

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Viola Home Telephone Company)	No. 05-0298
Petition for Declaratory Relief and/or)	
Suspension or Modification Relating to)	
Certain Duties Under Sections 251(b) and)	
(c) of the Federal Telecommunications Act)	
pursuant to Section 251(f)(2) of that Act; and)	
for any other necessary or appropriate relief.)	

**STAFF’S RESPONSE TO ADMINISTRATIVE LAW JUDGE’S MAY 6, 2005
NOTICE**

The Staff of the Illinois Commerce Commission (hereafter “the Staff”), by and through its attorneys, in response to the Administrative Law Judge’s Notice of May 6, 2005, states as follows:

On May 6, 2005, the Administrative Law Judge issued a Notice (hereafter “ALJ’s Notice”), which directed the parties to present argument regarding “wh[ether] Section 251(f)(1) of the federal Telecommunications Act of 1996 ... exempt[s] Petitioner, as a rural telephone company, from the obligations established in Section 251(c) (as well as those obligations established in Section 251(b)),[,] in light of the Commission not having terminated Petitioner’s rural telephone company exemption as described in Section 251(f)(1)(B).”

The rural ILECs¹ assert, in their respective but virtually identical Petitions, that they received communications from Sprint Communications, L.P. (hereafter “Sprint”), seeking negotiations for the purpose of concluding interconnection

¹ For purposes of this *Response*, the Staff will refer to the Petitioners in these proceedings, namely the Cambridge Telephone Company, C-R Telephone Company, the El Paso Telephone Company, the Geneseo Telephone Company, the Henry County Telephone Company, the Mid-Century Telephone Cooperative, the Reynolds Telephone Company, the Metamora Telephone Company, the Harrisonville Telephone Company, the Marseilles Telephone Company and the Viola Home Telephone Company as the “rural ILECs”.

agreements with each of the rural ILECS. See, e.g., Cambridge Petition, ¶¶4-6. The rural ILECs have apparently taken this to be a bona fide request for interconnection within the meaning of Section 251(f)(1)(A) of the federal Telecommunications Act of 1996. Id. The rural ILECs understand this request to have been made by Sprint in support of a company called Mediacom, a cable television provider which the rural ILECs state is not certified to provide telecommunications service in Illinois. Id., ¶¶7-8. The rural ILECs contend that Sprint further requested negotiations regarding (a) reciprocal compensation; and (b) number portability. Id., ¶¶5-6, 9-10.

The rural ILECs argue that they are not obligated to negotiate with Sprint, inasmuch as it is an intermediate transiting CLEC that does not itself plan to provide service in any of the rural ILECs' serving territories. Id., ¶11, *et seq.* They argue that Sprint, in view of its asserted intent to provide only transiting functions, is not a telecommunications carrier as that term is defined in the federal law and FCC rules and decisions, and that the rural ILECs accordingly have no duty to negotiate under Section 251(c). Id., ¶¶15-18. The rural ILECs likewise contend that Sprint is not the correct party with which to negotiate a reciprocal compensation arrangement; they contend that the proper party is Mediacom. Id., ¶¶19-24. The rural ILECs further contend, and for essentially the same reasons, that they have no obligation to provide number portability to Sprint. Id., ¶¶25-30. The rural ILECs next argue that, under Section 251(c)(2), an ILEC is required only to interconnect with other carriers at any technically feasible point on the ILEC's network. Id., ¶31. The rural ILECs allege that Sprint does not intend to

establish points of interconnection on or immediately adjacent to each of their networks, but instead would require them to transport traffic to a tandem switch outside their network, at their expense. Id., ¶32, *et seq.* To the extent that the Commission might find that the rural ILECs have a duty to undertake such transport, the rural ILECs seek a suspension of this duty, based on alleged adverse economic impact. Id., ¶40.

The rural ILECs further argue that, were Sprint permitted to undertake its proposal, there would exist significant opportunity for abuse, inasmuch as Sprint intends to terminate long distance and wireless traffic over the same facilities, despite the fact that each type of traffic is subject to a different compensation regime (e.g., reciprocal compensation, terminating access). Id., ¶¶44-45. The rural ILECs, on rather vague grounds, assume that Sprint cannot or will not properly segregate or account for this traffic. Id., ¶¶46-47.

Lastly, the rural ILECs allege that permitting Sprint to engage in this undertaking will result in “cherry picking”, thereby endangering universal service. Id., ¶¶48, *et seq.*

On May 9, 2005, Viola Home Telephone Company filed its *Response* to the *ALJ's Notice*; its Responses are, like its Petition, virtually identical to those of the other rural ILECs. *See, generally, Rural ILEC Responses.* Like the rural ILECs, Viola asserts that the Section 251(f)(1) rural exemption does indeed exempt it from the obligation to negotiate regarding interconnection or reciprocal compensation with Sprint. Rural ILEC Response at 1. The rural carriers assert that they have no obligation to negotiate Section 251(b) obligations, inasmuch as

“the duty to negotiate Section 251(b) obligations arises out of Section 251(c).” *Id.* at 3. However, the rural ILECs note that their Petitions assert that, even absent the rural exemption, they have no duty to negotiate with Sprint in the first place, inasmuch as they assert that Sprint is a transiting carrier. *Id.* at 1-2. Further, the rural ILECs aver that they seek, in their Petitions, a suspension of any obligation they might have to negotiate with Sprint pursuant to Section 251(f)(2) of the federal Act. *Id.* at 2; see also 47 U.S.C. §251(f)(2) (federal provision that permits state Commissions to suspend obligations of rural carriers under certain circumstances).

