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

_____)
In the Matter of)
)
Federal-State Joint Board on Universal)
Service: Promoting Deployment and)
Subscribership in Unserved and Underserved)
Areas, Including Tribal and Insular Areas)
_____)

CC Docket No. 96-45

**AT&T REPLY COMMENTS ON
UNSERVED AND UNDERSERVED AREAS FNPRM**

Pursuant to the Commission's Further Notice of Proposed Rulemaking ("FNPRM"), FCC 99-204, released September 3, 1999,¹ AT&T Corp. ("AT&T") submits these reply comments on the promotion of deployment of facilities and subscribership in unserved and underserved areas, including tribal and insular areas.

As AT&T shows in Section I, the comments generally support a definition of "unserved" areas as areas in which there is currently no local common carrier franchise, and the creation of a competitive bidding system for the designation of a carrier to serve those areas. The Commission should reject attempts to limit the competitive bidding process on jurisdictional grounds. Moreover, as discussed in Section II, the commenters agree that Commission should not establish a separate program for the non-statutory category of "underserved" areas at this time, but should expand the Link-Up program instead.

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List A B C D E

¹The reply comment date was extended to January 19, 2000, by FCC Public Notice, DA 99-2607, released November 22, 1999. A list of parties filing comments is attached as Appendix A.

I. THE COMMENTS SUPPORT IMPLEMENTATION OF THE COMMISSION'S PROPOSALS WITH RESPECT TO UNSERVED AREAS, WITH THE MODIFICATIONS PROPOSED BY AT&T.

As AT&T showed in its Comments (at 2-5), the Commission should refine its definition of "unserved" areas to include only areas without a local common carrier franchise, and it should establish a competitive bidding system to determine which carrier will serve those areas.² The comments support these conclusions.

A. The Commission Should Define "Unserved" Areas As Areas Without A Local Common Carrier Franchise.

A number of commenters agree that the Commission's proposed definition of "unserved areas" under Section 214(e)(3) would be too broad. The Commission proposes to define an "unserved area" as "any area in which facilities would need to be deployed in order for its residents to receive each of the services designated for support by the universal service support mechanisms." FNPRM ¶ 86. As GTE notes (at 7), that definition would include "any sliver of land within an existing ILEC serving area where facilities have not yet been extended in response to a request for service." Accordingly, the Commission's proposed definition would "create many thousands of 'unserved areas' across the country, and treat as special cases areas that states have traditionally addressed through line extension tariffs." GTE at 7. Moreover, as ARC observes (at 33), the Commission's definition would improperly include "newly constructed subdivisions and . . . sparsely inhabited wilderness areas within an existing carrier's designated service area," and would also include transitory "company towns" and seasonal communities. Congress could not have intended Section 214(e)(3) to sweep so broadly. Moreover, including such areas in the definition of "unserved"

²As AT&T noted (at n.2), its views on "unserved" (and underserved) areas apply equally to insular areas. *See* FNPRM ¶¶ 136-40 (seeking comment on insular areas).

areas would unnecessarily complicate the administration of the Section 214(e)(3) program.

As these commenters recognize, the Commission should define “unserved area” as any geographic area for which a local common carrier franchise does not exist. *See* GTE at 7 (“[i]t would be more reasonable to treat as ‘unserved’ any area *outside* a current ILEC serving area where facilities would have to be extended”). As AT&T noted (at 2), the Commission can employ a panel of experts to recommend how to carve out individual serving areas from the “unserved area” for purposes of administering Section 214(e)(3).

B. The Commission Should Use Competitive Bidding To Select A Carrier To Serve "Unserved" Areas, And Has Jurisdiction To Do So.

A number of commenters also agree with the Commission that it should use a competitive bidding process to determine which carrier should receive universal service support for serving “unserved” areas. FNPRM ¶ 95; GTE at 4-6; U S WEST at 3; AT&T at 3-5. As these commenters recognize, in circumstances such as these, a competitive bidding process is the most efficient and accurate means of determining which carrier should be designated. It is also the most accurate means of determining how much support each carrier should receive. *E.g.*, GTE at 5-6.

