones, Walker, et al, 201 St. Charles Ave., New Orleans, LA 70170-5100
(Rep. Louisiana CGSA, Inc.)

I - Victoria McHenry, Barbee Ponder, BellSouth Telecommunications, 365 Canal St., Suite 3060,
New Orleans, LA 70130 (Fax 504-528-2948) (P - 504- 528-2052)

I - Alicia Freysinger, Attorney at Law, 1515 Poydras St., Suite 1150, New Orleans, LA 70112
(Rep. e.spire) (T - 504-568-1500)