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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review For Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72
	)	

OPPOSITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES TO RURAL TELEPHONE COMPANIES' EMERGENCY MOTION FOR PARTIAL STAY

Pursuant to the Public Notice released July 31, 1997, in the above dockets (DA 97-1654), the Association for Local Telecommunications Services ("ALTS") hereby opposes the Rural Telephone Companies' "Joint Emergency Motion for Partial Stay of the Rural Telephone Companies" ("Joint Motion").[1]

I. THE JOINT MOTION MUST BE DENIED BECAUSE THE COMMISSION CANNOT HEAR CONSTITUTIONAL CHALLENGES TO THE SUBSTANTIVE STATUTES IT ENFORCES.

The Rural Telephone Companies ("Rural Companies") seek a stay of the portions of the Commission's Universal Service and Access Charge Reform orders making high cost and DEMS weighting subsidy mechanisms portable because this: " ... will result in an

[1] ALTS is the national trade association of more than thirty facilities-based providers of competitive access and local telecommunications services.

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illegal 'taking' of the Rural Telephone Companies' property without just compensation in violation of the Fifth Amendment to the U.S. Constitution" (Joint Motion at ii).

For several reasons discussed below, Rural Companies are incorrect in finding any constitutional infirmity in these rules. However, even if they were correct in their constitutional claims (which they clearly are not), they fail to acknowledge the threshold issue that the Commission is acting as the agent of Congress when it implements a new Federal law, and thus -- unlike Article III courts, which bear the duty of insuring that Article I bodies comply with the Constitution -- the Commission lacks authority to second-guess the initial determination of constitutionality which is implicit in Congress' passage of a new law. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies" Johnson v. Robison, 415 U.S. 367, 368 (1974).[2]

It is clear that Rural Companies here are asking the Commission to pass on the underlying constitutionality of Sections 214(e) and 254 of the Telecommunications Act of 1996, which require that universal support mechanisms be provided to all qualifying carriers. Rural Companies are not faulting the

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[2] See also Hospital and Service Employees Union, Service Employees Int. Union, AFL-CIO, Local 399 and Delta Air Lines, 263 N.L.R.B. 296, 299 (1982): "We have consistently taken the position that, as an administrative agency created by Congress, we will presume the constitutionality of the Act we are charged with administering, absent binding court decisions to the contrary."

Commission's rules for failing to adopt some other particular approach that would preserve the portability of universal service amounts to CLECs qualifying under Section 214(e). Rural Companies' undiscriminating opposition to any portability of the monies they currently receive unmistakably demonstrates that they are actually attacking the constitutionality of the statute, not the Commission's implementing rules.

II. RURAL COMPANIES HAVE FAILED TO SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

As noted above, the Joint Motion's basic claim is that Sections 214(e) and 254 violate the Fifth Amendment by allowing CLECs to compete for universal service amounts currently available only to incumbent rural LECs, such as DEMS weighting and high cost contributions.[3] According to Rural Companies: " ... the Commission's new rules making USF support and the recovery of local switching costs via DEM weighting portable have immediate and adverse consequences for the Rural Telephone Companies .... the portability rules unlawfully penalize the Rural Telephone Companies for making past investment in reliance on their ability to gain a fair return" (Joint Motion at 7). Rural Companies thus rest their claim on the assertion that: " ... these new regulations prevent the Rural Telephone Companies from recovering booked costs and hamper their ability to achieve

[3] Rural Companies also attempt to mount an Administrative Procedure Act challenge (Joint Motion at 14-18), but this claim simply restates the constitutional challenge ("by making the recovery of such costs portable, the Commission has deprived the Rural Telephone Companies of any opportunity to recover a fair return on their local switching investments, whether from IXCs or other USF contributors" (id. at 14)).

a reasonable rate of return on their interstate investment."

Before turning to the legal aspects of this claim, it might be useful to place it in the context of the economic history of America's regulated industries. The claim the Fifth Amendment bars any "hampering" of a regulated company's ability to earn a reasonable return certainly must come as surprising news to the many railroads, trucking companies, and airlines which gone into bankruptcy without being able to persuade Federal agencies to lift outstanding rate orders. The notion the Fifth Amendment somehow provides a broad economic insurance policy which protects regulated companies against the negative effects of any regulatory action is thus unsupported by history.

