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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Federal State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors)	CC Docket No. 97-21
of the National Exchange Carrier)	DA 98-1336
Association, Inc.)	

**COMMENTS OF U S WEST COMMUNICATIONS, INC.
TO USAC PLAN OF REORGANIZATION**

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August 5, 1998

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SUMMARY

In these comments, U S WEST discusses the proposed USAC Plan of Reorganization and the administration of federal universal service support mechanisms. U S WEST is concerned that the proposed USAC Plan will block Commission review of the SLC and RHCC divisions, seriously undermining the Commission's oversight responsibility for the operation of the federal universal service support mechanisms, contrary to the oversight role vested by Congress in this Commission.

It appears from the Public Notice that the SLC and the RHCC, if merged into USAC, propose to insulate their decisions, in part, from review from the only entity which is expressly authorized to administer any interstate universal service support program -- USAC. Divisions of USAC do not have the authority to create the equivalent of new guidelines. Yet, based on the SLC's past practice and its Report to the FCC, as a division of USAC, the SLC would assert rights and authority to promulgate new rules and guidelines through the decisions it makes even though the Commission in its May Report to Congress stated that divisions of USAC may only apply their expertise to interpreting and applying the Commission's existing decisional principles.

Any procedure which the Commission proposed to established in its May Report To Congress for the review of administrative decisions made by USAC would be eviscerated by the Notice's proposed maze of appellate and quasi-appellate routes. The complex web of appellate routes proposed in the Notice is unnecessary, inefficient, and unfair. It is not designed to ensure that federal universal service

support is distributed in a timely manner to those entities who are qualified and entitled to receive the support. As divisions of USAC are not authorized to make policy or create the equivalent of new guidelines this Commission, or its Bureau, have the authority and responsibility to make definitive determinations where a division of USAC has or has not correctly interpreted and applied the Commission's decisional principles. The Bureau's authority should be limited to those instances where a decision does not involve novel questions of fact, law or policy and requires only the application of existing Commission decisional principles. U S WEST urges the Commission to streamline the proposed Plan and assume more direct involvement and accountability in the processes.

U S WEST also addresses the RHCC's proposed changes to the Reorganization Plan. U S WEST supports the suggestion to increase the number of rural health care representatives to the Board. U S WEST also supports the RHCC's proposal that the head of the rural health care division should have authority to hire and fire personnel within that division and that the CEO of USAC should have authority to hire and fire the heads of the divisions, subject to the Commission's concurrence. U S WEST opposes the general requirement that a two-thirds supramajority vote of the members of a quorum of the Board would be required to reverse any division decision and also strongly opposes RHCC's suggestion that the decisions of the rural health care division should not be subject to review or reversal by the USAC Board.

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**COMMENTS OF U S WEST COMMUNICATIONS, INC.
TO USAC PLAN OF REORGANIZATION**

U S WEST Communications, Inc. ("U S WEST") submits comments in response to the Public Notice requesting comments on the proposed Universal Service Administrative Company ("USAC") Plan of Reorganization and the Administration of Federal Universal Service Support Mechanisms.¹

I. **THE SCHOOLS AND LIBRARIES CORPORATION ("SLC") AND THE RURAL HEALTH CARE CORPORATION ("RHCC") PROPOSE THAT THEY BE MERGED INTO USAC AND CONTINUE TO EXERCISE FUNCTIONS AS DIVISIONS OF USAC WHICH THEY NOW EXERCISE AS SEPARATE ENTITIES**

A. **Organizational Structure**

The Report To The FCC, appended to the Notice, says that the Plan of Reorganization "proposes a more streamlined and efficient organizational structure

¹ Public Notice, Common Carrier Bureau Seeks Comment on Administration of Federal Universal Service Support Mechanisms, DA 98-1336, rel. July 15, 1998 ("Notice").

for administering the various universal service programs”²

Under the proposed reorganization plan, USAC would have responsibility for the operation and administration of all universal service programs. USAC operations would consist of three committees or divisions: High-Cost/Low-Income, Schools and Libraries, and Rural Health Care. The three divisions would perform the functions appropriate to their specialized expertise, and common functions would be performed centrally by USAC.³

B. Performance of Functions

The reorganization plan for the three universal service programs is modeled on the USAC Committee which currently exists to administer the High-Cost/Low-Income program.⁴ Each of the divisions would bring specialized expertise to the “distinctive programmatic functions” of its respective program while functions and operations common to all divisions would be centrally performed “where consolidation is likely to achieve economies.”⁵

USAC is currently responsible for collecting and disbursing funds for the

² “Report To The FCC,” USAC, SLC, RHCC, July 1, 1998 at 1 (“Report To the FCC”).