Moreover, contrary to NTCA’s claims (at 27-28), the Commission has ample authority to adopt such a competitive bidding mechanism, for two reasons. First, NTCA’s interpretation of the scope of the FCC’s jurisdiction to designate carriers to serve unserved areas is too limited. Section 214(e)(3) provides that the Commission itself may designate a carrier to serve unserved areas “with respect to interstate services *or* an area served by a common carrier to which paragraph (6) applies.”

47 U.S.C. § 214(e)(3). Paragraph (6), in turn, gives the Commission jurisdiction to designate a carrier to serve unserved areas “in the case of a common carrier providing telephone exchange service or exchange access that is not subject to the jurisdiction of a State commission.” 47 U.S.C. § 214(e)(6). As the Commission concluded in the FNPRM (¶ 78), “the better interpretation of section 214(e)(6) is that the determination of whether a carrier is subject to the jurisdiction of a state commission depends in turn on the nature of the service provided . . . or the geographic area in which the service is being provided.”

In short, the FCC has authority to designate carriers in any situation in which the state commission currently has no jurisdiction. In other words, the FCC has that authority with respect to local exchange service on tribal lands and federal territories, and with respect to other services, such as wireless services, over which the states have no ratemaking authority. NTCA’s alternative interpretation – that the state commissions have designation authority if they have jurisdiction over the carrier – turns Section 214(e)(6) on its head. As everyone agrees, Section 214(e)(6) was added in 1997 to fill a gap in the original 1996 Act – *i.e.*, to “make it possible for telephone companies *serving areas not subject to the jurisdiction of State commission* to be eligible to receive federal universal service support.” FNPRM ¶ 78 (quoting statement of Representative Tauzin in legislative history) (emphasis added). But Section 214(e)(6) makes clear that it is the FCC that is to fill that gap, not the states. NTCA’s interpretation of Section 214(e)(6) would inexplicably *expand* the states’ jurisdiction into areas that are traditionally beyond the states’ jurisdiction (such as tribal lands). Such a reading of the Act is clearly contrary to Congress’s intent.

Moreover, even as to designations that are to be made by the state commissions under Section 214(e)(3), the Commission still has ample authority to require a competitive bidding process. As the Supreme Court held in *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 729-33 (1999), Section 201(b) of the Act provides ample authority for overriding Section 2(b)'s presumption of state jurisdiction over intrastate matters. The Supreme Court there explained that Section 201(b) of the Act expressly gives the FCC authority to promulgate rules "as may be necessary in the public interest to carry out the provisions of this Act," even where those provisions deal with intrastate matters. *Iowa*, 119 S.Ct. at 729-30.³ Because in that case the FCC was acting to implement a provision of the 1996 Act (Section 251) that unambiguously applies to intrastate matters, Section 201(b) was sufficient to override the presumption of Section 2(b): Section 201(b) explicitly gives the FCC "jurisdiction to make rules governing matters to which [Section 251] applies," even if those matters are intrastate in nature and therefore within the scope of Section 2(b). *Iowa*, 119 S.Ct. at 730-31.

That is equally true here. Indeed, in *Iowa* the Supreme Court upheld numerous FCC rules in which the FCC interpreted the statute's general substantive standards, even though those standards were to be applied by the state commissions in individual cases. *See Iowa*, 119 S.Ct. at 732 (upholding FCC authority to prescribe a pricing methodology where state commissions would "determin[e] the concrete result in particular circumstances"), 733 (upholding FCC rules governing the state commissions' application of Section 251(f)'s standards for exempting rural carriers from Section 251's

³Indeed, in this case Section 254(a) provides an independent explicit source of rulemaking authority concerning universal service matters.

requirements). Like the rules upheld in *Iowa*, the FCC has ample authority to prescribe authoritative interpretations of the substantive provisions of Section 214(e)(3). Those interpretations must then be applied by the state commissions in "determining the concrete result in particular circumstances." *Cf. Iowa*, 119 S.Ct. at 732.⁴

Finally, a number of commenters recognize that the Commission should not put additional strain on the universal service system by further substantially increasing the overall amount of federal funding. *See, e.g., AirTouch* at 12-13; *GTE* at 16-17. Indeed, as AT&T explained in its Comments (at 4-5), if the FCC funds the full amount of additional USF support for unserved areas, it should reconsider its high-cost funding decisions for non-rural carriers. The Commission has established over \$400 million in federal funding for non-rural carriers before even considering the funding requirements of unserved areas, which are truly the intended beneficiaries of Section 254. Accordingly, the Commission should reconsider its funding of non-rural carriers in conjunction with any expansion of federal support for unserved areas.

