FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket No. 97–134; FCC 97–171]

Treatment of Guam Telephone Authority and Other Similarly Situated LECs as ILECs Under Section 251(h)(2) of the Communications Act

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Notice of Proposed Rulemaking for CC Docket No. 97–134 tentatively concludes that, pursuant to section 251(h)(2) of the Communications Act, the Guam Telephone Authority (GTA) and similarly situated carriers, if any, can be treated as incumbent LECs for purposes of section 251(c) of the Communications Act, as amended, if three conditions are met: Under section 251(h)(2)(A), the LEC must ''occup[y] a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in (section 251(h)(1)).'' Under section 251(h)(2)(B), where the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from NECA member as of the date of enactment of the 1996 Act. Under section 251(h)(2)(C), treating the LEC as an incumbent LEC must be ''consistent with the public interest, convenience and necessity and the purposes of (section 251).''

DATES: Comments are due July 7, 1997, and reply comments are due July 28, 1997.

FOR FURTHER INFORMATION CONTACT: Alex Starr, Attorney, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580.

SUPPLEMENTARY INFORMATION: Regulatory Flexibility Analysis: This is a summary of the Commission's Notice of Proposed Rulemaking adopted May 16, 1997 and released May 19, 1997.

Synopsis of Notice of Proposed Rulemaking

I. Introduction

1. In a Declaratory Ruling, CCB Pol 96–18, released simultaneously with this NPRM, the Commission determined that GTA is not an ''incumbent local exchange carrier'' within the meaning of section 251(h)(1). This determination means that, absent a Commission decision to provide for the treatment of GTA as an incumbent LEC for purposes of section 251, GTA will presently be under no legal mandate to comply with the obligations of section 251(c). *See Local Competition Order,* 61 FR 45476 (August 29, 1996).

2. IT&E and GCT suggest section 251(h)(2) as an alternative for applying the obligations of section 251(c) to GTA. IT&E asserts that section 251(h)(2) permits the application of the obligations of section 251(c) to GTA because ''GTA meets the spirit, if not the letter, of the statutory definition of an 'incumbent LEC.' '' GCT maintains that section 251(h)(2) permits the application of the obligations of section 251(c) to GTA because GTA ''occupies a position 'comparable' to the position occupied by an incumbent LEC (*i.e.*, a quasi-monopoly position).'' The Guam Commission notes that ''the Commission may, by rule, provide that GTA is comparable to an incumbent LEC pursuant to section 251(h)(2),'' but ''section 251(h)(2) may not be applicable in this instance'' because ''GTA has not replaced an ILEC.''

3. Section 251(h)(2) allows the Commission to treat a LEC (or class or category of LECs) as an incumbent LEC, for purposes of section 251, when the LEC ''occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in (section 251(h)(1))''; 47 U.S.C. section 251 (h)(2)(A) the LEC has ''substantially replaced an incumbent local exchange carrier described in (section 251(h)(1))''; 47 U.S.C. section 251(h)(2)(B) and ''such treatment is consistent with the public interest, convenience, and necessity and the purposes of (section 251).'' 47 U.S.C. 251(h)(2)(C). In this NPRM, we tentatively conclude that each of these requirements is met with respect to GTA.

4. Regarding the first requirement, we tentatively conclude that GTA occupies a position in the market for telephone exchange service in its service area that is comparable to an incumbent LEC's, because GTA appears to occupy a dominant position in that market. Regarding the second requirement, we tentatively reject an overly literal reading of the statutory language that would produce absurd results at odds with manifest Congressional intent. Instead, we tentatively conclude that the second requirement is satisfied where the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act. Accordingly, we also tentatively conclude that GTA satisfies the second requirement, because GTA apparently provides all or virtually all of the telephone exchange service in Guam, and no NECA member provided telephone exchange service in Guam as of February 8, 1996. Regarding the third requirement, we tentatively conclude that treatment of GTA as an incumbent LEC would serve the public interest, convenience, and necessity and the purposes of section 251, because such treatment would foster the development of competitive telecommunications markets in Guam. In light of the foregoing tentative conclusions, we propose, pursuant to section 251(h)(2), to adopt a rule providing for the treatment of GTA as an incumbent LEC for purposes of section 251. We also seek comment whether LECs situated similarly to GTA exist and, if so, whether we should adopt the same rule with respect to such class or category of LECs.

