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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	)	CC Docket No. 96-45
Universal Service:	)	
Promoting Deployment and	)	
Subscribership in Unserved	)	
and Underserved Areas, Including	)	FCC 99-204
Tribal and Insular Areas	)	

COMMENTS

The United States Telecom Association (USTA)[1] and the National Exchange Carrier Association, Inc. (NECA)[2] submit these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[3]

The *FNPRM* invites comment on a wide range of proposals intended to advance universal service in unserved and underserved regions of the United States.[4] The *FNPRM*

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[1] USTA is the principal trade association of the local exchange carrier (LEC) industry. Its members provide over 95 percent of the exchange carrier-provided access lines in the United States.

[2] Under the Commission's rules, NECA is the responsible entity for the preparation of access charge tariffs on behalf of telephone companies that do not file separate tariffs; and for the collection and distribution of access charge revenues. *See* 47 C.F.R. §§ 69.603 and 69.604. A number of NECA pool members serve areas that may be directly impacted by the rules adopted in this docket.

[3] Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, *Further Notice of Proposed Rulemaking*, 64 Fed. Reg. 52738 (1999)(*Further Notice of Proposed Rulemaking* or *FNPRM*).

[4] *See FNPRM* at ¶¶ 1 – 2.

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expresses particular concern about the availability of universal service in tribal areas, and proposes various amendments to the Commission's high cost funding rules intended to provide additional support to these areas. Specifically, the *FNPRM* seeks comment on the possibility of allowing carriers to establish separate tribal study areas, raising the cap on the high-cost fund to allow for growth based on separate tribal study areas, and revisions to the Commission's Lifeline rules to permit tribal carriers (which may not be subject to state jurisdiction) to receive additional federal support without obtaining state authorization or Commission waiver.[5]

With regard to unserved areas, the Commission seeks comment on the potential implementation of section 241(e)(3) of the Act, which permits the Commission or state commissions to order a carrier to provide service to an unserved community. Specifically, the Commission seeks comment on possible use of a competitive bidding mechanism to determine support for carriers that provide service in these areas. The Commission also seeks comment on potential changes to the rules applicable to low-income and rural health care support mechanisms, including the possibility of expanding Link-Up to include facilities-based charges, and providing support for intrastate toll calling and rural health care infrastructure.[6]

USTA and NECA fully support the Commission in its efforts to improve existing high cost and low-income programs, so as to assure adequate telecommunications services in underserved and unserved areas. Adoption of the specific proposals set forth

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[5] *Id.* at ¶ 9.

[6] *See id.* at ¶ 10.

in the *FNPRM* (in particular, proposals to permit carriers to establish separate tribal study areas, raising the interim cap to accommodate high cost funding increases associated with such separate study areas, and simplifying the process by which tribal carriers become eligible to receive high cost funding) can be seen as positive "steps in the right direction" towards fulfilling the Act's universal service mandates in these areas. The Commission's study of other possible barriers to universal service (such as limited local calling areas, possible revisions to Lifeline and Link-Up programs, etc.) may also help achieve the intent of Congress in enacting section 254 of the Act.[7]

However, many of the unique circumstances faced by Native American and Alaskan populations are also faced by residents of other rural and insular areas. As NECA and other parties have previously stated, rural areas exhibit a variety of characteristics that make them different from non-rural areas. Large geographic service territories, low subscriber density, and limited economic bases make it costly for telephone companies to provide universal service in all such areas, not just those identified as tribal lands.

The Commission should apply the proposals set forth in the *FNPRM* to *all* high service cost areas, not just tribal and insular areas. The FNPRM appears to recognize, for example, that the current interim cap on high cost funding may be a significant factor contributing to the lack of deployment in tribal and insular areas.[8] The current cap

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[7] *See FNPRM* at ¶ 122.

[8] *See id.* at ¶ 28.

mechanism, which was put in place in 1994,[9] was originally intended to serve an *interim* means of moderating growth in the universal service fund (USF) pending reform of current high cost mechanisms.[10] It is becoming increasingly clear, however, that the "interim" cap has become a significant hindrance to the achievement of a "specific, predictable and sufficient" universal service funding mechanism required by the Act.