⁴ The Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC*, 188 F.3d 393 (1999), is not to the contrary. There, the Court held that the plain language of Section 214(e)(2) dealt solely with the number of carriers that could be designated as eligible to receive federal universal service funding. Accordingly, the Court held that this provision did not provide the Commission an explicit statutory basis on which to regulate eligibility requirements. Whether or not that holding was correct, the Commission has unquestioned authority under Section 254(d) to determine the *size* of federal universal service funding, whether by means of competitive bidding or otherwise.

II. THE COMMENTS SUPPORT EXPANSION OF THE LINK-UP PROGRAM TO MEET THE NEEDS OF INDIVIDUALS IN "UNDERSERVED" AREAS.

As to the non-statutory category of "*underserved*" areas, the Comments offer no support for a new high-cost program at this time.⁵ *See, e.g.*, TDS at 21. Rather, a number of commenters correctly support expansion of the Link-Up program as a superior means of providing subsidies for individual low-income consumers in underserved areas. *See, e.g.*, NRTA/OPASTCO at 7-8; USTA at 3. As AT&T explained (at 6), the existing Link-Up program, which has a maximum discount of \$30, may fall far short of the costs of installation in extreme outlying areas. Accordingly, the Commission should consider "feathering in" one-time discounts to the most needy, similar to the way the Commission has feathered in the inside-wire discounts of the Schools and Libraries Program.⁶ But there is no need whatever to create an entirely new, non-statutory high-cost program.

⁵Indeed, a number of commenters point to evidence that the extent to which such "underserved" areas exists is overstated. *See, e.g.*, NTCA at 2-6; TDS at 4-7; *see also Communications Daily* (November 10, 1999) (NTCA study shows that small rural telcos have highest subscriber penetration on Native American reservations and have infrastructure in place to offer advanced services to those areas, and that "[t]he so-called 'digital divide' is greatly exaggerated with respect to areas served by small telephone companies").

⁶ *Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, FCC 98-120 (June 22, 1998), *as clarified*, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service*, Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45, and Further Notice of Proposed Rulemaking, FCC 99-49 (May 28, 1999).

CONCLUSION

For the foregoing reasons and those in AT&T's Comments, the Commission should adopt rules as described herein.

Respectfully submitted,

/s/ 
Mark C. Rosebolum

Judy Sello
AT&T CORP.
Room 1135L2
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-8984

Gene C. Schaerr
James P. Young
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8141

Attorneys for AT&T Corp.

January 19, 2000

Unserved and Underserved Areas FNPRM
CC Docket No. 96-45
List of Commenters

AirTouch Communications and Globalstar USA, Inc. ("AirTouch")

Regulatory Commission of Alaska ("RCA")

Alaska Rural Coalition ("ARC")

American Samoa Telecommunications Authority ("American Samoa")

AMSC Subsidiary Corporation ("AMSC")

AT&T Corp. ("AT&T")

Bell Atlantic Mobile, Inc. ("BAMs")

CCI International, N.V. ("Constellation")

The Cellular Telecommunications Industry Association ("CTIA")

CenturyTel, Inc. ("CenturyTel")

Commonwealth of the Northern Mariana Islands ("Northern Marianas")

Crow Tribe of Indians of Montana ("Crow")

Dobson Communications Corporation ("Dobson")

Eastern Shoshone Tribe ("Shoshone")

Fort Belknap Indian Community ("Fort Belknap")

General Communications, Inc. ("GCI")