A. Discussion

1. Section 251(h)(2)(A)

5. Under section 251(h)(2)(A), in order for the Commission to treat GTA as an incumbent LEC, GTA must ''occup(y) a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in (section 251(h)(1)).'' 47 U.S.C. 251(h)(2)(A). Incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c). *See Local Competition Order,* 61 FR 45476 (August 29, 1996).

6. GTA seems to exercise such dominance in Guam. It apparently is the sole provider of local exchange and exchange access services on Guam. It therefore appears to control the bottleneck local exchange network on Guam and possess substantial economies of density, connectivity, and scale that, absent compliance with the obligations of section 251(c), can impede the development of telephone exchange service competition in Guam. Consequently, we tentatively conclude that GTA occupies a position in the market for telephone exchange service in Guam that is comparable to the position typically occupied by statutorily-defined incumbent LECs. Accordingly, we also tentatively conclude that GTA satisfies the requirement of section 251(h)(2)(A). We invite comment on these tentative conclusions.

2. Section 251(h)(2)(B)

7. Under section 251(h)(2)(B), in order for the Commission to treat GTA as an incumbent LEC, GTA must have ''substantially replaced an incumbent local exchange carrier described in (section 251(h)(1)).'' 47 U.S.C. 251(h)(2)(B) The word ''replace'' can mean ''to take the place of: serve as a substitute for or successor of: SUCCEED, SUPPLANT * * *'' *Webster's Third New International Dictionary of the English Language Unabridged* (1993) at 1925. Consequently, if construed literally, section 251(h)(2)(B) would mean that GTA must have supplanted an incumbent LEC (as defined in section 251(h)(1)) in its service area in order to be treated as an incumbent LEC for purposes of section 251. GTA did not supplant such an incumbent LEC, because none existed as of the date of enactment of the 1996 Act.

8. We invite comment on whether we should construe section 251(h)(2)(B) so literally. The Supreme Court has long and consistently recognized that the ''plain meaning'' rule of statutory construction must give way when its application would result in an absurd outcome contrary to the clear intent of Congress:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers * * * If a literal construction of the words be absurd, the Act must be construed to avoid the absurdity.

Holy Trinity Church v. *United States,* 143 U.S. 457, 459 (1898). *See, e.g., Public Citizen* v. *United States Department of Justice,* 491 U.S. 440, 454–455 (1989)(''Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope. The circumstances of the enactment of a particular legislation, for example, may persuade a court that Congress did not intend words of common meaning to have their literal effect''); *United States* v. *Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989)(where ''the literal application of a statute will produce a result demonstrably at odd with the intention of its drafter[,] * * * the intention of the drafters, rather than the strict language, controls''); *United Steelworkers of America* v. *Weber,* 443 U.S. 193, 201–04 (1979). Indeed, the Supreme Court has further instructed that ''even when the plain meaning [of statutory language] d[oes] not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.'' *United States* v. *American Trucking Associations,* 310 U.S. 534, 543 (1967)(citations, footnote, and quotation marks omitted). *Compare MCI Telecommunications Corp.* v. *American Telephone and Telegraph Co.,* 512 U.S. 218 (1994)(adhering to literal meaning of tariff provision of Communications Act partly because doing otherwise would frustrate purposes of complaint provisions of that Act).

9. The United States Courts of Appeals have followed these precedents when necessary to avoid results that are clearly inconsistent with Congressional intent. *See, e.g., Environmental Defense Fund* v. *Environmental Protection Agency,* 82 F.3d 451, 468–469 (D.C. Cir.), *amended on other grounds,* 92 F.3d 1209 (D.C. Cir 1996) (''Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to Congress's purpose''); *In re Nofziger,* 925 F.2d 428, 434–435 (D.C. Cir. 1991)(''In statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities—manifest intent prevails over the letter''); *Quinn* v. *Butz,* 510 F.2d 743, 753–54 (D.C. Cir. 1975)(''The Secretary's interpretation obviously rests upon a literal reading of the language, a technique which may well stifle true legislative intent''); *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F.2d 282, 287 (D.C. Cir.), *cert. denied,* 305 U.S. 625 (1938)(''A well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results''). So, too, has the Commission. *See Application of Fox Television Stations, Inc.,* Third Memorandum Opinion and Order, 10 FCC Rcd 8452, 8471 (1995), *recon. denied,* 11 FCC Rcd 7773 (1996)(rejecting literal ''count-the-shares'' methodology for determining whether foreign ownership ceiling in 47 U.S.C. 310(b)(4) is reached), *petitions for review pending sub nom., Metropolitan Council of NAACP Branches, et al.* v. *FCC,* No. 95–1424 and consolidated case (D.C. Cir. filed Aug. 21, 1995).

