

November 12, 1999

VIA ELECTRONIC FILING

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 96-262, 94-1, 99-249, 96-45

Dear Ms. Salas:

Transmitted herewith, on behalf of the National Rural Telecom Association (NRTA) and the National Telephone Cooperative Association (NTCA), is an electronic copy of its comments on the above-referenced proceedings for each of the captioned dockets.

In addition, three paper copies of this filing are being hand delivered to Wanda Harris in the Competitive Pricing Division. A diskette copy is also being hand delivered to the FCC's contractor, International Transcription Services, Inc.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

Margot Smiley Humphrey

Enclosure

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

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
)	
Price Cap Performance Review for Local Exchange Carriers)	CC Docket No. 94-1
)	
Low-Volume Long Distance Users)	CC Docket No. 99-249
)	
Federal-State Joint Board On Universal Service)	CC Docket No. 96-45

**COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION AND THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION**

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The National Rural Telecom Association (NRTA) and the National Telephone Cooperative Association (NTCA) submit these comments in response to the, the Commission's September 15, 1999 Notice of Proposed Rulemaking (NPRM) seeking comment on the access and universal service reform proposal submitted by AT&T, Bell Atlantic, Bell South, GTE, Sprint, and SBC (CALLS proposal). NRTA and NTCA are associations comprised of small and rural incumbent local exchange carriers (ILECs) that meet the "rural telephone company" definition in § 3(37) of the Communications Act. Although the CALLS proposal is, by its terms, inapplicable to NRTA and NTCA members or other rate-of-return-regulated ILECs, the proposal concerns legal and policy interpretations and concepts which are of enormous importance to rural

ILECs and their customers and decisions on it could become precedents or precursors for the resolution of access and universal issues for rural ILECs in separate proceedings.

1. INTRODUCTION AND SUMMARY

The CALLS group carriers present their proposal as an interstate universal service and interstate access reform plan, applicable only to price cap local exchange carriers (LECs) that volunteer to participate, including the CALLS group members. The proposed plan, designed to be implemented over five years beginning January 2000, seeks to:

1. Shift virtually all Subscriber Line Charges (SLCs), Primary Interexchange Carrier Charges (PICCs), Common Carrier Line Charges (CCLCs), and a significant portion of local switching charges into a single comprehensive SLC, capped at \$7.00 for primary residential and single line business and \$9.20 for multi-line business, on the theory that all such costs are “caused” by the end user of each loop;
2. Geographically deaverage SLCs within a LEC’s study area by customer class in up to four Unbundled Network Element (UNE) loop zones, subject to some requirements for the relationship among the deaveraged zone charges;
3. Provide \$650 million portable universal support fund to replace support the group has earmarked as the current implicit support in interstate access charges; and
4. Reduce traffic-sensitive switched access rates annually until they reach \$.0055 for regional Bell operating companies (RBOCs) and \$.0065 for other price cap carriers and then freeze rates for all access elements until July 1, 2004.

The NPRM seeks comment on whether to adopt the CALLS proposal in its entirety, as requested by the CALLS members, or any part of it.

NRTA and NTCA generally believe the Commission should give negotiated regulatory solutions proposed by carriers for themselves and their customers considerable weight, so long as the resulting proposals provide consumers the benefits Congress intended in enacting the 1996 Act. The CALLS proposal must be evaluated under the standards set by §254(b)(3) and (g) of the Act. The rate averaging, rate integration and “reasonably comparable” rural and urban rates and services requirements are central consumer safeguards to ensure that competition and universal service go hand in hand for all customers in all parts of the country. These requirements apply to SLCs, as interstate charges for access to interstate services, and cannot be evaded by either (a) shifting costs out of averaged IXC charges and into end user rates or (b) resurrecting the “board-to-board” heresy that IXC carriers have no responsibility for the costs of using the loops they need to reach their customers with their long distance services.

The CALLS proposal transfers to LEC end-users, on a capped but deaveraged basis, all costs for the loop used to originate and terminate IXCs’ long distance traffic and some additional non-traffic sensitive switching costs. Thus, it would relieve IXCs of all responsibility for the costs of the loop that they use to provide their long distance services and force rural customers to pay more for long distance access than urban customers. The Commission should determine and evaluate the impact of averaging and rural comparability and make any adjustments necessary to ensure that rural customers SLCs do not exceed the national average for such charges and to preserve geographic rate averaging.

