

**Before the
Federal Communications Commission
WASHINGTON, D.C.**

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
)	

**OPPOSITION OF THE COALITION FOR
AFFORDABLE LOCAL AND LONG DISTANCE SERVICE (“CALLS”)
TO PETITIONS FOR RECONSIDERATION**

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SUMMARY

The Commission's adoption of the CALLS plan marks the culmination of comprehensive year-long proceedings, which included extensive public participation, to break the gridlock surrounding universal service and interstate access charges. In these thorough proceedings, the Commission fully addressed and rejected the challenges raised in these petitions for reconsideration. As the Commission explained, these challenges are meritless.

ALTS and Focal's petition rehashes their challenges to the CALLS plan's targeted reduction of traffic-sensitive access charges and to the size of the universal support fund. As explained below, there is no basis whatsoever for their claim that the Commission is precluded from transforming the X-factor from a productivity measure into a transitional price-reduction targeting mechanism, and the Commission explicitly found that use of the targeting mechanism would produce reasonable, non-predatory rates. With respect to the size of the universal service fund, the Commission provided ample justification, explaining that the \$650 million figure is based on the range of estimates made on the record in the universal service proceeding, the fact that the figure was agreed to by parties with opposite interests, and the fact that the figure will be used only as a five-year interim determination. ALTS and Focal offer no credible challenge to these findings.

One Call's challenge to the Commission's refusal to reach several issues unique to the pay telephone industry is equally baseless. These issues are currently being considered in another proceeding, and are only marginally related to the CALLS plan. It

is well established that agencies need not reach even clearly related issues in a single proceeding.

Finally, Pathfinder's procedural challenges to adoption of the CALLS plan are wholly without merit. The Commission's Order was the product of robust and public debate, which included multiple rounds of formal public comments. Pathfinder does not identify a single instance in which the Commission's rules were not followed. Moreover, contrary to Pathfinder's assertions, the Commission did not violate the Negotiated Rulemaking Act, as the Act's procedures are permissive and in no way prohibit the use of different procedures. Nor did the Commission violate the Regulatory Flexibility Act. The Commission reasonably estimated the number of affected small entities, gave full consideration to alternatives for minimizing significant economic impact on small entities, and responded to small entities' comments. Indeed, the Commission made several accommodations specifically for small entities.

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The Coalition for Affordable Local and Long Distance Service (“CALLS”) and its members respectfully submit this opposition to the joint petition for reconsideration of the Commission’s Order¹ filed by the Association for Local Telecommunications Services (“ALTS”) and Focal Communications Corporation (“Focal”) and to the separate petitions for reconsideration filed by One Call Communications, Inc. (“One Call”) and Pathfinder Communications, Inc. (“Pathfinder”).

¹ Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket 99-249, Eleventh Report and Order in CC Docket No. 96-45, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, (rel. May 31, 2000) (“Order”).

The Commission's adoption of the CALLS plan has cut the "Gordian knot" (Order ¶ 26) of universal service and interstate access charges, resolving issues that have been unsettled in the four years since enactment of the Telecommunications Act of 1996 and the subject of debate at the FCC for over twenty years. As the Commission stated, the CALLS plan "accomplishes many objectives that the Commission to date has been unable to achieve in the absence of an industry consensus plan, while providing significant consumer benefits that we would not otherwise be able to ensure on such a wide-scale basis and in such a timely manner." Order ¶ 35. The plan brings substantial public benefits, including:

- Assuring affordable interstate rates for all Americans, particularly in rural and high cost areas and for low-income Americans;
- Promoting facilities-based competition and customer choice;
- Simplifying consumer bills;
- Promoting investment in and deployment of competing broadband-capable networks, particularly in rural and residential areas, and narrowing the "digital divide" in areas without local dial-up Internet access;
- Significantly reducing switching charges and other traffic-sensitive charges, pushing these charges toward forward looking cost; and
- Providing investment stability during a crucial five-year period in the development of telecommunications competition.