Gila River Telecommunications, Inc. (GRTI")

Golden West Telecommunications Cooperative, Inc., Midstate Telephone Company, Mount Rushmore Telephone Company, Roberts County Telephone Cooperative Association, RC Communications, Inc., Sully Buttes Telephone Cooperative, Inc., Interstate Telecom Cooperative and Vivian Telephone Company (collectively "South Dakota ILECs")

GTE Service Corporation ("GTE")

Government of Guam ("GovGuam")

State of Hawaii ("Hawaii")

Minnesota Public Utilities Commission ("MNPUC")

Montana Public Service Commission ("Montana PSC")

Motorola, Inc. and Iridium North America (collectively "Motorola")

National Telephone Cooperative Association ("NTCA")

National Rural Telecom Association ("NRTA") and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO")

Nez Perce Tribe ("Nez Perce")

Puerto Rico Telephone Company, Inc. ("PRTC")

QUALCOMM, Inc. ("QUALCOMM")

Rural Utilities Service ("RUS")

Salt River Pima-Maricopa Indian Community, Saddleback Communications Company and the National Tribal Telecommunications Alliance (collectively "Salt River")

Smith Bagley, Inc. ("SBI")

South Dakota Independent Telephone Coalition, Inc. ("SDITC")

Summit Telephone and Telegraph Company of Alaska, Inc. ("Summit")

TDS Telecommunications Corporation ("TDS Telecom")

Titan Wireless ("Titan")

Tuscarora Indian Nation of New York ("Tuscarora")

United States Cellular Corporation ("USCC")

United States Telecom Association ("USTA") and National Exchange Carrier Association, Inc. ("NECA")

U S WEST Communications, Inc. ("U S WEST")

Virgin Islands Public Service Commission ("VIPSC")

Virgin Islands Telephone Corporation ("Vitelco")

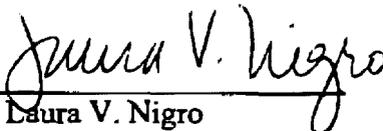
Western Alliance ("Western Alliance")

Western Wireless Corporation ("Western Wireless")

Public Service Commission of Wisconsin ("PSCW")

CERTIFICATE OF SERVICE

I, Laura V. Nigro, do hereby certify that on this 19th day of January, 2000, a copy of the foregoing "AT&T Reply Comments on Unserved and Underserved Areas FNPRM" was served by U.S. first class mail, postage prepaid, on the parties named on the attached Service List.

/s/ 
Laura V. Nigro

SERVICE LIST
UNSERVED AND UNDERSERVED AREAS FNPRM
CC Docket No. 96-45

The Honorable Susan Ness, Chair
Commissioner
Federal Communications Commission
445 Twelfth Street, SW, Room 8-B115
Washington, DC 20554

Irene Flannery
Acting Asst. Division Chief
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A426
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A302
Washington, DC 20554

Paul Gallant
Federal Communications Commission
Legal Advisor to Commissioner Tristani
445 Twelfth Street, SW, Room 8-C302B
Washington, DC 20554

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 Twelfth Street, SW, Room A-C302
Washington, DC 20554

Lori Kenyon
Common Carrier Specialist
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

The Honorable Julia Johnson, Chair
State Joint Board
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mark Long
Economic Analyst
Florida Public Service Commission
Gerald Gunter Bldg.
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0866

The Honorable James M. Posey
Commissioner
Alaska Public Utilities Commission
1016 West 6th Ave., Suite 400
Anchorage, AK 99501

Sandra Makeeff Adams
Accountant
Iowa Utilities Board
350 Maple Street
Des Moines, IA 50319

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, SD 57501-5070

Kevin Martin
Federal Communications Commission
Advisor to Commissioner Furchtgott-Roth
445 Twelfth Street, SW, Room 8-A302E
Washington, DC 20554

The Honorable Martha S. Hogerty
Public Counsel
Secretary of NASUCA
Truman Building
301 West High Street, Suite 250
P.O. Box 7800
Jefferson City, MO 65102

