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October 24, 2000

EX PARTE – Via Electronic Filing

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

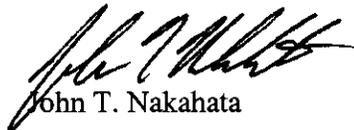
Re: Coalition for Affordable Local and Long Distance Service Proposal  
CC Dockets 96-262, 94-1, 96-45, 99-249

Dear Ms. Salas:

The attached letter was sent to Chairman Kennard today.

In accordance with the rules, a copy of this letter is being filed electronically in the above-captioned dockets.

Sincerely,



John T. Nakahata

*Counsel to the Coalition for Affordable Local  
and Long Distance Service*

JTN/krs

Attachment

cc: Ms. Anna Gomez, Legal Advisor to the Chairman  
Mr. Kyle Dixon, Legal Advisor to Commissioner Powell  
Ms. Sarah Whitesell, Legal Advisor to Commissioner Tristani  
Mr. Jordan Goldstein, Legal Advisor to Commissioner Ness  
Ms. Rebecca Beynon, Legal Advisor to Commissioner Furchtgott-Roth  
Ms. Dorothy Attwood, Chief, Common Carrier Bureau  
Ms. Carol Matthey, Deputy Chief, Common Carrier Bureau  
Ms. Jane Jackson, Chief, Competitive Pricing Division, Common Carrier Bureau  
Mr. Rich Lerner, Deputy Chief, Competitive Pricing Division, Common Carrier Bureau  
Mr. C. Anthony Bush, Acting Director, OCBO  
Mr. Eric Menge, Office of Advocacy, SBA



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ATTORNEYS AT LAW

October 24, 2000

Mr. William E. Kennard  
Chairman  
Federal Communications Commission  
Room 8-B201H  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Dear Chairman Kennard:

The Coalition for Affordable Local and Long Distance Service (“CALLS”) submits this letter in response to the letter of the Small Business Administration (“SBA”) dated September 12, 2000, as modified by SBA’s errata filed October 5, 2000. In its letter, SBA asserts that the Commission’s Order adopting the CALLS Plan<sup>1</sup> contains a flawed final regulatory flexibility analysis (“FRFA”) in violation of the Regulatory Flexibility Act (“RFA” or “Act”). CALLS submits this letter because SBA has misinterpreted the Commission’s Order as well as the requirements of the RFA. In addition, the relief SBA seeks runs directly counter to what SBA’s goals appear to be. That is, a stay of the Commission’s Order would only increase costs for small businesses, by delaying reduction of the multiline business PICC charges and postponing the increase of targeted universal service support to businesses (and residences) in rural areas, and by limiting the substantial reductions in long distance access charges which result in lower long distance bills for business customers.

**I. SBA Misstates The Impact of the Order on Small Businesses.**

As a preliminary matter, SBA’s description of the impact of the Order is fundamentally flawed and misleading. Not only does SBA err in claiming that end users of telecommunications services should have been identified as “small entities to which the rule will apply” (5 U.S.C. § 604(a)(3)) – an issue addressed below – but SBA’s analysis of the Order’s effect on end users contains numerous,

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<sup>1</sup> 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” or “Sixth Report and Order”).

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egregious errors, even after SBA's purported errata.<sup>2</sup> When corrected for these errors, SBA's own analysis demonstrates that the effects of the Sixth Report and Order will in fact benefit small businesses.

To begin with, SBA errs by assuming that all end users are charged rates at the nominal SLC caps. Under the Sixth Report and Order, SLCs are capped based upon CMT revenue per line, unless CMT revenue per line exceeds the nominal caps. Thus, even at full implementation, the nationwide average for single line business SLCs and multiline business SLCs will not reach the nominal caps. To the contrary, the Commission projected that, at full implementation in July 2004, the nationwide average primary residence and single line business SLC would be \$5.83 per month – not the \$6.50 per month claimed by SBA. *See* Order ¶ 79.

In addition, SBA inexplicably includes a multiline business PICC of \$4.31 per month for both year 2000 and year 2004. In fact, incumbent LEC tariffs filed June 15, 2000, for effect July 1, 2000, showed a nationwide average multiline business PICC of \$2.35.<sup>3</sup> This number will only get lower as the cap for primary residence and single line business SLCs increases and the multiline business PICCs decrease under the effects of the Order. Indeed, the FCC's Industry Analysis Division estimated that the multiline business PICC *plus* the multiline business SLC would be \$6.32 at full implementation, which is lower than the pre-Sixth Report and Order level for the multiline business SLC alone.<sup>4</sup>

SBA also understates the full impact of the elimination of the primary residence and single line business retail PICC charge. As the FCC noted, AT&T, WorldCom, and Sprint had been charging residential customers \$1.51, \$1.46 and \$1.50 per account per month, respectively, as the retail PICC recovery fee. *See* Order ¶ 78. Elimination of these charges will “result in a further reduction of the overall amount many customers currently pay for their individual SLCs and PICCs.” *Id.*

SBA goes on to mischaracterize the ILEC universal service fee, wrongly asserting that this fee is used solely to recover the \$650 million Interstate Access Universal Service Fund created in the Sixth Report and Order. In fact, this fee recovers incumbent LEC contributions to all federal universal service programs, not just the Access Universal Service Fund. The fee is in great part not a result of the Sixth Report and Order, but instead merely implements an option given to incumbent LECs by the Fifth Circuit's ruling in *Texas Office of Public Utility Counsel v. FCC*, which allows incumbent LECs to recover universal service contributions through end user charges. Because incumbent LECs have authority to implement this universal service fee under previous rules, it cannot properly be considered part of the impact of the *Sixth Report and Order*. The ILECs are now recovering their contributions for all of the universal service programs in the same manner as other telecommunications carriers.