II. ANY INTERSTATE SUBSCRIBER LINE CHARGE DEAVERAGING MUST COMPLY WITH THE SECTION 254(g) MANDATE FOR NATIONWIDE RURAL-URBAN AND STATE-TO-STATE GEOGRAPHIC TOLL RATE AVERAGING

The CALLS plan proposes a transition that would eventually shift virtually all costs currently recovered via SLCs, PICCs and CCL and a portion of local switching charges into a single SLC. The resulting SLC could be deaveraged, subject to caps set at \$7 and \$9.20 for residential and single line business SLCs and multiline business SLCs, respectively (unless a formula involving the revenues for the highest cost UNE zone identified a lower cap for primary and/or non-primary residence lines). The proposal specifies a capped total amount of additional portable universal service support, disaggregated by zone within each supported study area, as the replacement for implicit support in interstate access charges. The proposal would relieve IXC's of virtually all responsibility for the costs of the loops they use to originate and terminate their long distance traffic. Those costs are transferred to ILECs' end users rather than the IXC's' customers as an interstate end user charge.

In evaluating whether the proposed CALLS rate structure for recovery of interstate costs is consistent with the Communications Act, as amended by the 1996 Act, the Commission must determine whether it complies with the language and intent of the nationwide and state-to-state geographic rate averaging mandate set forth in §254(g). That must be gauged by examining both the impact on customers and which carriers bear the responsibility for compliance with the rate averaging law. The CALLS plan would not ensure the outcomes Congress intended.

1. Congress Enacted §254(g) to Preserve the Benefits and Responsibilities under the Commission's Existing Geographic Toll Rate Averaging and Rate Integration Policies

Section 254(g) mandates Commission rules to require that

the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban

areas ...[and] ... that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

The provision does not apply to carrier access charges, but applies to the interstate charges imposed on the end users of the services provided by interexchange carriers, as well as all other intrastate and interstate end user charges. Indeed, the legislative history left no doubt about what Congress intended to accomplish by enacting §254(g). The Conference Report (p. 132) explains that:

New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers.

Congress intended (*ibid.*) only “limited exceptions” and “expect[ed] that the Commission will continue to require that geographically averaged and rate integrated services, and any services for which an exception is granted, be generally available in the area served by a particular provider.”

The statute provides no exception for interstate interexchange access service provided to end users for a flat rate loop access charge. The SLC has been judicially upheld as within the Commission’s jurisdiction against claims that it is charged for intrastate or local service. The court agreed with the Commission that the currently imposed SLC recovers costs allocated to the interstate jurisdiction, caused by a subscriber’s “connection into the interstate network,” and that “[t]he FCC may properly order recovery, through charges imposed on telephone subscribers, of the portion of those costs that, in accordance with Smith, have been placed in the interstate

jurisdiction.”¹ Deaveraging and increasing existing SLCs by saddling customers with virtually 100% of the higher interstate loop costs that were averaged as part of the national toll rate averaging and rate integration policy when Congress enacted the law conflicts with the law through the harsh impact on disparities in what rural and urban ratepayers pay as a prerequisite to making any interstate calls. Once the SLC is deaveraged, no rural end user in the CALLS participants’ service areas will be able to “continue to receive ... interstate interexchange services” without paying more because of the higher access costs in rural areas. This result unquestionably thwarts Congress’s commitment to preserve rural end users’ access to interstate service at prices “no higher than those paid by urban subscribers” and deprives the rural local exchange customers of the benefits of interstate geographic averaging that Congress acted to preserve.

When the Commission shifted some of these same costs into the price cap carriers’ PICC charges, paid by the IXC, the Commission correctly recognized that letting the IXC pass the PICCs through to their customers on a deaveraged basis would conflict with §254(g). It held:

We find that establishing a broad exception to section 254(g) to permit IXC to pass through flat-rated charges on a deaveraged basis may create

¹ National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 737 F.2d 1095, 1113, 1114 (D.C. Cir. 1984), cert. denied, 84 L. Ed. 2d 364 (1985). The Conference Report (p.132) indicated that the limited exceptions Congress contemplated under §254(g) would be evaluated under the §10 forbearance standard.

a substantial risk that many subscribers in rural and high-cost areas may be charged significantly more than subscribers in other areas. Accordingly, we cannot conclude that enforcing our rate averaging requirement is unnecessary to ensure that charges are just and reasonable. In addition, because assessing subscribers flat-rated charges on a deaveraged basis could lead to significantly higher rates for subscribers in high-cost areas, we find no basis in this record to conclude that it is unnecessary to enforce section 254(g) to ensure protection of consumers or to protect the public interest.²

The same analysis should prevail over any effort to achieve the deaveraging indirectly by manipulation of cost recovery responsibility, the name of the charge or whether local exchange or interexchange customers must pay it.