When it was initially implemented, for example, the cap's effects on universal service funding were relatively minor. In 1994, for example, payment shortfalls associated with the cap amounted to about $36 million dollars, or less than 4% of the high cost fund revenue requirements. In the year 2000, six years after the "interim" cap was imposed, payment shortfalls are expected to total nearly $133 million dollars, almost 13% of total fund requirements. In all, payment shortfalls caused by the interim cap since 1994 have totaled over $350 million. These continuing shortfalls are inconsistent with the requirements of the Act for "specific, predictable and sufficient" universal service funding.

In considering the impacts of the interim cap on universal service, the Commission should bear in mind that high cost funding requirements under current rules are based on a percentage of the difference between costs incurred by high cost local exchange carriers (LECs) and nationwide average costs. Under the rules, it is possible

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[9] *See* Amendment of Part 36 of the Commissions Rule's and Establishment of a Joint Board, *Report and Order*, 9 FCC Rcd 303 (1994)(*Interim Cap Order*).

[10] *See Interim Cap Order* at 305 ("Because we shall soon initiate a rulemaking to evaluate the current high cost assistance mechanisms . . . it is sensible to adopt interim rules to prevent large increases in the USF during the pendency of the permanent rulemaking . . . . [T]he indexed cap represents an effective means of moderating USF growth during the interim period.")

for funding levels to rise and fall not only as a result of increases in the costs of serving rural areas, but also as a result of increases (or decreases) in costs experienced by larger companies serving low-cost, urban areas. Cost data used to determine funding levels in a given year (as well as the impact of the "cap") are developed based on actual historic data from the year two years' prior to the payment year (*e.g.*, high cost payments in the year 2000 will be based on year-end 1998 data). This means that carriers considering investments in underserved or unserved areas simply have no way of knowing whether and to what extent their high cost payments will be affected by the cap. Thus, to the extent that the cap mechanism was intended to serve as some type of incentive mechanism for encouraging carriers to limit investments in high cost areas, it has no rational basis. Rather than allowing for "specific, predictable and sufficient" support, the cap assures the opposite; namely, that high cost funding will be *in*sufficient (as measured by actual costs) and *un*predictable (since carriers have no way of knowing what effect the cap will have on them until at least a year after they incur expenses in serving high cost areas).

In addition to adverse effects caused by the cap on overall high cost funding, in recent years the Commission has also chosen to apply individual high cost funding caps on carriers involved in mergers and acquisitions. These caps were imposed on companies involved in transactions prior to May 7, 1997, ostensibly as a means of assuring that high

cost funding for companies serving newly-acquired territories did not increase unexpectedly following an acquisition.[11]

The Commission has more recently recognized that individual funding caps should not be imposed in perpetuity on all such companies, and decided to lift the individual caps imposed on affected companies that sought individual relief.[12] Individual caps continue to remain in effect on a number of carriers, however, restraining them from expanding service in underserved areas.[13] NECA understands that a number of these companies have filed petitions seeking similar relief to that granted in the Commission's September 9 *Individual Cap Relief Order*. The Commission must act expeditiously to grant such petitions and to eliminate any remaining caps imposed on similarly-situated companies.

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[11] Effective November 15, 1984, the Commission froze study area boundaries. An incumbent LEC wishing to sell or purchase an exchange must generally receive a waiver of the study area rule if such transaction changes the study area boundaries of either party. *See e.g.* Kansas State Telephone Company Petition for Waiver of Sections 36.154(e)(1) and (2), Sections 36.125(c) and (f), and the definition of "Study Area" in Part 36, Subpart H, of the Commission's Rules, United Telephone Company of Missouri, Petition for Waiver of Sections 36.154(e)(1) and (2) and Section 36.125(c) and the Definition of "Study Area" in Part 36, Subpart H, of the Commission's Rules, *Memorandum Opinion and Order*, 4 FCC Rcd 5505 (1989).

[12] *See* Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.419(c)(2), 69.605(c), 69.3(e)(11) an the Definition of "Study Area" Contained in Part 36 Appendix-Glossary of the Commission's Rules, AAD 93-93, AAD 95-72, AAD 95-30, AAD 97-21, AAD 97-23, AD 97-117, AAD 98-44, and AAD 98-53, *Memorandum Opinion and Order on Reconsideration*, DA 99-1845 (rel. Sept. 9, 1999)(*Individual Cap Relief Order).*

[13] Attached hereto is Appendix A, which includes a list of individual universal service caps that USTA and NECA believe are still in effect.