10. In keeping with this consistent precedent, we tentatively conclude that we should find section 251(h)(2)(B) satisfied where, as here, the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act. In our tentative view, we must so construe section 251(h)(2)(B) in order to avoid absurd and unreasonable results clearly contradictory of Congressional intent. We seek comment on these tentative conclusions.

11. These tentative conclusions are premised on Congress' clearly expressed purpose in the 1996 Act ''to provide for a pro-competitive, de-regulatory *national* policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to *all* Americans by opening *all* telecommunications markets to competition * * *'' Joint Explanatory Statement at 1 (emphasis added). *See generally* 47 U.S.C. 160(b)(providing in the 1996 Act that ''forbearance is in the public interest'' if it ''will promote competitive market conditions'' and ''enhance competition among providers of telecommunications services''); 47 U.S.C. 253(authorizing Commission to preempt state or local laws that ''may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service''); 47 U.S.C. 257(b)(describing the ''policies and purposes of this (1996) Act'' as ''favoring * * * vigorous economic competition''). To accomplish this purpose, Congress chose, *inter alia,* to impose on entities that are classified as incumbent LECs the duties of interconnection, access to unbundled network elements, resale of retail services, collocation, public notification of interoperability changes, and good faith negotiation specified in section 251(c). See 47 U.S.C. 251(c). These duties require incumbent LECs to share with competitors some of their inherent economic advantages—advantages that would otherwise render competitive entry very difficult, if not impossible. For example, the existing infrastructure of the incumbent LEC in an area enables the incumbent LEC to serve new customers therein at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking, and loops to serve its customers. Because the incumbent LEC is typically dominant in its service area, it has little economic incentive to assist new entrants. Prior to the enactment of section 251(c), an incumbent LEC also had the ability to discourage entry and robust competition by refusing to interconnect its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to its customers. *See Local*

Competition Order, 61 FR 45476 (August 29, 1996).

12. An unduly literal construction of section 251(h)(2)(B) would mean that these statutory objectives would be thwarted in Guam unless GTA were to comply voluntarily with each of the obligations of section 251(c). Indeed, GTA appears to possess all of the advantages of incumbency characteristic of the incumbent LECs described in section 251(h)(1), advantages that can impede the development of competitive markets. For example, GTA apparently has substantial financial resources, significant economies of density, connectivity, and scale, and, most importantly, control of the bottleneck local exchange network in Guam. Thus, the seemingly dominant market presence of GTA in Guam appears to be precisely the type of non-competitive situation that Congress intended section 251(c) to redress.

13. Moreover, we note that Congress left intact several provisions of the Communications Act that led the Commission in 1992 to conclude that ''the Communications Act was intended by Congress to apply, * * * in every respect, to all radio and wire communications originating or terminating on the Territory of Guam.'' *Guam Jurisdictional Order,* 7 FCC Rcd at 4024. First, in the 1996 Act, Congress incorporated by reference the definitions in the 1934 Act. 47 U.S.C. 153(b). Those definitions define the ''United States'' as including ''the several States and *Territories* * * * and the possessions of the United States * * *;'' 47 U.S.C. 153(50) (emphasis added) define ''State'' as including ''the Territories''; 47 U.S.C. 153(40) and define ''interstate communication'' as including ''communication or transmission * * * from any State, *Territory,* or possession of the United States * * * to any other State, *Territory,* or possession of the United States * * * .'' 47 U.S.C. 153(22) (emphasis added). Furthermore, despite amending section 1 of the 1934 Act in other respects, Congress left unchanged that section's command to the Commission ''to make available, so far as possible, to *all the people of the United States* * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * * .'' 47 U.S.C. 151 (emphasis added). *See* Joint Explanatory Statement at 32. These provisions appear to make clear that Congress believed that ''the residents of Guam are just as entitled to the benefits of competition in telecommunications as any other Americans,'' *Guam Jurisdictional Order,* 7 FCC Rcd at 4024, 4026. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,* Report and Order, 61 FR 42558 (August 16, 1996) (applying rate integration requirements of section 254(g) to Guam because section 153(40) defines ''State'' to include ''the Territories''). and suggest that Congress did not intend to exclude GTA from treatment as an incumbent LEC for purposes of section 251(c).