As noted above, the ALJ seeks comment on: “wh[ether] Section 251(f)(1) of the federal Telecommunications Act of 1996 ... exempt[s] Petitioner, as a rural telephone company, from the obligations established in Section 251(c) (as well as those obligations established in Section 251(b))[,] in light of the Commission not having terminated Petitioner’s rural telephone company exemption as described in Section 251(f)(1)(B).” The Staff notes that its *Response* addresses this point and nothing more, and the Staff specifically declines to offer any opinion at this time regarding the substance or the merits of the rural ILECs’ *Petitions*.

The ALJ recognizes that this matter is before the Commission in a rather unusual procedural posture. Section 251 provides, in relevant part, that:

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section

254 [47 USCS § 254] (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. **The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission.** The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [47 USCS § 254] (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

47 U.S.C. §251(f)(1)(A-B) (emphasis added)

The statute, in other words, specifically calls for the carrier requesting interconnection, UNEs, or services to bring the actions, whereas here, the carriers who allege that they have received requests for such interconnection, UNEs, or services have brought *Petitions* for declaratory relief.

This being the case, it appears to the Staff that the Section 251(c) issue is entirely unripe for decision. There is no question here that the rural ILECs are in all cases rural telephone companies within the meaning of Section 154(37) of the federal Telecommunications Act of 1934, 47 U.S.C. §154(37), and thus exempt from Section 251(c) obligations until such time as the Commission finds otherwise, pursuant to Section 251(f)(1)(A-C). The Staff is informed and believes that no such finding has been made to date with respect to any of the petitioning rural ILECs.

As a result, for the Section 251(c) issues – interconnection, UNEs and services – to come properly before the Commission, Sprint – the party that the rural ILECs allege to be requesting interconnection – must first “submit a notice of its request to the State commission.” 47 U.S.C. §251(f)(1)(B). If Sprint (or some other entity) has done so, the Staff is unaware of it. Accordingly, to the extent the rural ILEC’s Petitions seek a finding that the rural carrier exemption attaches, they should be dismissed as unripe. The Section 251(f)(1) rural exemption from Section 251(c) obligations unquestionably attaches at this time, and no challenge to it is properly before the Commission.

The questions of reciprocal compensation and number portability raised in the rural ILECS’ *Petitions* are not as easily disposed of. These obligations are founded in subsection (b) of Section 251. 47 U.S.C. §§251(b)(2), (b)(5). As noted above, the rural ILECs contend that the obligations of Section 251(b) can only be implemented through negotiations under Section 251(c) – from which the rural ILECs are currently exempt – the rural ILECs have no obligation to undertake negotiations regarding reciprocal compensation or number portability. In the Staff’s view, this considerably overstates the case.

As previously noted, the rural exemption extends to those obligations established under Section 251(c). 47 U.S.C. §251(f)(1). The rural ILECs appear to contend that this absolves them from the duty to negotiate regarding – or, it would appear, pay – reciprocal compensation. However, the federal Act is very clear on this point; all ILECs have the affirmative duty to “establish reciprocal

compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. §251(b)(5).

The FCC has determined that Section 251(b) obligations are independent of Section 251(c). In its *TRS Wireless Order*, the FCC stated that:

The [FCC’s] *Local Competition Order* clearly calls for LECs immediately to cease charging CMRS providers for terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC.

Opinion, ¶29 In the Matters of TSR Wireless, LLC, et al. v. U S West Communications, Inc., et al., FCC No. 00-194, File Nos. E-98-13, E-98-15; E-98-16, E-98-17, E-98-18, 15 FCC Rcd 11166; 2000 FCC LEXIS 3219; 21 Comm. Reg. (P & F) 49 (Rel. June 21, 2000)

At least one federal Circuit Court of Appeals has reached the same conclusion, holding that rural carriers were not exempt from reciprocal compensation obligations, as follows:

The [rural carriers’] assertion that the FCC expected reciprocal compensation arrangements to be contained in agreements under *section 251(c)* is unsupported by the ... *TSR Wireless [Order]* ... [which] indicat[ed] that certain duties imposed under reciprocal compensation were operative regardless of the existence of an agreement. [citation omitted]. The [rural carriers] further argue that the indirect connection at issue in the instant agreements would render their rural exemption nugatory because carriers like the CMRS providers would not be required to request interconnection under *47 U.S.C. § 251(c)*. As we explained above, no such requirement applies to the CMRS providers, and the rural exemption remains available when the RTCs are confronted with requests for direct connection under § 251(c).