These results stem from comprehensive year-long efforts of the Commission, numerous state regulators, carriers, consumers, and other groups. The CALLS plan was subject to no less than four sets of formal public comments at the Commission, with more than 40 parties participating and submitting comments. Moreover, in crafting the plan, the Commission received input from numerous, diverse sources. In short, development and approval of the CALLS plan involved unprecedented public participation.

The petitions for reconsideration at issue here raise challenges that have been fully addressed and rejected in these comprehensive proceedings. As such, they should be denied on their face. As the Commission has stated, “It is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved.” Memorandum Opinion and Order, *Application of Educational Information Corp.*, 13 FCC Rcd 23746, ¶ 8 n.3 (rel. Oct. 8, 1998). In any case, as discussed below, the petitioners’ claims are meritless.

I. ALTS AND FOCAL’S CLAIMS SHOULD BE REJECTED

Seeking to preserve a “major source of CLEC revenues” from per-minute access charges (ALTS/Time Warner Comments at 10), ALTS and Focal once again challenge the CALLS plan’s targeted reduction of traffic-sensitive access charges and the size of the universal support fund. As the Commission has explained, each of these claims is baseless.

A. ALTS And Focal’s Challenges To Targeted Access Charge Reductions Are Meritless

Primarily, ALTS and Focal contest the Commission’s decision to use the X-factor as a targeting mechanism for rate reductions rather than, as the X-factor has been used in the past, a measure of productivity; these parties assert that this change constitutes a “misuse” of the X-factor. Fundamentally, ALTS and Focal’s assertion is a complaint about labeling. Had the Commission abolished the X-factor and substituted a “Transitional Price Reduction Factor” of 6.5%, the result would be exactly the same, and ALTS and Focal could not complain.

In any case, there is no basis for the novel argument that the Commission is precluded from altering the X-factor’s purpose. To the contrary, it is a basic principle of

administrative law that an agency can make even fundamental changes to its rules and practices, so long as it provides “a reasoned explanation for its change in policy.”

Association Of Public-Safety Communs. Officials-International, Inc. v. FCC, 76 F.3d 395, 399 (D.C. Cir. 1996). Indeed, ALTS itself advocated changing the X-factor to a targeting mechanism in this proceeding, disagreeing only as to where and when the X-factor reductions would be made. *See* ALTS Supp. Comments at 4, 16.

Here, the Commission carefully explained its reasons for changing the X-factor’s operation:

During the five-year term of the CALLS Proposal, the X-factor as adopted herein will not be a productivity factor as it has been in past price cap formulas. Instead, the X-factor is now a transitional mechanism to lower access charges to target rates for switched access, and to lower rates for a specified time period for special access. Although the X-factor under the CALLS Proposal will not be tied to price cap LEC productivity, it will lower access charges over the term of the proposal. As noted by CALLS, the prescriptions of prior productivity factors in the price cap formula have been the subject of extensive regulatory proceedings and litigation, and the Commission’s decision to select 6.5 percent as the most recent X-factor has been reversed and remanded by the court. The compromise advocated by CALLS will provide a solution to the contentious X-factor prescription proceeding for the term of the CALLS Proposal for those price cap LECs that do not elect to set rates based on a cost study proceeding.

Order ¶ 160 (footnotes omitted). In addition, the Commission explained that the plan of targeted access charge reductions “is in the public interest because it provides an immediate reduction in switched access rates that will result in lower long-distance charges for consumers, while also simplifying the current price cap access charge regime.” *Id.* ¶ 151. These statements, along with the Commission’s numerous other

statements describing the reasons for targeted access charge reductions, easily satisfy any requirement of a “reasoned explanation.”²

ALTS and Focal further argue that only if the X-factor is used as a productivity measure will the resulting rates be reasonable. *See* ALTS/Focal Recon. at 4-5. However, these parties ignore the Commission’s explicit findings that the rates resulting from the CALLS plan are reasonable. As the Commission stated, “The rates proposed by CALLS are reasonable. We have compared LEC revenues over the five-year period under the modified CALLS Proposal with what their revenues would be under the status quo, and conclude that they are roughly the same.” Order ¶ 41 (footnotes omitted). The Commission also found “that the target rates we are adopting are a reasonable transitional estimate of rates that might be set through competition [, because,] [n]ot only are the target rates supported by both price cap LECs and IXC, but competitive LECs have also proposed reducing access charges to the same target rates.” *Id.* ¶ 178. ALTS and Focal do not, and cannot, offer any credible challenge to these findings.