³ Id. at 4. The functions which would be performed on a central basis are: office space; insurance; employee benefits and human resources; administrative policies, procedures, and practices; accounting systems; auditing; reporting to federal agencies and Congress; budget; liaison with the FCC and carriers; regulatory filings; counsel; information systems; invoice processing; boards and management. Id. at 3.

⁴ Id. at 1. The schools and libraries and rural health care committees would be “modeled after the High Cost/Low Income Committee in existence today.” Id. at 5.

⁵ Id.

interstate High-Cost/Low-Income program.⁶ It is also responsible for “billing contributors, collecting contributions to the universal service support mechanisms, and distributing the universal service support funds for all of the universal service support programs (schools and libraries, rural health care, low-income consumers, and high-cost areas).”⁷

The Report to the FCC assumes that the SLC and the RHCC are merged into USAC. Each of the three divisions would have “independent decision making [authority] with regard to fulfilling the [division’s] unique mission.”⁸ The new schools and libraries and rural health care divisions of USAC would continue to perform the functions which the SLC and RHCC now perform as described in the Report To The FCC:

SLC is charged with administering the application process, including the independent review of applications for compliance with FCC rules, creating and maintaining a website to post service applications, and performing outreach and public education functions needed to administer the schools and libraries program.⁹

RHCC is charged with administering the application process, including the independent review of applications for compliance with the FCC rules, creating and maintaining a website to post service applications, and performing outreach and public education functions needed to administer the rural health care program.¹⁰

However, if the Commission decides not to merge the SLC and RHCC into

⁶ Id. at 2.

⁷ Id.

⁸ Id. at 8.

⁹ Id. at 2.

¹⁰ Id.

USAC and instead creates a streamlined single body within USAC to administer all federal universal service programs, nowhere in the Notice or in the Report to the FCC (Executive Summary attached to the Notice) is there an explanation of what authority the new entity within USAC would possess and what functions it would perform.

Based upon their assumption that the SLC and RHCC will be merged into USAC, it appears that the new divisions propose to insulate their decisions, in part, from review by USAC -- the only entity which is expressly authorized to administer any interstate universal service support program. For example, the Notice says that any action taken by one of the three divisions with regard to their respective support mechanisms "would be binding on the [USAC] Board, unless such action is presented for review to the full Board by the USAC CEO and the Board disapproves of such action by a two-thirds vote of a quorum of directors."¹¹ The RHCC is even bolder when it says that decisions of the rural health care committee "should not be subject to being overridden by the USAC Board."¹²

These roadblocks to reviews of division actions seriously undermine the Commission's oversight responsibility for the operation of the federal universal service support mechanisms, and they are contrary to the oversight role which the Commission told Congress it would establish.

¹¹ Notice at 2.

¹² Separate Statement of the Rural Health Care Corporation and Request for Three Changes in the Plan at 3.

II. THE DIVISIONS OF USAC MAY ONLY APPLY THEIR EXPERTISE TO INTERPRETING AND APPLYING THE COMMISSION'S EXISTING DECISIONAL PRINCIPLES

In the May Report to Congress, the Commission proposed that USAC be named the permanent administrator.¹³ In light of the pending legislation, the Commission also said: “[W]e expect that USAC would apply its expertise to interpreting and applying existing decisional principles, but would not make policy or create the equivalent of new guidelines, or interpret the intent of Congress, without appropriate consultation and guidance from the Commission.”¹⁴

With regard to review of USAC’s actions, the Commission also advised Congress:

[W]e propose to establish a procedure under which administrative decisions made by USAC would be reviewable by the Commission. Under this procedure, an administrative decision by USAC could be appealed by affected parties to the Commission. . . . In addition, the Commission would maintain the authority to review the decisions of USAC at any time on the Commission’s own motion.¹⁵

The Commission assumes, erroneously, that even though they have no authority to act today,¹⁶ the SLC and the RHCC have been operating and would be operating within the narrow constraints described by the Commission in its May Report to Congress when they become divisions of USAC and when their functions, assets, employees, rights, and liabilities are transferred to USAC.