Atlas Telephone Company, et al. v. Oklahoma Corp. Comm’n, 400 F.3d 1256, 1267-68; 2005 U.S. App. Lexis 4020 at 27 (10th Cir. 2005)

Further, FCC rules provide that: “[e]ach LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications

traffic with any requesting telecommunications carrier.” 47 C.F.R. §51.703(a). The FCC has determined that:

[A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

47 C.F.R. §51.701(e)

It appears to the Staff that a “reciprocal compensation arrangement” may very well be a thing wholly distinct from, and not necessarily within the scope of, a Section 251(c) interconnection agreement. It is significant in this context that FCC rule permit carriers to use “bill – and – keep” arrangements for reciprocal compensation, in which each carrier terminates the other carrier’s traffic free of charge. 47 C.F.R. §51.713. Clearly, based on this provision, such arrangements can be very informal, and may not require formal requisites of a contract or agreement.

Further, the Staff can readily posit situations where carriers not obligated to conclude interconnection agreements with one another – for example, two CLECs that serve customers in a given area – would nonetheless have a duty to pay reciprocal compensation to one another under a reciprocal compensation arrangement if they initiate traffic that terminates on one another’s networks. Accordingly, it does not appear to the Staff that the mere existence of the Section 251(c) rural exemption necessarily resolves this matter.

Likewise, it appears to the Staff that the obligation of ILECs to “provide, to the extent technically feasible, number portability in accordance with the

requirements prescribed by the [FCC,]" 47 U.S.C. §251(b)(2), is not necessarily within the scope of the Section 251(f)(1) rural exemption from Section 251(c) obligations. This is confirmed by referring to FCC rules regarding local number portability, which provide that:

Subject to paragraphs (b) and (c) of this section, **all local exchange carriers (LECs) must provide number portability** in compliance with ... performance criteria [set forth elsewhere in the rule].

47 C.F.R. §52.23(a) (emphasis added)

Beginning January 1, 1999, **all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.**

47 C.F.R. §52.23(c) (emphasis added)

Pursuant to the Commission's adoption of thousands-block number pooling as a mandatory nationwide numbering resource optimization strategy, **all carriers, except those exempted by the Commission**, must participate in thousands-block number pooling where it is implemented and in accordance with the national thousands-block number pooling framework and implementation schedule established by the Commission.

47 C.F.R. §52.20(b) (emphasis added)

There is no express statutory exemption from these rules for rural ILECs, and the FCC has not, to the Staff's knowledge, formulated a regulatory one. It is significant that ILECs must implement number portability on behalf of a carrier which merely "plans to operate" in an area, 47 C.F.R. §52.23(c), indicating that the obligation to implement number portability is not contingent upon direct, formal interconnection under Section 251(c). Accordingly, it appears to the Staff

that rural carriers cannot avoid number portability obligations by invoking the Section 251(f)(1) rural exemption.

This is not to suggest that the rural ILECs do not have a right to seek relief from Section 251(b) obligations before this Commission; Section 251(f)(2) very clearly affords them such a right. See 47 U.S.C. §251(f)(2) (rural ILECs may petition a state Commission for a “suspension or modification” of Section 251(b) obligations, on an affirmative showing by the rural ILEC that such obligation imposes an undue economic burden, is technically infeasible, or adversely affects service, and is consistent with the public interest). Indeed, the rural ILECs specifically seek such a suspension, *albeit* in the alternative. See, e.g., Cambridge Petition, ¶40. However, where a rural ILEC seeks suspension or modification of a Section 251(b) obligation, it clearly has the burden of filing a petition and making the necessary showing of infeasibility, hardship, or adverse impact, and consistency with the public interest. In contrast, under Section 251(f)(1), the burden is on the requesting carrier to make a *bona fide* request, and to submit a notice to the appropriate State Commission. 47 U.S.C. §251(f)(1)(B). Further, the requesting carrier has the burden of proof in such proceedings. Iowa Utilities Board v. FCC, 219 F.3d 744, 762; 2000 U.S. App. Lexis 17234 at 50-51; 21 Comm. Reg. (P & F) 180 (8th Cir. 2000), *rev’d in part on other grounds*, Verizon Communications, Inc. v. FCC, 535 U.S. 467, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002). At least one state court has taken a similar view. ACS of Alaska v. Regulatory Comm’n of Alaska, et al., 81 P.3d 292, 299; 2003 Alas. Lexis 150 at 22-23 (Alaska 2003). Thus, it is very clear that Congress

intended rural carriers to have a blanket (if terminable) exemption from Section 251(c) obligations, but no automatic exemption from Section 251(b) obligations.

In summary, then, the Staff takes the view that, to the extent that the *Viola Petition* sounds in Section 251(c), it should be dismissed as unripe. To the extent that the *Viola Petition* sounds in Section 251(b), it should go forward.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission hereby requests that its recommendations to the Commission be adopted.

Respectfully submitted,

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