ALTS and Focal also renew their challenge to the fact that the CALLS plan focuses its reductions on traffic-sensitive rates. *See* ALTS/Focal Recon. at 11-13. These parties assert that the CALLS plan will allow ILECs anticompetitively to subsidize switching with common line revenues. *See id.* However, as ALTS and Focal

² ALTS and Focal also state that if the Commission wishes to target reductions to the X-factor, it must do so only by using forward-looking cost studies or rate-of-return proceedings. ALTS/Focal Recon. at 4. ALTS and Focal provide no support for this proposition, and CALLS is unaware of any. In any case, the Commission properly concluded that because determinations of forward-looking cost or rate-of-return “would necessitate a lengthy and complex proceeding[,] . . . the public interest is better served by the immediate reduction in access rates brought about by . . . adoption of the CALLS Proposal target rates.” Order ¶ 178.

acknowledge, the targeted rate reductions will be anticompetitive only if they set switching rates at predatory levels. *See* ALTS/Focal Recon. at 11-13. At no point have either ALTS or Focal “assert[ed] that the reductions proposed by CALLS will result in below-cost access rates.” Order ¶ 46. To the contrary, ALTS embraced virtually identical rates in its proposed alternative plan.

Moreover, the Commission fully explained that the CALLS rates “are not predatory.” Order ¶ 170. The Commission found evidence that the CALLS rates are not below incremental costs, in that interconnection agreements reached through negotiations in the marketplace contain network element rates that are below the target rates. *See id.* While ALTS and Focal claim that these rates fail to shed light on forward looking costs, they provide no evidence whatsoever to support their claim.

ALTS and Focal’s further claim that targeting reductions to traffic-sensitive charges is arbitrary (*see* ALTS/Focal Recon. at 9-11) similarly falls flat. The Commission reasonably determined that such targeting “is appropriate to drive average traffic sensitive charges closer to the cost of providing these services, and that it will not harm efficient competition.” Order ¶ 170. ALTS and Focal offer no response to this point, and the Commission’s decision was entirely reasonable.³

³ ALTS and FOCAL go to great lengths to try to show that the CALLS plan’s targeted reductions to traffic-sensitive charges are very different than previous Commission targeted reductions to the g factor, q factor, and the TIC. *See* ALTS/Focal Recon. at 5-7. Even if this were true – which it is not – the CALLS plan’s focused reductions have been fully explained by the Commission, which is all that law and policy require. *See Association Of Public-Safety Communs. Officials-International, Inc.*, 76 F.3d at 399.

ALTS and Focal also challenge the fact that the Order allows price cap LECs to apply X-factor reductions to any traffic-sensitive rate element, so long as the total traffic-sensitive rate meets the target. They claim that this aspect of the CALLS plan grants price cap LECs premature pricing flexibility. This argument is baseless. The CALLS plan in no way replaces the price cap basket structure. Price cap LECs still must price below the cap for each basket and cannot raise the price of one basket in order to lower the price in another. The only “flexibility” the plan grants LECs is minimal freedom to choose where to target reductions in the price caps. This is a far cry from pricing flexibility, and ALTS and Focal’s challenge should be rejected.