¹³ Id. at ¶ 13.

¹⁴ Id. at ¶ 14.

¹⁵ Id.

¹⁶ Letter to Senator Ted Stevens, United States Senate from the General Accounting Office dated Feb. 10, 1998.

The SLC is not today just “interpreting and applying existing decisional principles.” It has been creating the equivalent of new guidelines. Because the Commission advised Congress that it proposed to transfer all of the functions and rights now possessed and exercised by the SLC to USAC which clearly exceed the limited scope of functions described to Congress, the SLC, as a division of USAC, would assert rights and authority to promulgate new rules and guidelines through the decisions which it makes. The SLC does not possess that authority today and it should not possess that authority on January 1, 1999.

The record in the Universal Service Docket is replete with examples of the SLC’s own formulation of interpretations which are plainly inconsistent with the Commission’s rules. For example, the Florida Department of Management Services (“DMS”) recently was required to file a Motion for Declaratory Ruling or, in the Alternative, Petition for Waiver of the Commission’s existing contracts rule. In the Universal Service Order, the Commission concluded that schools and libraries must solicit competitive bids for all services eligible for discounts under Section 254(h) of the 1996 Act.¹⁷ However, the Commission recognized an exception to this requirement if the school or library had negotiated a contract for such services.¹⁸ Section 54.511(d) of the Commission’s rules provides that the exemption from the competitive bidding requirements for existing contracts “shall not apply to

¹⁷ In the Matter of Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, 9028-29 ¶¶ 479-80 (1997) (“Universal Service Order”), on recon., 12 FCC Rcd. 10095 (1997); appeal pending sub nom. Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.).

¹⁸ Id. at 9062-63 ¶¶ 545-46.

voluntary extensions of existing contracts.”

The SLC released a Fact Sheet providing its interpretation of some of the Commission’s rules. One of the questions answered by the SLC related to contract extensions:

Q. 5) What is a voluntary extension of an existing contract?

A. A voluntary extension is an amendment which enables the contracting party to choose unilaterally whether to lengthen the term of the existing contract beyond the termination date prescribed in the existing contract. In other words, the extension is completely at the option of the contracting party who has no contractual penalties for not exercising the option.¹⁹

However, this answer was not applied by the SLC for a contract renewal provision contained in an existing contract which permits a party to renew or extend the contract. As the Florida DMS advised the Commission, such provisions were originally contemplated by the contracting parties and were not added as an “amendment” after the original contract was signed. In fact, such provisions do not even represent a change to, or modification of, the original contract, because they are contained in the original contract. Accordingly, when a party exercises a contract right contained in an existing contract to renew or extend that contract, there is no “amendment” to the contract, and the competitive bidding requirement does not apply.

U S WEST agrees with the Florida DMS that the Commission should issue a declaratory ruling that the exercise of a renewal or extension provision contained in an original “existing contract” does not disqualify the contract as an “existing

¹⁹ SLC Fact Sheet on Master Contracts, February 24, 1998 (emphasis added).

contract” and, therefore, such a renewal or extension is not subject to the competitive bidding requirements. In this instance, the SLC did not apply “existing decisional principles,” but issued an interpretation to the Florida DMS which was the equivalent of a new rule or guideline.

The SLC also misinterpreted the Commission’s “Existing Contract” rule relative to interstate tariffs. U S WEST has asked the Commission to clarify that telecommunications services purchased under a carrier’s interstate tariff, pursuant to which a school or library or rural health care provider has made a term commitment, should be regarded as “existing contracts” under the Commission’s rules.²⁰

The SLC has taken the position that the Commission’s “existing contract” rules require a “signed contract,” between the carrier and the school, library, or health care provider, even though U S WEST’s and many other carriers’ services in the interstate jurisdiction are only provided pursuant to tariff. Carriers, like U S WEST, have designed interstate tariffs which provide an end-user customer with many of the same economic benefits, as well as liabilities, of a privately negotiated and signed contract. Their interstate tariffs contain all of the material terms and conditions which would otherwise be contained in a contract. However, the SLC has taken the position that a signed contract is required for the “existing contract” exemption.

²⁰ Petition for Reconsideration or Clarification of Fourth Order on Reconsideration of U S WEST, Inc., CC Docket No. 96-45, filed Feb. 12, 1998 at 7-13 (“Petition for Reconsideration”).

