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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	DA 98-2410
	)	

COMMENTS OF BELL ATLANTIC ON SECOND RECOMMENDED DECISION

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Before the
Federal Communications Commission
Washington, D.C. 20554

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COMMENTS OF BELL ATLANTIC[1] ON SECOND RECOMMENDED DECISION

I. Introduction and Summary

In two important respects, the Joint Board's recommendation is consistent with fundamental principles that should continue to guide the Commission's universal service policy. First, the appropriate role for a federal universal service fund under the 1996 Act is as a limited supplement to the primary role of the states in maintaining universal service. As a result, since the current level of support under the federal universal service mechanism has proven adequate and telephone service is now universally available and affordable, the size of the federal fund adopted here should approximate current levels.

Second, the federal high cost fund should be based on a national cost benchmark and should be limited to providing support only to those states in which average costs in a study area are so significantly above that benchmark that supplemental federal funding is needed to preserve rates in high cost areas that are reasonably comparable to those in lower cost areas.

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

There is one tentative recommendation of the Joint Board that is contrary to the Act and should be rejected. The Commission should not revisit its finding that assessments for the federal high-cost fund should be based only on interstate end-user revenues. Aside from the legal requirement that assessments should be so limited, taxing intrastate revenues for the federal fund would undermine the states' efforts to meet their primary responsibility of maintaining universal service within the state by reducing the revenue base for intrastate assessments.

Finally, in order to meet the requirement of competitive neutrality, the Commission should ensure that assessments on competing local exchange carriers are based on all of their revenues that are properly classified as interstate. This includes any amount they receive in so-called reciprocal compensation for Internet traffic.

II. Federal High-Cost Funding Should Be Limited To Those States That Require Federal Support to Maintain Affordable Rates, As The Joint Board Recommends.

The Act requires that telephone service be available at just, reasonable, and affordable rates. 47 U.S.C. § 254(b)(1). As the Joint Board accurately finds, most Americans find telephone service affordable today. *See Second Recommended Decision*, FCC 98J-7, ¶ 39 (rel. Nov. 25, 1998) ("Joint Board") ("[R]ates today are generally affordable and subscribership is currently high in most areas of the nation"). Because rates in urban areas are affordable, rates in rural, insular, and high cost areas that are "reasonably comparable" to those in urban areas are likewise affordable.[2] *See* 47 U.S.C. § 254(b)(3), (requiring such comparability). However, the issue of affordability primarily concerns the rates for local telephone service, and those rates are under the jurisdiction of the state regulatory bodies. *See* 47 U.S.C. § 152(b).

[2] Although income levels also play a role in affordability, low-income support issues have been resolved in earlier phases of this proceeding and are not addressed here.

A. The Commission Should Affirm the Predominant Role of the States in Preserving Universal Service.

The states have historically played the "predominant role" in preserving universal service, a role which the Commission recently acknowledged. *See Alenco Communications, Inc. v. FCC*, No. 98-60213, Brief of the Federal Communications Commission at 5-6 (5th Cir., filed Oct. 30, 1998) (citing *Report and Order*, 12 FCC Rcd 8776, ¶ 7 (1997) ("R&O")). The Commission's role has been to supplement state action through a limited federal fund designed to assist states' universal service policies.

This complementary federal-state relationship – with the states playing a primary role and the federal government only a limited supporting role – has worked; as the Joint Board acknowledged, rates are now at affordable levels. Not wanting to upset an effective policy, in the 1996 Act, Congress preserved this joint approach to ensuring that rates in high-cost areas are reasonably comparable to those in low-cost urban areas. Section 254(b)(5) specifies that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5) (emphasis added). The Act further defines the federal and state roles in this process, specifying, for example, that states may adopt regulations "to preserve and advance universal service." 47 U.S.C. § 254(f). It gives a state wide discretion to design mechanisms "to preserve and advance universal service within that State," so long as they are "not inconsistent with" federal support mechanisms. *Id.* (emphasis added).