B. ALTS And Focal’s Challenge To The \$650 Million Universal Service Fund Is Baseless

In addition to their access charge challenges, ALTS and Focal contest the establishment of a \$650 million universal service fund, claiming that the size of the fund is arbitrary. *See* ALTS/Focal Recon. at 14-15. As an initial matter, the credibility of this claim is seriously undermined by the fact that ALTS and Focal have themselves advocated a \$300 million fund that lacks any empirical support or explanation. *See* ALTS/Focal Recon. at 15; ALTS/Time Warner Supp. Comments at 17. In any case, their challenge is baseless.

As the Commission has explained, identifying the appropriate size of the universal service fund at this time is, at best, “an imprecise exercise.” Order ¶ 201. The various implicit support flows (*e.g.*, business to residential, high-volume to low-volume, and geographic rate averaging) that the fund is to replace are not easily quantifiable. *See id.* Moreover, competitive pricing pressures present during the transition to competition complicate determination of the appropriate fund amount. *See id.* Thus, the Commission

appropriately recognized that “different estimates of this amount each may be considered reasonable.” *Id.*

Notwithstanding these difficulties, the Commission justifiably concluded that \$650 million is “a reasonable estimate of the amount of universal service support that currently is in our interstate access charge regime.” Order ¶ 202. As the Commission explained, this estimate falls within the range of estimates made on the record in the universal service proceeding. *See id.* For example, USTA estimated that then-current interstate common line rates contained \$3.9 billion in implicit universal service support. *See* Order ¶ 199. Rogerson and Kwerel of the FCC estimated that there is \$1.9 billion in implicit universal service support, with the assumption that residential SLCs would be capped at \$6.50 per month. *See id.* And the HAI model projected a forward-looking estimate of implicit support in interstate common line elements at approximately \$250 million. *See id.*⁴ The \$650 million figure falls well within this range.

In addition, the Commission reasonably concluded that “the negotiated nature of the \$650 million estimate provides strong evidence that \$650 million will be sufficient, though not excessive, to ensure affordable and reasonably comparable rates.” Order ¶ 202. As the Commission explained, CALLS consists of parties that have opposite interests with respect to the size of universal service support mechanisms. AT&T and Sprint, as major IXCs, pay a significant share of universal service contributions, and SBC and the former Bell Atlantic, which provide local service in areas that tend to be lower

⁴ The figures advocated in this proceeding make the same point. For example, U S West estimated a fund size of \$1.2 billion, Texas Counsel/CFA/CU recommended that no fund be established, and, as mentioned, ALTS called for a universal service fund of \$300 million.

cost to serve on average, are net payers of universal service contributions. *See id.* At the same time, BellSouth, the former GTE, and Sprint Local provide service in areas that generally have higher costs and therefore are usually net recipients of universal service support. *See id.* Thus, as the Commission found, “the divergent interests of these parties” provides a strong indication that the figure is reasonable. *Id.*

Furthermore, the \$650 million fund is only an interim estimate – “a necessary first step to remove implicit support from our interstate access charge regime” – with a more final determination to be made before the end of the five-year plan. *See* Order ¶ 203. The use of some interim fund size has proven essential, as, due to regulatory distortions, it is extraordinarily difficult to finalize the size of the fund in a vacuum. Indeed, current Commission deliberations have consumed over four years without even an initial resolution. There can be no question that the \$650 million figure is reasonable for the limited purpose of establishing an interim measure.⁵

II. THE COMMISSION ACTED PROPERLY IN ABSTAINING FROM REACHING THE PAYPHONE ISSUES RAISED BY ONE CALL

One Call claims that the Commission acted arbitrarily and capriciously in refusing to reach issues unique to the pay telephone industry – specifically, whether the PICC and SLC should be eliminated for pay telephone lines or whether the PICC presently assessed on pay telephone lines should be combined with the SLC and assessed directly on the

⁵ The \$650 million fund is also consistent with the Commission’s cost model. As stated in the Declaration of Joel Lubin, which was attached both to the CALLS initial Memorandum and the initial Reply Comments, the Commission’s high cost-proxy model supports the \$650 million estimate. Although some CALLS members do not endorse the cost model as a method for determining interstate access related universal service funding, it is another indicator that an interim \$650 million interstate access universal service fund is reasonable.

