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

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
	)	
Universal Service	)	
	)	

COMMENTS OF THE STATE OF HAWAII

The State of Hawaii (the "State")[1] hereby supports the petition for clarification of TelHawaii, Inc. ("TelHawaii") filed on July 17, 1997 concerning the First Report and Order in the above-captioned proceeding.[2]

I. INTRODUCTION

TelHawaii asks the FCC to clarify that Paragraph 308 does not apply to the transfer of exchanges mandated by a state public utilities commission for the purpose of replacing the incumbent carrier currently serving the area with a new carrier. Paragraph 308 should not apply regardless of whether the state commission orders the transfer after the cutoff date of May 7, 1997.[3] Allowing an exception for such an "extraordinary" action taken by a

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[1] These comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] Federal-State Joint Board on Universal Service, First Report and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("Universal Service Order").

[3] See Petition for Clarification by TelHawaii, Inc.

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state commission is appropriate because the primary purpose of an exchange transfer in such a case is not qualifying for universal service support.[4] Rather, the purpose is replacing a carrier whose inadequate provision of telecommunications services is "endanger[ing] the life and property of residents and businesses in the service area."[5] In situations involving inadequate service, therefore, Paragraph 308 of the Universal Service Order should not apply and the newly designated carrier should be able to receive universal service support immediately for the newly acquired exchange, based upon an analysis of the average cost of all its lines, both those newly acquired and those it had prior to execution of the acquisition. Plainly stated, there is no principled basis for continuing to deny customers in the State of Hawaii access to any such universal service funding, as has been the historic practice.

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[4] The Western Alliance goes even further in its petition, arguing that Paragraph 308 is unreasonable and unlawful in its entirety. See Petition for Reconsideration of the Western Alliance. The Alliance argues that there is "simply no truth" to the assertion that LECs purchase exchanges primarily to obtain additional universal service support. Id. at 12. According to the Alliance, USF support is a "minor consideration" in a LEC's decision to purchase an exchange. In reality, exchange purchases are undertaken for legitimate business reasons, such as "expansion into neighboring markets and realization of increased economies of scale." Id. at 13. In fact, the Commission's study area waiver files are "replete with examples of small LECs acquiring and upgrading rural exchanges long neglected by their larger counterparts." The Alliance also argues that Paragraph 308 frustrates the Communications Act's requirement that support be "sufficient" to preserve and advance universal service. See 47 U.S.C. § 254(b)(5).

[5] Petition for Clarification by TelHawaii at 3.

II. PARAGRAPH 308 OF THE UNIVERSAL SERVICE ORDER DOES NOT APPLY WHEN THE ACQUISITION OF AN EXCHANGE IS ORDERED BY A STATE PUBLIC UTILITIES COMMISSION BECAUSE THE EXISTING CARRIER IS PROVIDING INADEQUATE SERVICE

The State wholeheartedly supports TelHawaii's request for clarification. In a July 1996 order, the Hawaii Public Utilities Commission ("HPUC") designated TelHawaii as the local telecommunications carrier of last resort for the Ka'u district of the Island of Hawaii, and ordered GTE Hawaiian Telephone to negotiate with TelHawaii for the use or transfer of GTE Hawaiian Telephone's exchange assets in the Ka'u area.[6] The HPUC took such drastic action only after a three-year investigation, which revealed that the telecommunications service provided by GTE Hawaiian Telephone in rural areas of the State of Hawaii, and particularly in the Ka'u area, was inadequate.[7] The HPUC concluded that such inadequate service jeopardized the public health and safety, and hampered economic development in these rural areas.[8]

In Paragraph 308 of the Universal Service Order, the FCC states that it wants to "discourage carriers from placing unreasonable reliance upon potential universal service support in deciding whether to purchase exchanges from other carriers." Similarly, the FCC states that

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[6] GTE Hawaiian Telephone Co. Inc. -- Order to Show Cause, Order No. 14789, Docket No. 94-0346 (Haw. PUC, Jul. 15, 1996). GTE Hawaiian Telephone's request to stay Order No. 14789 was denied by the Hawaii Supreme Court. Consequently, Order No. 14789 remains in full force and effect.

[7] The HPUC designated TelHawaii pursuant to Act 80 of the 1994 Hawaii State Legislative session, which requires that the "commission, upon determination that any area of the State has less than adequate telecommunications service, shall require the existing telecommunications provider to show cause as to why the commission should not authorize an alternative provider for that area." Haw. Rev. Stat. § 269-16.9(h) (1996 supp.).

[8] See Letter from Yukio Nato, Chairman of HPUC, to William Caton, FCC Secretary, regarding TelHawaii's Petition for a Study Area Waiver, AAD 96-93 (Feb. 21, 1997).

it does not want such potential support to be the "primary factor" in a carrier's decision to purchase an exchange.[9]

In the case of TelHawaii, obtaining universal service support was clearly not the primary factor the HPUC considered in deciding to designate TelHawaii as the carrier of last resort in the Ka'u area. As described above, the primary factor the HPUC considered was the public health and safety of the residents of the Ka'u area, who were receiving inadequate telecommunications service from GTE Hawaiian Telephone. The language of Paragraph 308 strongly suggests, therefore, that the restriction on obtaining immediate universal service support does not apply to TelHawaii and similar cases in which an exchange acquisition is ordered by a state public utilities commission because the existing carrier is providing inadequate service. A state public utilities commission is primarily concerned with the public interest, not with a carrier's profits, and thus its determinations should not be frustrated by FCC restrictions aimed at the wholly unrelated motivations of carriers. The FCC should clarify that the State and TelHawaii's interpretation of Paragraph 308 is, in fact, correct.

That said, there is absolutely nothing wrong with high cost areas in the State of Hawaii benefitting from such universal service support, which is also available to support services in other states. The fact that customers located in Hawaii have never been able to benefit from such funds in the past, but have only been contributors, is not a valid basis for applying the restrictions of Paragraph 308 to TelHawaii. Simple fairness to the State of Hawaii dictates that such benefits be delayed no longer.

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[9] Universal Service Order at ¶ 308.

III. CONCLUSION

Based on the foregoing reasons, the FCC should GRANT TelHawaii's petition for clarification and clarify that a limited exception to the applicability of Paragraph 308 exists in cases where the sale of a local exchange is ordered by a state public utilities commission because the existing carrier is providing inadequate service.

Respectfully submitted,

THE STATE OF HAWAII

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STATE OF HAWAII

August 18, 1997

CERTIFICATE OF SERVICE

I, James M. Fink, do hereby certify that on this 18th day of August, 1997, I have caused a copy of the foregoing "Comments of the State of Hawaii" in CC Docket No. 96-45 to be served by first class, postage pre-paid mail to the persons listed below.

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