For these reasons, as the Joint Board recommends, the Commission should affirm that rates are generally affordable today and find that major surgery to the existing universal service mechanism is not needed. It should also reiterate that individual states retain their

historically primary role of ensuring that rates in high-cost areas are reasonably comparable to those in low-cost urban areas, using the mechanisms that they deem most effective to achieve this result. In some states, this requirement may be fulfilled through mechanisms that are already in place, and, in any event, the Commission should endorse the Joint Board's view that no state is obligated to establish an intrastate universal service fund. Joint Board at ¶ 38.

As is the case today, the Commission should agree with the Joint Board that federal support should be narrowly limited to assisting those states that "face significant obstacles in maintaining reasonably comparable rates." *Id.* at ¶ 40. This preserves the historical federal-state roles and prevents the dislocations that would come from requiring ratepayers in one state to support rates in high cost areas of other states that can maintain comparable rates through their own internal universal service mechanisms.

The Commission should also accept the method that the Joint Board recommends to achieve that result, establishment of a national cost benchmark which is compared with the average costs within each study area. *Id.* at ¶ 43. The federal fund should provide support, moreover, only where a state's costs within a study area significantly exceed the national benchmark. In this way, the states will retain the primary responsibility to address cost variations within the state, confining the federal fund to those states that experience unusually high costs (and that are unable through their own state mechanisms to provide the support needed to ensure comparability among high- and low-cost areas) as the Act requires. Only in this way can the Commission give effect to the statutory intent to avoid dislocations that would occur when large sums are moved from state-to-state, but it ensures that states that are truly unable to achieve compatibility through internal means receive federal support.

The Commission should not, however, accept the Board's recommendation to hold all states harmless by keeping any state's support level permanently no lower than the amount the state receives today. *See Id.* at ¶ 53. Instead, any state that would not qualify for its current support under the newly-adopted methodology would receive the current amount in the first year. That support would be reduced on a linear basis over a finite number of years until the state's support level is the amount, if any, calculated under the new methodology. In that way, telephone service customers would not receive a sudden rate shock stemming from an immediate sharp reduction in high cost support, but ratepayers in other states would not permanently pay that state the support amount for which it would not qualify under the new formula.

B. State Costs Should Be Aggregated At No Less Than Study Areas.

To help ensure that federal high cost funding is limited to those states that require outside help, the Commission should adopt the Joint Board's recommendation that costs be aggregated at a level no lower than study areas within each state and reject earlier proposals to deaverage to the wire center level or below. *Id.* at ¶¶ 32-33. Disaggregating costs at a lower level than study areas would result in significant increases in the high cost fund, as ratepayers in one state would be called upon to support high cost areas in states that otherwise could internally ensure rate comparability. Aggregation at least at the study area level will confine support to states that are unable to maintain affordable rates themselves. Such a higher level of aggregation will also help mitigate the significant inaccuracies inherent in the cost proxy models under consideration, inaccuracies which are particularly evident at the wire center level, as Bell Atlantic has recently shown. *See* Bell Atlantic's Petition for Reconsideration at 8-9 (filed Dec. 18, 1998) ("Petition for Reconsideration").

III. The Commission's Proposed Proxy Model Should Not Be Used To Determine Costs.

The Joint Board does not recommend which particular forward-looking methodology should be used to calculate costs, principally because the Commission's proposed cost proxy model is not complete. Joint Board at ¶¶ 28-29. The problems with the Commission's model are pervasive, however, and the model itself unverifiable. As Bell Atlantic has recently shown, key data needed to evaluate the model are proprietary, in violation of the Commission's own criterion for proxy models, and parties were denied a reasonable opportunity to evaluate the model prior to its adoption. *See* Petition for Reconsideration at 5-6. The Joint Board likewise expressed concern that certain key data are proprietary. Joint Board at ¶ 29. Nonetheless, as Bell Atlantic shows in its reconsideration petition, previous models, on which the Commission's model is based, would yield a high cost fund two to four times the size of the existing fund, even without the "hold harmless" provision the Joint Board favors (at ¶¶ 51-53). *See* Petition for Reconsideration at 8 and Att. This is inconsistent with the Joint Board's finding that the fund size should not appreciably increase. *See* Joint Board at ¶ 49 ("We do not believe, however, that current circumstances warrant a high cost support mechanism that results in a significantly larger federal support amount than exists today").