location provider. *See* One Call Recon. at 4. The Commission’s decision to abstain from reaching these issues was entirely proper. These issues, which are currently being considered in another proceeding,⁶ are, at best, only tangentially related to the CALLS proceeding. Indeed, One Call’s proposals cannot even be characterized as an extension of the CALLS plan, as the Commission expressly decided to maintain the multi-line business PICC (*see* Order ¶ 107). Moreover, it is hornbook law that agencies need not reach even clearly related issues in a single proceeding. *See, e.g.*, Report and Order, *Amendment of § 73.658(i) of the Commission’s Rules*, 5 FCC Rcd 7280, ¶ 6 (rel. Dec. 3, 1990) (“We believe that it is important not to disturb too many facets of the industry at the same time. We also recognize that our limited resources do not permit resolution of all questions at once.”). Accordingly, One Call’s petition should be denied.

III. CONTRARY TO PATHFINDER’S ASSERTIONS, THE COMMISSION’S ORDER IS THE PRODUCT OF OPEN AND ROBUST PUBLIC DEBATE AND IS ENTIRELY LAWFUL

Pathfinder claims that the Commission’s Order is the product of a secret “back-room deal” among CALLS members and thus, according to Pathfinder, violates various statutory requirements. *See* Pathfinder Recon. at 9-11. These claims are baseless.

⁶ *See* Public Notice, *Commission Seeks Comment on Specific Questions Related to Assessment of Presubscribed Interexchange Carrier Charges on Public Payphone Lines*, DA 98-845 (May 4, 1998).

A. The Commission’s Order Is The Product Of Open And Robust Public Debate

Contrary to Pathfinder’s assertions, there can be no question that the CALLS plan was subject to open and rigorous debate. The plan was subject to no less than four sets of formal public comments at the Commission, with more than 40 parties participating and submitting comments. Moreover, outside of this formal process, the Commission sought participation and input from the fullest array of sources. To facilitate a full vetting of its proposals, CALLS and its members voluntarily filed extensive supporting materials, including complete draft rules and economic analyses. The March 8 modifications to the initial CALLS proposal – a slower, primary residential SLC cap progression and large up-front access rate reductions, well in excess of those required under current rules – were a direct response to the comments and suggestions of public interest groups, end users, state commissions, and Commission staff. In short, this proceeding involved an unprecedented level of public participation.

The fact that the CALLS plan originally stemmed from compromise discussions – which were then followed by extensive public comment and Commission deliberations – in no way alters this conclusion. To the contrary, as the Commission found, “[t]he fact that the resolution of these issues was achieved through a joint proposal among a cross-section of LECs and IXCs provides us with some indication that the proposal is within a zone of reasonableness. We believe the parties have negotiated with each other in good faith and fashioned a reasonable compromise that both addresses their competing interests and serves the broader public interest.” Order ¶ 48. Indeed, numerous entities that are independent of CALLS and its members – competitors, consumer groups, and regulators – supported the CALLS plan as in the public interest. *See id.*

Nor is there any merit to Pathfinder's assertions that CALLS and Commission staff engaged in improper secret meetings or agreed to tie the outcome of this proceeding to issues raised in other dockets. *See* Pathfinder Recon. at 11. While CALLS, along with numerous other proponents and opponents of the plan, participated in *ex parte* presentations before Commissioners and Commission staff, these meetings are fully consistent with the Commission's rules governing permit-but-disclose rulemaking proceedings. *See* 47 C.F.R. § 1.1206. Pathfinder does not identify a single instance in which these rules were not followed.

Furthermore, concerning the issues raised in other dockets that Pathfinder alleges CALLS improperly linked to this proceeding – issues involving a depreciation waiver item and special access reform – the CALLS Coalition has made plain that it believes those issues should be resolved on their merits in the context of their respective proceedings. *See* CALLS Further Reply Comments at 53-54. Indeed, individual CALLS members took strong, opposing positions on the record in those dockets.⁷ Accordingly, as Chairman Kennard has stated, the Commission should “reject . . . [the] suggestion that the CALLS proceedings have improperly tainted” other proceedings. Supplemental Order Clarification, *Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (rel. June 2, 2000) (Separate Statement Of Chairman William E. Kennard).