As to the legal merits of this claim, ALTS adopts and endorses the views of the Department of Justice when the Department rejected identical claims made the ILECs in the Local Competition docket (DOJ Reply Comments filed May 30, 1996, in CC Docket No. 96-98 at 16-18):

> "The Department submits that such [constitutional] arguments are premature, not demonstrated with sufficient specificity, and overstate the scope of the constitutional guarantee. Consequently, the Commission is not legally prohibited from adopting pricing principles for interconnection and access to network elements that do not, at this time, allow recapture of historical or embedded costs.
>
> "The Supreme Court's decision in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) articulated the framework in which agency ratemaking is to be tested for compliance with the constitutional ban against uncompensated takings. In Hope, the Supreme Court held that agencies are 'not bound to the use of any single formula or combination of formulas in determining rates,' Id. at 602, and upheld the agency's reliance on a 'historical cost' methodology. Finding that the 'just and reasonable'

statutory standard mirrored the constitutional requirement, the Court held that the only requirement as to the adequacy of compensation was that the "end result" reflect a reasonable balance of investor and consumer interests. Id. at 603.

"While it allowed the agency to utilize a historical cost methodology in that case, the Hope decision preserved agency discretion to utilize other methodologies as long as the total effect of the rate order could not be said to be unjust or unreasonable. 'It is the result reached not the method employed which is controlling . . . It is not theory but the impact of the rate order which counts.' Id. at 602. This agency flexibility was reaffirmed in Wisconsin v. Federal Power Commission, 373 U.S. 294, 309 (1963) where the Court stated that 'to declare that a particular method of ratemaking is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with the Court's consistent and clearly articulated approach to the question of the Commission's power to regulate rates.' And, in Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) the Court expressly rejected the suggestion that the 'prudent investment rule' should be elevated to a constitutional requirement. Instead, it reiterated the broad agency discretion allowed by Hope, id. at 316, and stated that a 'rigid requirement of the prudent investment rule would foreclose,' among others, methodologies that mimic the operation of the competitive market and thereby provide utilities with incentives to manage their operations efficiently. Id. at 316, n. 10, 308-09. In view of these decisions, suggestions that the Telecommunications Act of 1996 or the Constitution requires the Commission to employ a methodology that allows the recovery of all prudently made (on an a priori basis) investments must be rejected. It is the end result that counts in determining whether investors have been denied their entitlement to reasonable rates ...."[4]

Given that Rural Companies have not attempted to quantify their claim as to the effect of the portability rule, they lack any factual basis whatever for mounting a constitutional attack based on its financial consequences at this time.

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[4] See also the recent decision of the Eighth Circuit in Iowa Utilities Board v. FCC, No. 96-3321, finding that these same Fifth Amendment Claims of the ILECs were not yet "ripe for review" (slip opinion at 151).

The Rural Companies also attack the asserted financial effects of any failures by states to promptly adopt state USF plans and the cap on recovery of corporate expenses, as supposedly calculated in Exhibits to the Joint Motion. The Rural Companies have declined to make these calculations available to ALTS even pursuant to a confidentiality agreement.

Assuming, with conceding, that Rural Companies have the procedural right to mount a takings claims based on secret factual assertions, that claim would clearly be premature in the present circumstances. Rural Companies have no sound basis for assuming that any state will fail to take timely action, or for demonstrating that their inability to recovery certain corporate amounts results in the kind of Fifth Amendment taking cognizable under Barasch.

III. RURAL COMPANIES HAVE FAILED TO SHOW THE ABSENCE OF ANY SUBSTANTIAL HARM BY ISSUANCE OF A STAY.

Rural Companies contend the issuance of a stay would impose no burden on CLECs because: "CLECs have the opportunity under existing rules to receive USF support for their own investments in infrastructure. A stay would only prevent them from receiving the USF support or local switching cost recovery previously received by the ILECs" (Joint Motion at 31-32).

But this assumption rests on the mysterious claim by Rural Companies that the cost structure of a CLEC somehow differs from an incumbent when they each serve the same high cost, rural

territory ("... the Rural Telephone Companies are essentially fighting with one hand tied behind their back as they attempt to compete with new entrants which have no booked costs, but do have the ability to usurp the USF support and local switching cost recovery relied upon the by the Rural Telephone Companies" (Joint Motion at 29)). This statement is unsupported by logic or fact. The members of ALTS would certainly welcome the magical ability to provide service in high cost areas without having to incur any costs, but the economic truth is quite different. CLECs and ILECs have the same terrain to cover, the same low densities to deal with, and the same vendors to obtain equipment and services from. Nor do CLECs enjoy any special advantage as to financing given the incumbents' access to funds currently not available to CLECs.[5]

Because the same cost structure imposed on Rural Companies also falls on CLECs, it would clearly impose irreparable injury on qualifying CLECs to not allow them access to the same universal service subsidies currently being paid to Rural Companies.

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[5] Indeed, Rural Companies make much in their Joint Motion of their "state of the art" networks representing "significant capital investments" (at 7).

CONCLUSION

For the foregoing reasons, ALTS requests that the Joint Motion for Partial Stay of the Rural Telephone Companies be denied.

Respectfully submitted,

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August 7, 1997

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to the Joint Emergency Motion for Partial Stay was filed by the Association for Local Telecommunications Services and served August 7, 1997, on the following persons by First-Class Mail or by hand service, as indicated.

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