14. Of course, under section 251(f), our holding in the Declaratory Ruling issued simultaneously with this NPRM that GTA is a ''rural telephone company'' within the meaning of section 3(37) would entitle GTA to an exemption, at least initially, from the obligations of section 251(c), should GTA be treated as an incumbent LEC in the future. Congress included within section 251(f), however, a procedure for terminating such an exemption under appropriate circumstances. Construing section 251(h)(2)(B) to foreclose the possibility of classifying GTA as an incumbent LEC would thwart that procedure, substituting a permanent exemption for the potentially temporary exemption expressly set forth in section 251(f).

15. An overly literal interpretation of section 251(h)(2)(B) would also exalt form over substance. As indicated previously, on May 12, 1997, the Commission granted NECA's petition to become a member of NECA. GTA apparently could have filed that petition at any time after the release of the *Guam Jurisdictional Order* on June 2, 1992. Thus, it appears that only the date of initial NECA membership will distinguish GTA from LECs that are incumbent LECs under section 251(h)(1).

16. In sum, the circumstances with respect to GTA and Guam appear to counsel against an overly literal construction of statutory language. *See, e.g., EDF* v. *EPA,* 82 F. 3d at 468–69. Construed so literally, the language of section 251(h)(2)(B) would produce absurd results ''demonstrably at odds with the intention of its drafters.'' *U.S.* v. *Ron Pair,* 489 U.S. at 242. The most immediate absurdity would be a permanent exemption of a seemingly dominant provider of local exchange and exchange access services—GTA—from the very requirements that Congress designed specifically to end such dominance and foster competition in local exchange and exchange access markets. Furthermore, this result would not be benign; rather, it apparently would conflict with Congress' pro-competitive objectives with respect to the twenty-ninth largest local telephone network in the United States. We seek comment, therefore, on whether the outcome suggested by an unduly literal reading of the statute's language would be an ''unreasonable one 'plainly at variance with the policy of the legislation as a whole.''' *Quinn* v. *Butz,* 510 F.2d at 753 (*quoting U.S.* v. *A.T.A.,* 310 U.S. at 543).

17. To avoid these absurd results and to construe the statute consistently with Congress' obvious pro-competitive purpose, we propose to interpret section 251(h)(2)(B) to include any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where, as here, no NECA member served the area at issue as of the date of enactment of the 1996 Act. Accordingly, we also propose to find that GTA satisfies section 251(h)(2)(B) as construed in this manner. We invite comment on these proposals.

18. We also seek comment whether reading section 251(h)(2) in conjunction with other provisions of the Communications Act creates ambiguity in Section 251(h)(2)'s meaning and intended application such that we may reasonably exercise our discretion to construe the statute to permit treating GTA as an incumbent LEC. Applying section 251(h)(2) so as to exempt GTA permanently from the statutory responsibilities of an incumbent LEC would, as described above, arguably conflict with sections 251(c) and 251(f), among other Communications Act provisions. *Cf. Lyons* v. *Ohio Adult Parole Authority,* 105 F.3d 1063, 1067–68 (6th Cir. 1997) (holding that two statutory provisions were in direct conflict, creating ''a rare but difficult form of ambiguity'').