⁷ *See* Fourth Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Comments of Sprint Corporation (filed January 19, 2000); Comments of AT&T Corp. (filed January 19, 2000); Comments of GTE (filed January 19, 2000); Comments of BellSouth (filed January 19, 2000); Comments of SBC (filed January 19, 2000).

B. The Commission Did Not Violate The Negotiated Rulemaking Act

Pathfinder also claims that the Commission violated the Negotiated Rulemaking Act, which allows an agency to establish a committee to facilitate negotiated rulemaking. This claim fails on its face.

The procedures of the Negotiated Rulemaking Act are *permissive*, as Congress enacted the Act to provide agencies *additional options* in rulemaking proceedings. The very first provision of the Act makes plain that the Act in no way limits or prohibits following different procedures, so long as those procedures are not otherwise unlawful: “Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.” 5 U.S.C. § 561. Moreover, each of the Act’s relevant provisions are explicitly permissive. *See, e.g.*, 5 U.S.C. § 563(a) (“An agency *may* establish a negotiated rulemaking committee”) (emphasis added); *id.* § 563(b) (An agency *may* use the services of a convener. . . .”) (emphasis added). Pathfinder fails to cite even a single authority for the proposition that the Negotiated Rulemaking Act’s provisions are mandatory, and CALLS is unaware of any. Accordingly, the Commission could not have violated the Negotiated Rulemaking Act.⁸

C. The Commission Did Not Violate The Regulatory Flexibility Act

Pathfinder’s claims that the Commission violated the Regulatory Flexibility Act are equally baseless.

⁸ Pathfinder also states that the Commission violated its own rules (*see* Pathfinder Recon. at 12), but provides no explanation of this claim. In fact, as discussed, the process in this proceeding met or exceeded all rulemaking requirements.

Pathfinder first asserts that, in concluding that it lacked sufficient data to make a precise estimate, the Commission undercounted affected small entities. *See* Pathfinder Recon. at 13. This assertion is simply wrong. Although the Commission determined that it could not precisely estimate how many of the 13 affected price cap LECs and 129 affected competitive access and competitive local exchange providers qualified as “small entities” under the Regulatory Flexibility Act (*see* Order ¶¶ 257-258), this determination caused no undercounting. The Commission assumed, for purposes of the Regulatory Flexibility Act, that virtually all of the effected entities qualified as small entities, stating simply that “fewer than 129 providers are of local exchange service are small entities or small competitive LECs” and, for price cap LECs, “four of which share common ownership,” that “significantly fewer than 13 providers . . . are estimated to be small entities.” *Id.* ¶ 257. Thus, there is no basis for Pathfinder’s claim that small entities were undercounted.

Pathfinder’s assertion (at 13) that the Commission concluded that only thirteen small companies would be affected by the Order completely misreads the Commission’s Order. The Commission concluded that, *of price cap LECs*, only 13 could potentially be small entities under the Regulatory Flexibility Act, because “there are currently only 13 price cap LECs.” Order ¶ 257. The Commission went on to state that up to “129 companies . . . engaged in the provision of either competitive access provider services or competitive local exchange carrier services” (*id.* ¶ 258) could also qualify as small businesses affected by the Order.

Pathfinder’s comparisons to estimates of affected small entities from other proceedings – the *Truth-in-billing and Billing Format* First Report and Order and the

Elimination of Part 41 Telephone and Telegraph Franks Notice of Proposed Rulemaking⁹ – are irrelevant here. Those proceedings addressed fundamentally different issues: billing rules that “apply to all telecommunications carriers, both wireline and wireless” (*Truth-in-billing and Billing Format* First Report and Order ¶ 13) and “the issuance of franks . . . and certain reports of ships at sea . . . by all common carriers subject to the Communications Act” (*Elimination of Part 41 Telephone and Telegraph Franks* Notice of Proposed Rulemaking ¶ 25). They thus say nothing about the numbers of affected small entities in this proceeding.