U S WEST believes that the same public policy and decisional principles which supported the Commission's adoption of the exemption for "existing contracts" also apply to services purchased under rate stability plans and variable term pricing plans, or similar plans offered by other carriers, in the interstate jurisdiction even though the customer's commitment may not be evidenced by a signed contract. This is another example where the SLC misinterpreted the Commission's "existing decisional principles."

If the functions and rights of the SLC and RHCC as they are exercised today are transferred to USAC for the reorganization, they can be expected to exceed the narrow bounds of the Commission's own assurance to Congress that the new divisions of USAC will only interpret the Commission's rules in accordance with existing decisional principles.

III. THE PROPOSED PROCESSES TO OBTAIN REVIEW OF DECISIONS BY DIVISIONS OF USAC AND THEIR STAFFS ARE NEITHER EFFICIENT NOR FAIR

In its May Report To Congress, the Commission said that it would establish a procedure under which administrative decisions made by USAC would be reviewable by the Commission and that the Commission would maintain the authority to review the decisions of USAC at any time on the Commission's own motion.²¹

Instead of those straightforward review procedures, the Notice proposes a maze of appellate and quasi-appellate routes, some of which are available only upon

²¹ May Report To Congress ¶ 14.

securing a supra-majority vote and some of which are blocked absolutely. For example:

- (1) Any action taken by the Schools and Libraries, Rural Health Care, and High-Cost/Low Income divisions “would be binding on the [USAC] Board, unless such action is presented for review to the full Board by the USAC CEO and the Board disapproved of such action by a two-thirds vote of a quorum of directors.”²²
- (2) The RHCC proposes to eliminate appellate review by USAC altogether: “The Rural Health Care Committee should have authority to bind USAC financially and otherwise with respect to the programmatic aspects of the rural health care program, and the Committee’s decisions on such matters should not be subject to being overridden by the USAC Board.”²³
- (3) Even though the Commission assured Congress that it would establish a specific procedure under which administrative decisions made by USAC would be reviewable by the Commission, the Commission proposes instead in the Notice that a party must seek review of a decision by USAC from the Common Carrier Bureau, pursuant to delegated authority.²⁴

²² Notice at 2.

²³ Separate Statement of the RHCC and Request for Three Changes in the Plan at 3.

²⁴ Notice at 5.

- (a) The Bureau would conduct de novo review of appeals from USAC decisions.
 - (b) If the Bureau took no action within sixty days, USAC's decision would be deemed approved by the Bureau.²⁵
 - (c) The Bureau's appellate authority would be limited to "issues that are not novel questions of fact, law or policy."²⁶
- (4) However, even before appealing to the Bureau, the Notice takes a circuitous turn and erects another speed bump by proposing that a "party affected by a decision made by the division staff should be required to seek relief from the appropriate committee of the Board before filing an appeal with the Commission."²⁷

The proposals outlined in the Notice and in the Separate Statement of the RHCC are neither fair nor efficient.

U S WEST agrees with Commissioner Furchtgott-Roth's other criticisms of the proposed appellate procedure:

- "[T]he Commission itself is insufficiently involved in the decision-making process under the Bureau's proposal."²⁸

²⁵ U S WEST agrees with Commissioner Furchtgott-Roth's criticism of this step in the procedure, because the Bureau is not required to issue an order explaining its reason for taking no action and may permit USAC's decision to be deemed approved. Furchtgott-Roth at 2.

²⁶ Id. at 6.

²⁷ Id.

²⁸ Id. at 1.

- “[T]he proposed committees of USAC would have the power to bind the USAC Board regarding matters within their expertise, absent a supermajority of the full USAC Board voting to override the committee’s actions.”²⁹
- “[T]he full Commission must take a more active role in the direct oversight of these quasi-public companies.”³⁰

Appeals from decisions by a division staff or by the full division should be to the Bureau or directly to the Commission, because the divisions are only authorized to interpret and apply existing Commission decisional principles. They may not make policy or create the equivalent of new guidelines. The only entity with authority to make definitive determination that a division has or has not correctly interpreted the Commission’s rules and decisional principles is the Commission itself. If a party believes that a division or a division staff has misinterpreted or misapplied existing principles, the most efficient procedure to resolve the error is review by the Commission itself. Only if a decision involves issues that are not novel questions of fact, law or policy and requires only the application of existing Commission decisional principles should review be sought from the Bureau. But even then, a party may seek review by the Commission of the Bureau’s action.³¹

If the Bureau is to have appellate review authority, the Commission should require the division to issue a written decision, and it should require the Bureau to

²⁹ Id. at 2.