Philip F. McClelland
 Assistant Consumer Advocate
 Pennsylvania Office of Consumer Advocate
 1425 Strawberry Square
 Harrisburg, PA 17120
 Charles Bolle
 Public Utilities Commission of Nevada
 1150 East William Street
 Carson City, NV 89701

Thor Nelson
 Rate Analyst/Economist
 Colorado Office of Consumer Counsel
 1580 Logan Street, Suite 610
 Denver, CO 80203

Jordan Goldstein
 Federal Communications Commission
 Legal Advisor to Commissioner Ness
 445 Twelfth Street, SW, Room 5-C441
 Washington, DC 20554

Barry Payne
 Economist
 Indiana Office of the Consumer Counsel
 100 North Senate Avenue, Room N501
 Indianapolis, IN 46204-2208

Rowland Curry
 Policy Consultant
 Texas Public Utility Commission
 1701 North Congress Avenue
 P.O. Box 13326
 Austin, TX 78701

Brad Ramsay
 Deputy Assistant
 General Counsel
 National Assoc. of Regulatory Utility
 Commissioners
 1100 Pennsylvania Avenue, NW
 P.O. Box 684
 Washington, DC 20044-0684

Brian Roberts
 Regulatory Analyst
 California Public Utilities Commission
 505 Van Ness Avenue
 San Francisco, CA 94102

Tiane Sommer
 Special Assistant
 Attorney General
 Georgia Public Service Commission
 47 Trinity Avenue
 Atlanta, GA 30334

Patrick H. Wood, III
 Chairman
 Texas Public Utility Commission
 1701 North Congress Avenue
 P.O. Box 13326
 Austin, TX 78711-3326

Peter Bluhm
 Director of Policy
 Vermont Public Service Board
 Research Drawer 20
 112 State St., 4th Floor
 Montpelier, VT 05620-2701

Walter Bolter
 Intergovernmental Liaison
 Florida Public Service Commission
 Gerald Gunter Building, Suite 270
 2540 Shumard Oak Blvd.
 Tallahassee, FL 32399-0850

Carl Johnson
 Telecom Policy Analyst
 New York Public Service Commission
 3 Empire State Plaza
 Albany, NY 12223-1350

Doris McCarter
 Ohio Public Utilities Commission
 180 E. Broad Street
 Columbus, OH 43215-3793

Susan Stevens Miller
Assistant General Counsel
Maryland Public Service Commission
6 Paul Street, 16th Floor
Baltimore, MD 21202-6806

Mary E. Newmeyer
Federal Affairs Advisor
Alabama Public Service Commission
100 N. Union Street, Suite 800
Montgomery, AL 36104

Tom Wilson
Economist
Washington Utilities & Transportation
Commission
1300 Evergreen Park Drive, S.W.
P.O. Box 47250
Olympia, WA 98504-7250

Linda Armstrong
Attorney
Federal Communications Commission
CCB, Accounting and Audits Division
Universal Service Branch
445 Twelfth Street, SW, Room 5A-663
Washington, DC 20554

Lisa Boehley
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B544
Washington, DC 20554

Craig Brown
Deputy Division Chief
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A425
Washington, D.C. 20554

Steve Burnett
Public Utilities Specialist
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B418
Washington, D.C. 20554

Bryan Clopton
Public Utilities Specialist
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A465
Washington, DC 20554

Andrew Firth
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A505
Washington, DC 20554

Lisa Gelb
Division Chief
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A520
Washington, DC 20554

Emily Hoffnar
Federal Staff Chair
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A660
Washington, DC 20554

Charles L. Keller
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A664
Washington, DC 20554

Katie King
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B550
Washington, DC 20554

Robert Loube
Telecom. Policy Analyst
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B524
Washington, DC 20554

Brian Millin
Interpreter
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A525
Washington, DC 20552

Sumita Mukhoty
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A633
Washington, DC 20554

Mark Nadel
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B551
Washington, DC 20554

Kaylene Shannon
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A520
Washington, DC 20554

Richard D. Smith
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5B-448
Washington, DC 20554

Matthew Vitale
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B530
Washington, D.C 20554