The Commission also recognized not only that §254 places the responsibility for that averaging on the IXC's, but also that they had demonstrated their ability to fulfill that responsibility. Said the Commission:

We also note that IXC's now pay access charges that often vary from location to location and from incumbent LEC to incumbent LEC, and still maintain geographically averaged rates. We therefore conclude that, based on the record before us, the IXC's have not met the test set forth in section 10(a) of the Act, and forbearance of section 254(g) is not warranted.

The CALLS proposal thus must not be allowed to evade the Act's geographic averaging mandate by shifting the interstate loop costs out of the IXC's' long distance rates and into deaveraged SLC's to be collected from the ILEC's' customers, rather than as averaged PICC pass-

² Access Charge Reform / Price Cap Performance Review For Local Exchange Carriers / Transport Rate Structure And Pricing / End User Common Line Charges, CC Docket Nos. 96-262, et al., 12 FCC Rcd 15982, ¶97 (1997).

through charges imposed on the IXCs' presubscribed customers. The result is to shift the burden of higher interstate access costs to rural local exchange customers rather than all of each IXC's long distance customers, thus denying the rural local customers the benefits of §254(g) averaging of these costs. In effect, the shifting and deaveraging proposal shifts the consumer benefits of rate averaging that Congress directed the FCC to maintain to the IXCs, which are relieved of most of their responsibility for averaging and all of their existing responsibility to pay for the loops they use and need to reach their customers.

The Commission should retain the benefits of toll rate averaging and rate integration for the rural customers and states Congress intended to benefit from continuation of these policies. It should not allow AT&T and a handful of price cap ILECs to negotiate away statutory responsibilities of IXCs and statutory safeguards for rural customers by indirectly deaveraging rural toll rates via changes in what charges are called, what carrier recovers them or what customers pay them.

2. The Commission Cannot Lawfully or Logically Assume That All Remaining Interstate Carrier Common Line Charges and an Additional Portion of Switching Costs Constitute Implicit Support for ILEC Services

The CALLS plan proceeds from the apparent assumption that all non-traffic sensitive costs, whether currently recovered as common line or switching costs, are "caused" by ILECs' end users. The only interstate common line costs that are not eventually shifted to these end users are to be recovered through the federal universal service fund measured by applying a cap devised to control the total amount of cost added to that support mechanism. But the fiction that each end user is the sole "cost causer" for his entire local loop does not comport with the way the public

switched network works in fact or the legal relationships among carriers under the 1996 Act and related judicial precedents.

The Commission's discussion of the "cost causation" concerns raised by including loop costs in IXC access charges tends to confuse two different issues: (1) how the interstate loop costs should be recovered and (2) who is the cost causer. The true issue is whether it is appropriate to employ usage-sensitive charges to recover costs that are not usage-sensitive. However, that flat rate recovery for loop costs would better reflect economic cost causation does not mean that the flat rates must be charged to the end users and collected by the local exchange carrier from local exchange customers.

The jurisdictional logic of Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 51 S. Ct. 65 (1930), identifies interstate toll service as a distinct line of business that makes use of local loop plant, which is necessary for provision of local and long distance, as well as interstate and intrastate services. While the local exchange customer needs the loop to access local or long distance service, to be sure, the IXC has an equivalent need for the local loop to originate and terminate both traffic initiated by the IXC's end users in an ILEC's area and traffic initiated by the IXC's end users in distant places, whose calls the IXC undertakes to deliver to the destination chosen by that customer. The availability and quality of local loops have been shaped by the needs of the IXCs as well as the needs of the end users connected into the public switched network by the same local loop. The claim that an IXC cannot be forced to pay for a share of the costs of this necessary input to its interstate service was specifically rejected by the D.C. Circuit when MCI challenged the existing 25% allocation of non-traffic sensitive (NTS) loop costs to the

interstate jurisdiction for recovery in IXCs' rates. The court expressly held that it is not confiscatory to charge IXCs for a share of the loop costs because

MCI cannot operate general long distance service without using the facilities of local exchange companies. The proposition cannot seriously be entertained that requiring MCI to absorb part of the NTS costs of local exchanges amounts to a confiscation."³

Given the long history of demands by IXCs for equal access, the requirement for interconnection in §201 and the 1996 Act's establishment in §251(a) of a right for all telecommunications carriers to interconnect on request with the facilities and services of all other telecommunications carriers, it is fanciful to indulge in a "board-to-board" cost causation presumption that denies the IXCs' position as a customer for access to the local loop, as well as for the traffic sensitive plant used to originate and terminate its traffic.

Moreover, a plan that provides cost-free use of the local loop by IXCs and, instead, assigns those costs only to end users and, in significant part, to the federal universal service fund conflicts with section 254(k) of the 1996 Act. That section prohibits carriers from using "services that are not competitive to subsidize services that are subject to competition." The CALLS proposal, however, would force local exchange end users and the federal universal service fund to subsidize costs that have historically been paid for by IXCs that use the loops to originate and terminate the traffic that constitutes their profitable and competitive interstate toll business.