Under section 54.305 of the Commission's rules, companies that enter into a binding agreement to acquire exchanges from another company after May 7, 1997 are only permitted to receive universal service support for acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer.[14] This rule may also have adverse effects on universal service. Lines that rural carriers acquire from larger carriers may have little, if any, support associated with them, making it less likely that service will be upgraded in these historically underserved areas. As part of this proceeding the Commission should re-consider the actual effects of section 54.305's limitation on high cost support is having on customers living in outlying high cost exchanges.[15] Since this prohibition is limiting the advancement of universal service, the Commission should revise or eliminate the rule. This rule also places a significant administrative burden on small carriers by requiring them to track these costs outside of their normal accounting procedures. This conflicts with stated Commission and Small Business Administration policy, and the Regulatory Flexibility Act.[16]

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[14] 47 C.F.R. § 54.305.

[15] Universal service rules calculate support at a study area level. *See* 47 C.F.R. § 36.611. In a study area that has both urban and rural exchanges, average cost-per-loop, and support levels, will be reduced by low cost urban lines. When rural carriers buy high cost lines from larger companies, the support is calculated on the basis of the non-rural carrier's cost-per-loop, and, therefore, is insufficient.

[16] The Regulatory Flexibility Act requires the Commission to analyze the impact of its rulemaking efforts, including projected reporting and recordkeeping requirements, on small entities. In situations where there is an impact, the Commission has an obligation to look for alternative, less burdensome means to achieve its objectives. *See* U.S. Small Business Administration, Office of Advocacy, *A Guide to the Regulatory Flexibility Act*, p. 12 (May 1996). *See also* 5 U.S.C. A. § 604. Clearly, requiring a small LEC to duplicate record keeping efforts has a significant economic impact on small entities, and

The Commission should also amend current rules governing the *timing* of universal service support to newly-served areas. Under current rules, in order to determine which study areas are entitled to an expense adjustment for USF purposes, each LEC must submit cost and loop count information to NECA on or before July 31 of each year.[17] Data for these submissions must be calculated as of December 31st of the calendar year preceding each July 31st filing.[18] These data ultimately form the basis of high cost funding requirements in the next succeeding year.[19]

Unfortunately, LECs seeking to provide telephone service to previously unserved or underserved areas do not have preceding year information to submit to NECA for calculation of USF support that reflects the current costs being incurred to expand universal service. Such carriers are therefore required to wait for up to two years following the time that they incur costs in serving these areas before they can receive high cost support.

Initially, the two-year "lag" built into the current rules facilitated administration of the current high cost support mechanism. Use of prior year data, measured at year-end, allowed carriers ample time to collect and review data, and provided time for NECA

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the Commission has an obligation to look for a less burdensome alternative. *See* 5 U.S.C.A. § 601 *et.seq.* *See also FNPRM* at ¶ 153, n. 291, and Appendix F.

[17] *See* 47 C.F.R. § 36.611. LECs may chose to make three data submissions, as quarterly updates, in addition to the required July 31 annual submission. *See* 47 C.F.R. § 36.612.

[18] *Id.* *See also* 47 C.F.R. sec. 36.601(b) ("The expense adjustment will be computed on the basis of data for a preceding calendar year . . .")

[19] Non-incumbent LECs, such as competitive LECs, are also subject to the historical data requirement, and may encounter a "lag" before receiving universal service support. *See* 47 C.F.R. § 54.307.

and the Administrator to process and evaluate the data before support payments were made. For the majority of carriers, the two-year lag inherent in this process did no harm, and still does no harm today.

However, in situations when historical data is not available, these rules delay support to eligible carriers and their customers who are most in need of support. In specific instances, the Commission has recognized the potential harm caused by this delay, and has waived its rules to allow a carrier offering service to a previously unserved area to use a combination of current and projected data rather than the required 12 months of historical data. The methodology utilizes a rolling annualized average of combined data that is reconciled quarterly with actual costs.[20] The Commission will improve the availability of universal service in these areas, and more closely realize the goal of creating a "specific, predictable and sufficient" high cost support system, if it amends its rules to allow general use of such a methodology in unserved and underserved areas.