Melissa Waksman
Deputy Division Chief
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-A423
Washington, DC 20554

Sharon Webber
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B552
Washington, DC 20554

Jane Whang
Attorney
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B540
Washington, D.C. 20554

Adrian Wright
Accountant
Federal Communications Commission
CCB, Accounting Policy Division
445 Twelfth Street, SW, Room 5-B510
Washington, DC 20554

Ann Dean
 Assistant Director
 Maryland Public Service Commission
 6 Paul Street, 16th Floor
 Baltimore, MD 21202-6806

David Dowds
 Public Utilities Supervisor
 High Cost Model
 Florida Public Service Commission
 Gerald Gunter Bldg.
 2540 Shumard Oaks Blvd.
 Tallahassee, FL 32399-0866

Don Durack
 High Cost Model
 Staffer for Barry Payne
 Indiana Office of Consumer Counsel
 100 North Senate Avenue
 Indianapolis, IN 46204-2208

Greg Fogleman
 Regulatory Analyst
 High Cost Model
 Florida Public Service Commission
 Gerald Gunter Bldg.
 2540 Shumard Oak Blvd.
 Tallahassee, FL 32399-0866

Anthony Myers
 Technical Advisor
 High Cost Model
 Maryland Public Service Commission
 6 St. Paul Street, 19th Floor
 Baltimore, MD 21202-6806

Diana Zake
 Texas Public Utility Commission
 1701 North Congress Avenue
 P.O. Box 13326
 Austin, TX 78711-3326

Tim Zakriski
 NYS Department of Public Service
 3 Empire State Plaza
 Albany, NY 12223

Pamela J. Riley
 AirTouch Communications
 1818 N Street, NW, Suite 800
 Washington, DC 20036

Charles D. Cosson
 AirTouch Communications
 One California Street, 21st Floor
 San Francisco, CA 94111

G. Nannette Thompson, Chair
 Regulatory Commission of Alaska
 1016 West Sixth Avenue, Suite 400
 Anchorage, AK 99501

Heather H. Grahame
 Dorsey & Whitney, LLP
 1031 W. 4th Avenue, Suite 600
 Anchorage, AK 99501
 Counsel for the Alaska Rural Coalition

Richard S. Rodin
 David L. Sieradzki
 Ronnie London
 Hogan & Hartson, LLP
 Columbia Square
 555 13th Street, NW
 Washington, DC 20004
 Counsel for the American Samoa
 Telecommunications Authority

Lon C. Levin
 VP and Regulatory Counsel
 AMSC Subsidiary Corporation
 10802 Parkridge Boulevard
 Reston, VA 22091

Bruce D. Jacobs
 Stephen J. Berman
 Colette M. Capretz
 Fisher Wayland Cooper Leader
 & Zaragoza, LLP
 2001 Pennsylvania Ave., NW, Suite 400
 Washington, DC 20006
 Counsel for AMSC Subsidiary Corporation

John T. Scott, III
 Crowell & Moring, LLP
 1001 Pennsylvania Ave., NW
 Washington, DC 20004
 Counsel for Bell Atlantic Mobile, Inc.

S. Mark Tuller
 VP, Legal and External Affairs,
 Secretary and General Counsel
 Bell Atlantic Mobile, Inc.
 180 Washington, Valley Road
 Bedminster, NJ 07921

Lolita D. Smith, Staff Counsel
 Michael F. Altschul, Vice President for
 Regulatory Policy and Law
 Cellular Telecommunications Industry
 Association
 1250 Connecticut Ave., NW, Suite 800
 Washington, DC 20036

Karen Brinkmann
 Richard R. Cameron
 William S. Carnell
 Latham & Watkins
 1001 Pennsylvania Avenue, NW
 Washington, DC 20004
 Counsel for CenturyTel, Inc.