³⁰ Id.

³¹ 47 C.F.R. § 1.115.

issue a written decision when it either approves or disapproves the division's decision.

USAC and its divisions are prohibited from setting policy. They may only process applications for federal support. The complex web of appellate routes proposed in the Notice is unnecessary, inefficient, and unfair. It is not designed to ensure that federal universal service support is distributed in a timely manner to those entities who are qualified and entitled to receive the support.

IV. MISCELLANEOUS

The RHCC proposes three changes to the Reorganization Plan:

(1) Two additional rural health care representatives should be added to the USAC Board, and the merger agreement between USAC and RHCC should identify the individuals who would initially comprise the combined Board and who would serve on the initial Rural Health Care Committee of the USAC Board.³²

The USAC Board would consist of seventeen members plus the USAC CEO.³³ It represents a cross-section of industry and beneficiary interests.³⁴ Because there is only one representative from the rural health care sector on the Board, U S WEST supports the RHCC's suggestion to increase the number of rural health care representatives to the Board.

(2) The RHCC should have authority to bind USAC financially and otherwise with respect to the programmatic aspects of the rural health care

³² RHCC at 3.

³³ Notice at 2.

³⁴ Id.

program, and the Committee's decisions on such matters should not be subject to being overridden by the USAC Board.³⁵

U S WEST opposes the general requirement that a two-thirds supramajority vote of the members of a quorum of the Board will be required to reverse any division decision, because such a requirement is designed to discourage appeals of division decisions and to consolidate decision-making authority with a division. U S WEST strongly opposes RHCC's suggestion that the decisions of the rural health care division should not be subject to review or reversal by the USAC Board, the parent administrative entity in the hierarchy. The rural health care division is accountable and answerable to USAC as well as to the full Commission. To suggest that its actions should bind USAC represents an unreasonable and presumptive assertion of power which the rural health care division ought not exercise.

(3) The CEO of USAC should have the authority to hire and fire the head of the rural health care division of USAC, who in turn should have the authority to hire and fire personnel within that division.³⁶

U S WEST supports RHCC's suggestion that the head of the rural health care division should have authority to hire and fire personnel within that division. U S WEST also supports RHCC's suggestion that the CEO of USAC should have authority to hire and fire the heads of the divisions so long as it is subject to the Commission's concurrence. Because the Commission acknowledges the importance of this reorganization plan to bring the efficiencies and accountability that the

³⁵ RHCC at 3.

Commission and the Congress are seeking, the head of the rural health care division as well as the heads of the other divisions should be directly accountable to the Commission.

V. CONCLUSION

In formulating the organization and structure of a reorganization plan to perform the functions of administering the operation of all federal universal service programs, and to ensure that decisions and the appeals process are as fair and efficient as possible, the Commission should streamline the proposed Plan and assume more direct involvement and accountability in the processes. The functions to be performed by the schools and libraries division and the rural health care division are ill-defined and over-broad. The proposed procedures for appellate review of division decisions are cumbersome, inefficient, and unfair. They are designed to insulate the divisions from direct oversight by the Commission.

U S WEST would welcome a streamlined USAC organization where the administrative functions to be performed are identified with specificity and where the review process for division decisions permits a timely and fair resolution of

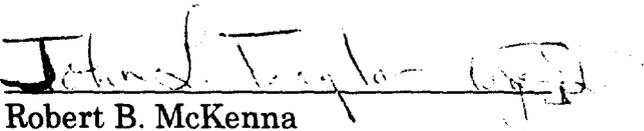
³⁶ RHCC at 3.

disputes by the Commission and not by supramajority votes of the divisions or the
USAC Board.

Respectfully submitted,

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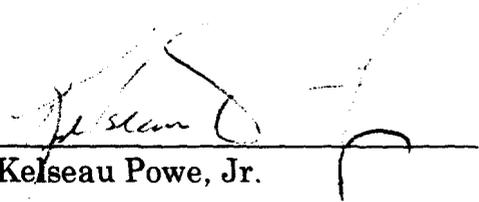
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Dan L. Poole

August 5, 1998

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 5th day of August, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC. TO USAC PLAN OF REORGANIZATION** to be served, via first class United States Mail, postage pre-paid, upon the persons listed on the attached service list.



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