Moreover, the Commission's model is based on an hypothetical network that no local exchange carrier, incumbent or new entrant, would ever build. And, as Bell Atlantic shows in the petition, the Commission appears not to have followed its own policy that any model be capable of being validated with actual criteria from the existing network. Petition for Reconsideration at 10-11. At a minimum, at least until a valid model is developed and subjected to full public scrutiny, the Commission should adopt the Joint Board's recommendation and use

the current method for identifying high cost states when it implements the new universal service fund mechanism on July 1, 1999. *See* Joint Board at ¶ 29.

IV. Assessments For The Federal High-Cost Fund Must Be Based On Only Interstate Revenues.

The Commission should not adopt the "tentative" suggestion of a majority of the Joint Board that it "may wish to consider" assessing high-cost contributions on both interstate and intrastate end user revenues, rather than just interstate revenue as at present. As Commissioners Furchtgott-Roth (at 13-15) and Schoenfelder (at 3) noted in their separate statements, the Commission does not have the authority under the Act to assess intrastate revenues.[3]

In addition to the statutory provisions quoted above that expressly preserve the historical role of the states, the unambiguous legislative history of the 1996 Act makes it crystal clear that Congressional intent was to retain the states' primary authority over universal service support. For example, the Senate Report expressly states that section 254 "recognizes the primary importance of the states in developing policies to define, protect and defend universal service." S Rep. No. 104-23, 104th Cong., 1st Sess. 5 (1995). And the Conference Report echoes that "State authority with respect to universal service is specifically preserved." H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. 132 (1996). In fact, during floor consideration, the Senate expressly rejected a proposal that would have displaced the historically primary role of the states

[3] In addition, Commissioner Tristani (at 2) would have preferred that the Board reserve judgment on the assessment base because the jurisdictional issue is currently pending before the United States Court of Appeals. *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (5th Cir. 1997).

by moving all support payments out of interstate and intrastate rates and substitute a federally-administered "voucher" system. *See* 141 Cong. Rec. S8209-10, S8239 (June 13, 1995).

As a result, in section 254, rather than modifying states' authority over universal service, Congress preserved it and affirmed the primacy of the states. Congress even specified how the states and the Commission were to finance their respective complementary universal service mechanisms. Interstate universal service support is to be financed by contributions from all providers of interstate telecommunications services, while states are free to tax providers of intrastate telecommunications services. *See* 47 U.S.C. § 254(d) and (f). To the extent that a provider offers both interstate and intrastate services, it follows that the Commission has authority to assess only interstate revenues and the states may tax only intrastate revenues. Nothing in the Act gives either the Commission or the states authority to assess contributions based upon the other's funding sources. If Congress had intended that both the Commission and states could tax both interstate and intrastate revenues, there would have been no reason for it to specify separate universal service funds and funding sources.

Even if these provisions were ambiguous, which they are not, section 2(b) provides both a rule of construction and a substantive limitation that bans federal assessment based on intrastate revenues. That section specifies that

> nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

47 U.S.C. § 152(b). That rule is directly implicated here, because essentially all of the services that are supported by the high cost fund are intrastate – single-party, voice-grade access to the

public switched network, with DTMF signaling, access to emergency services, to operator services, and to interexchange services. *See* R&O at ¶¶ 61-76.

As the Supreme Court has explained, section 2(b) acts as both a substantive limit on Commission authority and a rule of construction. It imposes "express jurisdictional limitations on FCC power" and "fences off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 370 (1986) ("*Louisiana*").[4] And it functions as a "rule of statutory construction" that prevents the Commission from acting where it is "at least possible" that Congress intended to withhold such power. *Id.* at 376 n.5, 377. As a result, only a "straightforward" and "unambiguous" grant of authority to the Commission can "override the command of § 152(b)" and upset the traditional commitment of intrastate matters to the authority of the states. *Id.* at 377. Here, however, in enacting section 254, Congress specifically upheld state authority.