3. Section 251(h)(2)(C)

19. Under section 251(h)(2)(C), in order for the Commission to treat GTA as an incumbent LEC for purposes of section 251, ''such treatment (must be) consistent with the public interest, convenience, and necessity and the purposes of (section 251).'' 47 U.S.C. 251(h)(2)(C). As described above, Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest, convenience, and necessity. Treating GTA as an incumbent LEC would promote competition in the local exchange and exchange access markets in Guam, because such treatment would require GTA to comply with the pro-competitive obligations of section 251(c), absent an exemption,

suspension, or modification under section 251(f). Moreover, because GTA appears to be the sole provider of local exchange and exchange access services in Guam, we tentatively conclude that GTA has market power, economies of density, connectivity, and scale, and control of the local network comparable to that possessed by entities that are incumbent LECs under section 251(h)(1). Consequently, treating GTA as an incumbent LEC may well be a prerequisite for the development of competition in the local exchange and exchange access markets in Guam. Thus, we tentatively conclude that treating GTA as an incumbent LEC for purposes of section 251 would be consistent with the public interest, convenience, and necessity.

20. For similar reasons, we also tentatively conclude that treating GTA as an incumbent LEC would be consistent with the purposes of section 251. Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets. It is possible that failing to treat GTA as an incumbent LEC would stifle competition in Guam.

21. Having tentatively concluded that GTA has market power, economies of density, connectivity, and scale, and control of the local network, and that treating GTA as an incumbent LEC would be consistent with the public interest, convenience, and necessity and the purposes of section 251, we further conclude tentatively that the circumstances here satisfy the requirements of section 251(h)(2)(C). We invite comment regarding these tentative conclusions.

4. Proposal to Treat GTA—and Possibly Others—as an Incumbent LEC

22. For all of the reasons explained above, we tentatively conclude that the relevant facts and circumstances meet the requirements of section 251(h)(2) for treating GTA as an incumbent LEC for purposes of section 251. Accordingly, we propose to provide for the treatment of GTA as an incumbent LEC for purposes of section 251. We seek comment regarding this tentative conclusion and proposal. We also seek comment whether LECs situated similarly to GTA exist and, if so, whether we should adopt the same rule with respect to such class or category of LECs.

B. Procedural Matters

1. *Ex Parte* Presentations

23. With respect to the rulemaking proposal in Part IV, *supra*, to treat GTA as an incumbent local exchange carrier pursuant to section 251(h)(2), this is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as required by the Commission's rules. *See generally* 47 CFR 1.1201, 1.1203, and 1.1206.

2. Initial Regulatory Flexibility Analysis

24. Section 603 of the Regulatory Flexibility Act, as amended, 5 U.S.C. 603, requires an initial regulatory flexibility analysis in NPRM and comment rulemaking proceedings, unless we certify that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. section 605(b). Our proposal in Part IV, *supra*, to treat GTA as an incumbent local exchange carrier pursuant to section 251(h)(2) will affect only GTA and the limited number of entities that seek to interconnect with GTA's network or resell GTA's services. Even if all of these entities can be classified as small entities, we do not believe that they constitute a ''significant number of small entities'' for purposes of the Regulatory Flexibility Act. Therefore, we certify that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 605(b). A copy of this certification also will be published in the **Federal Register**.

3. Comment Filing Procedures

25. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before July 7, 1997 and reply comments on or before July 28, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you would like each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW, Room 222, Washington, DC 20554. Parties should also file copies of any documents filed in this docket with Janice Myles of the Common Carrier Bureau, 1919 M Street, NW, Room 544, Washington, DC 20554, and with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, NW, Suite 140, Washington, DC 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, NW, Room 239, Washington, DC 20554.

II. Ordering Clauses

26. *It is ordered* That, pursuant to sections 1, 2, 4, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154, 251, and 303(r), the Notice of Proposed Rulemaking contained herein, is hereby adopted.

27. *It is further ordered* That the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (1981).

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–14119 Filed 5–29–97; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 93–02; Notice 15]

RIN 2127–AF51

Federal Motor Vehicle Safety Standards; Compressed Natural Gas Fuel Containers

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes deleting the material and manufacturing process requirements in Standard No. 304, *Compressed Natural Gas Fuel Container Integrity*. The proposal is based on the most recent proposed voluntary industry standard. The agency believes that such an amendment would facilitate technological innovation, without any detriment to safety.

DATES: Comments must be received on or before July 14, 1997.