John R. Jones
 Director of Government Relations
 CenturyTel, Inc.
 100 Century Park Drive
 Monroe, LA 71203

Thomas K. Crowe
 C. Jeffrey Tibbles
 Law Offices of Thomas K. Crowe, PC
 2300 M Street, NW, Suite 800
 Washington, DC 20037
 Counsel for the Commonwealth of the
 Northern Mariana Islands

Robert A. Mazer
 Albert Shuldiner
 Vinson & Elkins, LLP
 1455 Pennsylvania Avenue, NW
 Washington, DC 20004
 Counsel for Constellation

Sam S. Painter
 Crow Tribe of Indians
 PO Box 159
 Crow Agency, MT 59022

Ronald L. Ripley, Esq.
 VP & Sr. Corporate Counsel
 Dobson Communications Corporation
 13439 N. Broadway Extension, Suite 200
 Oklahoma City, OK 73114

General Counsel
 Eastern Shoshone Tribe
 Wind River Reservation
 15 North Fork Road
 Fort Washakie, WY 82514

Arthur Stiffarm, Director
 Tribal Planning Department
 Fort Belknap Community Council
 RR 1, Box 66
 Fort Belknap Agency
 Harlem, MT 59526

Jimmy Jackson
 General Communication, Inc.
 2550 Denali Street, Suite 1000
 Anchorage, AK 99503

Belinda Nelson, General Manager
 Gila River Telecommunications, Inc.
 7605 West Allison Road, Box 5015
 Chandler, AZ 85226

Benjamin H. Dickens, Jr.
 Michael B. Adams, Jr.
 Blooston, Mordofsky Jackson & Dickens
 2120 L Street, NW
 Washington, DC 20037
 Counsel for Golden West
 Telecommunications Cooperative, Inc.

Jeffrey S. Linder
 Kenneth J. Krisko
 Wiley Rein & Fielding
 1776 K Street, NW
 Washington, DC 20006
 Counsel for GTE Service Corporation

Gail L. Polivy
 GTE Service Corporation
 1850 M Street, NW, Suite 1200
 Washington, DC 20036

Thomas R. Parker
 GTE Service Corporation
 600 Hidden Ridge, MS HQ-E03J43
 PO Box 152092
 Irving, TX 75015-2092

Mary Eva Candon
 Government of Guam
 Department of Commerce
 102 M Street
 Tiyan, Guam 96913

Michael D. Wilson
 Executive Director
 Division of Consumer Advocacy
 State of Hawaii
 345 Kekuanaoa Street, Suite 31
 Hilo, HI 96720

Gregory Scott, Chairman
 Minnesota Public Utilities Commission
 333 S. Washington Street
 Redwood Falls, MN 56283

Martin Jacobson
 Special Assistant Attorney General
 Montana Public Service Commission
 1701 Prospect Avenue
 PO Box 202601
 Helena, MT 59620

Philip L. Malet
 James M. Talens
 Omer C. Eyal
 Steptoe & Johnson, LLP
 1330 Connecticut Avenue, NW
 Washington, DC 20036
 Counsel for Motorola and Iridium North
 America

Laura A. Lo Bianco
 Senior Attorney
 Iridium North America
 8440 S. River Parkway
 Tempe, AZ 85284

Michael D. Kennedy
 Barry Lambergman
 Leigh M. Chinitz
 Motorola, Inc.
 1350 I Street, NW
 Washington, DC 20005

L. Marie Guillory
 Daniel Mitchell
 National Telephone Cooperative
 Association
 4121 Wilson Boulevard, 10th Floor
 Arlington, VA 22203

Margot Smiley Humphrey
 Koteen & Naftalin, LLP
 1150 Connecticut Avenue, NW, Suite 1000
 Washington, DC 20036
 Counsel for NRTA

Samuel N. Penney, Chairman
 Nez Perce Tribal Executive Committee
 PO Box 305
 Lapwai, ID 83540

Kate Kaercher
 Stuart Polikoff
 OPASTCO
 21 Dupont Circle, NW, Suite 700
 Washington, DC 20036

Joe D. Edge
 Tina M. Pidgeon
 Courtney R. Eden
 Drinker Biddle & Reath, LLP
 1500 K Street, NW, Suite 1100
 Washington, DC 20005
 Counsel for Puerto Rico Telephone Co.,
 Inc.