Finally, in the event that the Commission decides to develop special mechanisms applicable specifically to "tribal lands", it should consider carefully ways in which such support can be made available to areas that may not fall under the specific definitions proposed in the *FNPRM*, but that nevertheless should qualify. Examples of such territories may include the Hawaiian Home Lands, and various U.S. territories in the Pacific such as American Samoa, Guam, Palau, and other areas primarily populated by

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[20] *See* Border to Border Communications, Inc. petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules, *Memorandum Opinion and Order*, 10 FCC Rcd 5055 (1995). *See also* Sandwich Isles Communications, Inc., *Order*, 13 FCC Rcd 2407 (1998) and South park Telephone Company, *Order*, 13 FCC Rcd 198 (1998).

native peoples. These areas may be in a situation similar to Native American peoples and Alaska Natives, and may require similar assistance in deploying basic and advanced telecommunications services.

Conclusion

As the Commission examines ways of improving universal service support in targeted rural areas, it must consider the extent to which existing rules may impede the deployment of telecommunications services in all underserved and unserved areas. Specifically, the Commission should eliminate the interim cap on high cost support, the remaining individual caps placed on companies involved in mergers and acquisitions, and the limitation on high cost support embodied in section 54.305 of the rules. The Commission should also amend its rules so as to speed the availability of high cost support funds to carriers serving underserved territories and those seeking to extend service to existing unserved territories. These changes will help assure that *all*

customers living in high-cost rural areas benefit from the promises inherent in the universal service provisions of the Telecommunications Act of 1996.

Respectfully submitted,

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ATTACHMENT A

NAME OF COMPANY	EFFECTIVE DATE	FCC Rcd CITE
Brazos Telephone Cooperative, Inc.	August 8, 1995	11 FCC Rcd 5536
Cass County Telephone Company Ozark Telephone Company, Inc.	January 17, 1996	11 FCC Rcd 1815
Alenco Communications, Inc. Cap Rock Telephone Cooperative, Inc. Peoples Telephone Cooperative, Inc. Central Texas Telephone Cooperative, Inc. Ganado Telephone Co. Inc. Guadalupe Valley Telephone Cooperative, Inc. Mid Plains Rural Telephone Cooperative, Inc.	April 2, 1996	11 FCC Rcd 11477
Accipiter Communications, Inc.	November 14, 1996	11 FCC Rcd 14962
Pend Oreille Telephone Company, Inc.	January 10, 1996	12 FCC Rcd 63
Pioneer Telephone Cooperative Inc.	December 1, 1994	9 FCC Rcd 7785
Roosevelt County Rural Telephone Cooperative, Inc.	July 11, 1996	11 FCC Rcd 8066
S&T Telephone Cooperative Association, Inc. Golden Belt Telephone Association, Inc.	August 30, 1996	11 FCC Rcd 10165
S&T Telephone Cooperative Association, Inc. Golden Belt Telephone Association, Inc.	October 25, 1996	11 FCC Rcd 14409
San Carlos Apache Telecommunications Utility, Inc.	November 8, 1996	11 FCC Rcd 14591
Santa Rosa Telephone Cooperative, Inc.	August 7, 1995	11 FCC Rcd 3245
Skyline Telecom. South Central Telephone Association, Inc.	June 14, 1996	11 FCC Rcd 7097
Sunflower Telephone Company, Inc.	June 14, 1996	11 FCC Rcd 7130
North Dakota Telephone Company	April 4, 1996	11 FCC Rcd 10855
Grand River Mutual Telephone Corporation Alpine Communications, L.C.	February 14, 1997	12 FCC Rcd 2367

ATTACHMENT A

NAME OF COMPANY	EFFECTIVE DATE	FCC Rcd Cite
Armour Independent Telephone Company Hanson County Telephone, Inc. Interstate Telecommunications Cooperative, Inc. Midstate Telephone Company Mobridge Telecommunications Company Splitrock Telecom Cooperative, Inc. West River Telecommunications Cooperative James Valley Cooperative Telephone Company, Inc. Kennebec Telephone Company, Inc. Roberts County Telephone Cooperative Association	April 11, 1996	11 FCC Rcd 11513
J.B.N. Telephone Company, Inc.	July 17, 1996	11 FCC Rcd 8619

CERTIFICATE OF SERVICE

I hereby certify that copy of the Comments was served this 17th day of December 1999, by electronic delivery or first class mail, to the persons listed below.

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