³ Rural Telephone Coalition v. Federal Communications Commission, 838 F2d 1307, ___ (D.C. Cir. 1988).

At the very least, the loop costs that the CALLS plan would shift to the federal universal service fund should instead remain the responsibility of the IXC's, whether recovered through IXC contributions or some other type of interexchange charge.⁴

III. ANY INTERSTATE SUBSCRIBER LINE CHARGE DE-AVERAGING THE COMMISSION AUTHORIZES MUST COMPLY WITH SECTION 254(b)'s NATIONAL COMMITMENT TO REASONABLY COMPARABLE NATIONWIDE CHARGES AND SERVICES FOR RURAL AND URBAN CUSTOMERS

The CALLS proposal to de-average the proposed enlarged interstate SLC conflicts directly with section 254(b)(3) of the Telecommunications Act of 1996. Section 254(b)(3) states specifically:

Access in Rural and High Cost Area. Consumers in all regions of the Nation, including low-income consumers in rural insular, and high cost areas, should have access to telecommunications and information services, including interexchange services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to the rates charged for similar services in urban areas.

⁴ The issue of usage sensitive recovery of loop costs can be addressed by imposing a flat rated cost recovery element on the IXC's, which could then be passed through to their customers as the IXC's chose, provided that the pass through charges were averaged in compliance with §254(g).

Reducing IXC per-minute-of-use long distance service rates by reducing local switching and switched transport access charges and combining the SLC, PICC, and CCLC into a larger unified SLC only changes how and where the interstate charges appear on the end-user's telephone bill. The resulting IXC per-minute-of-use rate long distance services and the new combined SLC rate are still rates and charges associated with the provision of interexchange services and, the customer charge portion is governed by the "reasonably comparable" rural and urban rate requirements of section 254(b).

Permitting price cap carriers to deaverage interstate SLC costs to end users within four zones within the same geographic study area would ensure that for rural and urban households and businesses end user charge for access to interexchange services would not be reasonably comparable unless no rural consumer pays more than the nationwide average SLC. The CALLS proposal simply assumes that if the caps establish a ceiling acceptable to the CALLS carriers, it will satisfy the statute. The proposal does not even consider what the resulting range in SLCs throughout the nation's urban and rural areas would be. The Commission, however, should not forget its statutory responsibility to carry out the national policy Congress has set.

The comparability policy in section 254 crystallizes Congress's intention to ensure that the advent of competition takes place without subjecting customers and businesses in high cost areas to rates out of line with rates available to urban business and residential end users. Even though the Fifth Circuit has observed that the principles are not stated as binding mandates, they are clearly intended to shape national telecommunications policy and to safeguard nationwide access to the fruits of the telecommunications revolution. The Commission properly recognized in its recent price caps proxy decision that "reasonably comparable" is an important standard for

federal implementation of section 254. There the Commission deliberately balanced competing interests

in a way that is faithful to the statute's commitment to ensuring that support mechanisms serve "*consumers* in all regions in the nation," and that consumers in high-cost areas continue to have access to reasonably comparable services at reasonably comparable rates.⁵

The Commission should therefore at least determine what SLC disparities will become for the CALLS group customers so that it can determine whether the reasonable comparability standard will be met. To do otherwise would simply ignore a crucial Congressional objective and the most recent Commission precedent.

IV. CONCLUSION

Therefore, the Commission should give weight to the negotiated proposal for application to the carriers in the CALLS group, but should evaluate it under and ensure its compliance with the rate averaging and reasonable comparability standards of §§254(b)(3) and (g) and take into account the practical reality of IXCs need, as customers and cost causers, for the loops provided by ILECs.

Respectfully submitted,

⁵ In the Matter of Federal-State Joint Board on Universal Service, Ninth Report & Order and Eighteenth Order on Reconsideration, CC Docket No. 96-45, ¶2 (rel. Nov. 2, 1999), citing 47 U.S.C. § 254(b)(3) (emphasis added by the Commission). The Commission there admitted its responsibility for the interstate achievement of "reasonably comparable" rates, "as a matter of policy" regardless of the Fifth Circuit decision, while leaving comparability for intrastate charges "within their borders" and within their jurisdiction to the states. Id. at ¶ 7.

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November 12, 1999

CERTIFICATE OF SERVICE

I, Victoria C. Kim, of Koteen & Naftalin, hereby certify that true copies of the foregoing Comments of the National Rural Telecom Association and the National Telephone Cooperative Association, CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, have been served on the parties listed below, via first class mail, postage prepaid on the 12th day of November 1999.

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