Nor can Pathfinder find aid in the comments of the Small Business Administration (“SBA”), as the SBA’s comments similarly miss their mark. Primarily, the SBA faults the Commission for failing to consider end users as affected small entities. But it is well settled that the only small entities relevant to the Regulatory Flexibility Act are those directly regulated by the agency; customers of regulated entities fall outside the Act’s scope. As the D.C. Circuit has stated, “An agency is under ‘no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate.’” *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 466 (D.C. Cir. 1998) (quoting *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). “Congress did not intend to require that every agency consider every indirect effect that any regulation

⁹ First Report and Order and Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, CC Docket No. 98-170 (rel. May 11, 1999); Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review, Elimination of Part 41 Telephone and Telegraph Franks*, CC Docket No. 98-119 (rel. June 21, 1998).

might have on small businesses in any stratum of the national economy.” *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).¹⁰

The SBA also criticizes the Commission for failing to single out resellers as affected small entities. As the SBA concedes, however, resellers are merely a subclass of CLECs, which the Commission explicitly took into account (*see* SBA Sept. 12, 2000 Ex Parte at 4-5). Contrary to the SBA’s suggestions, there is no requirement – statutory or otherwise – that an agency split affected classes of entities into each identifiable subclass. And, as a practical matter, there is no basis for the SBA’s claim that the Order will affect resellers in a fundamentally different manner than it will affect UNE-based and facilities-based CLECs.

Pathfinder’s challenge to the Commission’s consideration of alternatives for minimizing significant economic impact on small entities fails no better. Pathfinder claims that the Commission’s Order is unlawful in failing to consider explicitly each of the four alternatives described in 5 U.S.C. § 603(c). *See* Pathfinder Recon. at 16. In doing so, Pathfinder completely misreads the statute. Section 603(c) explicitly applies only to an “initial regulatory flexibility analysis” of a proposed rule, not the “final regulatory flexibility analysis” at issue here. Even for an initial regulatory flexibility

¹⁰ The SBA’s analysis of the impact of the Order on end users also contains numerous flaws. As just one example, the SBA reached its estimate of a \$44.40 annual per-line charge for universal service contributions (*see* SBA Sept. 12, 2000 Ex Parte at 6) by taking the \$650 million annual fund, dividing it by the estimated number of telephone lines (175 million), and then multiplying this number by 12. Since \$650 million is the amount to be collected annually – not monthly – multiplying the cost per line by 12 caused the SBA to grossly overstate the per-line cost. In fact, correcting for this error alone shows that businesses will pay less under the CALLS plan than under the status quo. Moreover, the SBA analysis double counts the cost of the \$650 million

analysis, the statute requires consideration of no specific alternatives; the four alternatives listed are merely *examples*: “Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, *such as* [the four enumerated alternatives].” 5 U.S.C. § 603(c) (emphasis added).

Regardless, the Commission’s Order makes plain that the Commission did consider numerous alternatives to the CALLS plan. For example, the Order discusses in detail proposals to combine the multi-line business PICC with the SLC (*see* Order ¶¶ 107-112), proposals to conduct a cost study to determine the SLC rate (*see id.* ¶ 84), different sized universal service funds (*see id.* ¶¶ 204-05), the incomplete alternative plan proposed by ALTS and Time Warner (*see id.* ¶ 43), and continuing in effect the existing access charge and universal service fund rule (*see id.* ¶ 260). As the Commission made clear, none of these alternatives “would lessen the significant economic impact on small entities while remaining consistent with this Order’s objectives.” *Id.* ¶ 260.¹¹

The SBA’s claim that the Commission was required to discuss each of these proposed alternatives in the final regulatory flexibility analysis, rather than in the body of the Order (*see* SBA Sept. 12, 2000 Ex Parte at 7-10), is baseless. The Commission discussed these alternatives in the body of the Order because they were among the most important issues the Commission addressed in this proceeding. The Commission then incorporated these discussions in the final regulatory flexibility analysis. *See* Order ¶ 60.

universal service support by failing to recognize that per minute and per line carrier-paid access charges are reduced to offset the \$650 million fund.