Kelly Cameron
 Robert L. Galbreath
 Powell Goldstein Frazer & Murphy, LLP
 1001 Pennsylvania Ave., NW, 6th Floor
 Washington, DC 20004

Christopher A. McLean
 Acting Administrator
 The Rural Utilities Service
 (Address not available)

Charles H. Kennedy
 James A. Casey
 Morrison & Foerster, LLP
 2000 Pennsylvania Ave., NW, Suite 500
 Washington, DC 20006
 Counsel for Salt River Pima-Maricopa
 Indian Community, Saddleback
 Communications Company, and National
 Tribal Telecommunications Alliance

William W. Quinn
 Snell & Wilmer
 One Arizona Center
 Phoenix, AZ 85004
 Counsel for Salt River Pima-Maricopa
 Indian Community

David A. LaFuria
 B. Lynn F. Ratnavale
 Lukas Nace Gutierrez & Sachs Chartered
 1111 19th Street, NW, Suite 1200
 Washington, DC 20036
 Counsel for Smith Bagley, Inc.

Richard D. Coit
 South Dakota Independent Telephone
 Coalition, Inc.
 207 E. Capitol Ave., Suite 206
 PO Box 57
 Pierre, SD 57501

Kenneth E. Trout, CPA
 3225 Purdue Street
 Anchorage, AK 99508
 Counsel for Summit Telephone
 Company, Inc.

Margot Smiley Humphrey
 Koteen & Naftalin, LLP
 1150 Connecticut Ave., NW, Suite 1000
 Washington, DC 20036
 Counsel for TDS Telecommunications
 Corporation

Pantelis Michalopoulos
 Steptoe & Johnson, LLP
 1330 Connecticut Avenue, NW
 Washington, DC 20036
 Counsel for Titan Wireless

James T. Taylor, General Counsel
 Titan Wireless
 3033 Science Park Road
 San Diego, CA 92121

Christopher A. Karns
 Dorsey & Whitney, LLP
 Suite 300 South
 1001 Pennsylvania Ave., NW
 Washington, DC 20004
 Counsel for the Tuscarora Indian Nation

Peter M. Connolly
 Koteen & Naftalin, LLP
 1150 Connecticut Ave, NW
 Washington, DC 20036
 Counsel for United States Cellular
 Corporation

Lawrence E. Sargeant
 Linda L. Kent
 Keith Townsend
 John W. Hunter
 Julie L. Roncs
 United States Telecom Association
 1401 H Street, NW, Suite 600
 Washington, DC 20005

Richard A. Askoff
 Regina McNeil
 National Exchange Carrier Association, Inc.
 80 South Jefferson Road
 Whippany, NJ 07981

Steven R. Beck
 Dan L. Poole
 U S WEST Communications, Inc.
 1020 19th Street, NW, Suite 700
 Washington, DC 20036

Walter L. Challenger, Chairman
 Public Service Commission of the
 United States Virgin Islands
 PO Box 40
 Charlotte Amalie, USVI 00804

Gregory Vogt
 Daniel J. Smith
 Joshua S. Turner
 Wiley Rein & Fielding
 1776 K Street, NW
 Washington, DC 20006
 Counsel for the Virgin Islands
 Telephone Company

Samuel E. Ebbesen
 President & Chief Executive Officer
 Virgin Islands Telephone Corporation
 PO Box 6100
 St Thomas, USVI 00801-6100

Gerard J. Duffy
 Blooston Mordkofsky Jackson & Dickens
 2120 L Street, NW, Suite 300
 Washington, DC 20037
 Counsel for Western Alliance

Michele C. Farquhar
 David L. Sieradzki
 Ronnie London
 Hogan & Hartson, LLP
 555 13th Street, NW
 Washington, DC 20004
 Counsel for Western Wireless Corporation

Gene DeJordy
 VP, Regulatory Affairs
 Western Wireless Corporation
 3650 - 131st Ave., SE, Suite 400
 Bellevue, WA 98006

Linda L Dorr
 Public Service Commission of Wisconsin
 125 South Webster Street
 Madison, WI 53702