If the Commission were to attempt to place an assessment on revenues from intrastate services, varying the amount of assessment according to the amount of the intrastate revenues, it is a matter of plain English that the Commission would be exercising "jurisdiction" to act "with respect to" intrastate charges or services, in violation of section 2(b). There can be little question that a government plainly exercises "jurisdiction" over the transactions it taxes. *See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation,* 508 U.S. 114 (1993).

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[4] *See Iowa Util. Bd. v. FCC,* 120 F.3d 753, 796 (8th Cir. 1997) ("The Supreme Court emphasized that section 2(b) constitutes an explicit congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters or by directly modifying section 2(b)," Citing *Louisiana* at 377.

Moreover, while some parties may argue that imposing a tax based on intrastate service revenues is not "regulating" intrastate services, section 2(b)'s proscription is not limited to "regulating." Without question, the Commission would be attempting to exercise jurisdiction "with respect to" such services, which 2(b) prohibits. Nor can section 254 plausibly be read – based on its separate interstate and intrastate support mechanisms – to authorize an assessment of intrastate revenues. Any such reading runs afoul of *Louisiana's* high standard for overriding section 2(b)'s jurisdictional limits and "rule of statutory construction." This is especially true in light of Congress's rejection of attempts to alter section 2(b) for purposes of section 254.[5]

There are also sound policy reasons why the Commission should assess only interstate revenues for the high cost fund. Any attempt by this Commission to tax intrastate revenues would reduce the revenue base that states may use to assess for their own universal service program. With a reduced revenue base available, states may be unable to satisfy their primary responsibility to preserve universal service and affordable local rates.

In addition, as Commissioner Furtchgott-Roth points out (at 14), if the Commission decides it can assess intrastate revenues, section 254(d) of the Act limits this right only to carriers that offer at least one interstate service. *See, also* Declaration of Robert W. Crandall, appended to Comments of Bell Atlantic on the Joint Board's initial recommendation (filed Dec. 19, 1996). Such a result would violate the principle of competitive neutrality. A carrier with no interstate revenue at all would be subject to assessment only by the states, while its competitor that has both interstate and intrastate revenues, no matter how small an amount, would be subject to double-taxation based on <u>all</u> of its end user revenue. That result could cause

[5] Amendments were rejected in both houses that would have excluded section 254 from the jurisdictional limit of 2(b).

carriers to attempt to exit either the interstate or intrastate market, thereby reducing the number of competitors, or, as the Joint Board points out (at ¶ 63), "misclassify revenues between jurisdictions" to appear not to be offering both interstate and intrastate services. Those results would not serve the public interest. Accordingly, regardless of the outcome of the pending Fifth Circuit appeal, the Commission should not revisit the revenue base for assessing high cost support.

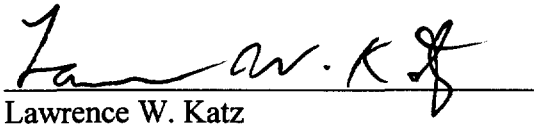
Finally, the Commission should ensure that competing carriers are assessed based upon all revenues that are properly classified as interstate. This includes so-called reciprocal compensation payments they receive when they carry Internet traffic – traffic that the Commission has specifically recognized is interstate. *See GTE Telephone Operating Cos.*, CC Docket No. 98-79, FCC 98-292, ¶¶ 20-21 (rel. Oct. 30, 1998).[6]

[6] It also should include amounts local carriers receive as compensation for the portion of their facilities that would be classified as interstate under the separations rules if they were subject to those rules. A reasonable surrogate for the latter is the end user common line charges that incumbent local exchange carriers charge to their end users.

V. Conclusion

Accordingly, the Commission should adopt a high cost universal service fund comparable in size to the current fund, with assessments based on interstate end user revenues.

Respectfully Submitted,



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December 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 1998, a copy of the foregoing "Reply Comments of Bell Atlantic" was sent by first class mail, postage prepaid, to the parties on the attached list.

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