¹¹ *See* 5 U.S.C. § 604(a)(3) (requiring “a description of each of the significant alternatives to the rule consistent with the stated objectives and designed to minimize any significant economic impact on small entities.”).

The SBA's strange claim that these discussions should have been fully repeated in the final regulatory flexibility analysis has no basis in law or logic.

Finally, Pathfinder asserts that the Commission violated the Regulatory Flexibility Act by allegedly ignoring the comments of small entities. Nothing could be further from the truth. As an initial matter, the Act requires the Commission to address only those "issues raised by the public comments *in response to the initial regulatory flexibility analysis* ["IFRA"]." 5 U.S.C. § 604(a)(2) (emphasis added). The Commission went above and beyond this requirement, noting that it "received no comments addressing the IFRA" but *choosing* to summarize "general small-business-related comments." Order ¶ 254; *see also id.* ¶¶ 260-262.¹²

Moreover, the Commission fully and explicitly addressed the significant comments of small entities:

Several commenters, while not directly responding to our IRFA, did raise general small-business-related concerns. Commenters concerned about protecting smaller IXCs in competition with large IXCs request that the CALLS Proposal require a proportionate share of the agreed upon local switching rate reductions to come from tandem-switched rates. This Order explains, however, that 1) competition in the long-distance market eliminates the need for rules protecting smaller IXCs, and 2) even if price cap LECs target their access rate reductions only to direct-trunked transport, these reductions should make direct-trunked transport an affordable alternative for smaller IXCs. Other commenters argue that the CALLS Proposal should have a separate X-factor for mid-size price cap incumbent LECs because these carriers are not able to achieve the same levels of productivity growth as larger LECs. As this Order explains,

¹² Given that the Regulatory Flexibility Act requires the final regulatory flexibility analysis to address only those "issues raised by the public comments in response to the initial regulatory flexibility analysis" (5 U.S.C. § 604(a)(2)), the SBA's suggestion that the Commission was required to explicitly discuss, in the final regulatory flexibility analysis, "all significant issues raised by public comment" (SBA Sept. 12, 2000 Ex Parte at 3) is simply wrong. In any case, the Commission addressed, elsewhere in the Order, all of the comments the SBA claims were significant.

however, the X-factor adopted under the CALLS Proposal is not a productivity offset, but is merely a method to reduce traffic sensitive charges to the proposal's target level.

Order ¶ 261 (footnotes omitted). In addition, the Commission specifically responded to Pathfinder's comments, explaining that it considered Pathfinder's argument "that the multi-line business PICC . . . should be . . . eliminated," but determined "that the restructuring of the multi-line business PICC proposed in the CALLS Proposal is the better approach at this time." *See* Order ¶ 105 & n.192.

Not only did the Commission respond to the comments of small entities, it made several accommodations for them. The Order allows a higher target access rate for smaller and rural price cap LECs. The Order also allows mid-size price cap carriers with at least 20 percent of total holding company lines serving statutorily rural areas to pool their access charge reductions and to temporarily recover them from sources other than residential end users and per-minute charges. *Id.* ¶262 (footnotes omitted). Accordingly, there is no basis whatsoever for Pathfinder's claims, and its petition should be denied.

IV. CONCLUSION

For the foregoing reasons, the petitions for reconsideration filed by ALTS, Focal, One Call, and Pathfinder should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2000, I caused to be served a true and correct copy of the foregoing Opposition of the Coalition for Affordable Local and Long Distance Service (“CALLS”) to Petition for Reconsideration by first class U.S. mail, postage pre-paid, to:

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