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<sup>2</sup> In its errata, SBA corrected an arithmetic error that led to an estimate of a \$44.40 annual per-line charge to end users for universal service contributions (*see* SBA Sept. 12, 2000 Ex Parte at 6; SBA October 5, 2000 Errata). SBA states in its errata that according to its methodology (which itself is flawed), the correct number was \$3.71. This was, however, only one of many errors in SBA's analysis, and SBA does not modify its conclusions in light of this correction.

<sup>3</sup> Although price cap incumbent LECs subsequently filed revised tariffs, the revised tariffs do not materially change this result.

<sup>4</sup> Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, *CALLS Analysis* at 30, Graph 22 (filed May 25, 2000) (“*CALLS Analysis*”).

Moreover, even using SBA's methodology for calculating the incremental universal service fee per line, SBA's calculation is flawed. It fails to include wireless "lines," which also contribute to universal service, as well as the additional universal service support provided under the Sixth Report and Order for Lifeline service. Correcting for these two errors – and assuming incremental additional Lifeline support of \$55 million<sup>5</sup> and wireless "lines" of 86,047,003<sup>6</sup> – the incremental universal service fee per "line" should be \$2.70 per year, or less than \$.23 per line per month.

SBA also fails to consider long distance bill reductions that will occur as access rates fall. The Ad Hoc Telecommunications Users Group previously submitted to the Commission a report demonstrating that mass market long distance rates for customers using more than \$50 in monthly long distance service have fallen in tandem with large company off-net/off-net rates as the FCC has successively reformed access charges.<sup>7</sup> While the magnitude of these savings depends upon a particular business' long distance usage, the FCC's Industry Analysis Division's study shows that even a business using only as much long distance as the average residence will save an additional \$35.16 per year as a result of the Sixth Report and Order.<sup>8</sup> This study also shows that per minute access costs to long distance carriers are immediately 22% less than the base case and 31% less in July 2001. The average interstate and international access cost will be less than one cent as of July 2001.<sup>9</sup>

Finally, SBA ignores the fact that by creating a more rational rate structure, the *Sixth Report and Order* will increase the likelihood that facilities-based competition will put pressure on mass market telephone rates. This effect cannot be quantified, but is an important benefit nonetheless.

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<sup>5</sup> See *Modified Universal Service and Access Reform Proposal*, n. 4, filed as Appendix A to the Memorandum in Support of the Revised Plan of the Coalition for Affordable Local and Long Distance Service (filed March 8, 2000).

<sup>6</sup> See <<http://www.wow-com.com/statsurv/survey/199912c.cfm>> (wireless subscribership as of December 1999).

<sup>7</sup> See Letter of James S. Blaszak to Magalie Roman Salas and attached report (filed Feb. 25, 2000), CC Dockets 94-1 & 96-262.

<sup>8</sup> The Industry Analysis Division projects that an average single line residential consumer will save \$35.16 per year (\$2.93 per month) in interstate long distance charges. *CALLS Analysis* Appendix C at 1.

<sup>9</sup> Graph 7 of FCC's IAD report.

Even when corrected for only some of these egregious errors, SBA's analysis changes substantially. Even using SBA's Universal Service Fund methodology (corrected to reflect incremental Lifeline support and wireless "lines"), and excluding long distance savings and competition savings, a more accurate analysis would have been as follows:

	Charges on End Users Before Order for year 2000	Charges on End Users After Order for year 2000	Charges on End Users After Order for year 2004
<b>Single Line Business (all small business)</b>			
SLC	\$42.00	\$52.20	\$69.96
PICC (retail ~\$1.50)	18.00	0.00	0.00
Universal Service Charge	0.00	2.70	2.70
<b>Total (excluding LD savings)</b>	<b>\$60.00</b>	<b>\$54.90</b>	<b>\$72.66</b>
<b>Multiline Business (both large and small businesses)</b>			
SLC	\$83.76	\$79.44	
PICC	31.20	28.20	\$75.84
Universal Service Charge	0.00	2.70	2.70
<b>Total (excluding LD savings)</b>	<b>\$114.96</b>	<b>\$110.34</b>	<b>\$78.54</b>

It is clear from this chart that after the Sixth Report and Order, telephone bills for small businesses are falling, not rising. Furthermore, when long distance savings are factored in, single line businesses are also likely to see immediate reductions in their bills under the Sixth Report and Order. Accordingly, there is no basis for SBA's claims that the Sixth Report and Order negatively impacts small businesses.

**II. In Addressing Comments Concerning Small Entities, The Commission Went Above And Beyond The RFA's Requirements.**

SBA similarly misstates the requirements of the RFA. Primarily, SBA claims that the Order's FRFA is deficient in failing to address "all significant issues raised by public comment." See SBA Sept. 12, 2000 Ex Parte at 3. However, that is not what the Act requires. The Act requires only that the Commission address 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. Among other things, the Commission stated:

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, 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).

Not only did the Commission respond to small-entity-related comments, it made several accommodations specifically for small entities. 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).

Additionally, the Commission's Order *fully addressed all of the other issues that SBA asserts are significant*. SBA's only complaint is that these issues were discussed in the body of the Order rather than in the FRFA. *See* SBA Sept. 12, 2000 Ex Parte at 3. However, the Commission discussed these issues in the body of the Order because they were among the most important issues the Commission addressed in this proceeding. SBA's claim that such discussions should have been fully repeated in the FRFA has no basis in law.

### **III. The Commission Accurately Identified Small Entities "To Which The Rule Will Apply."**

SBA's challenge to the Commission's description of "the number of small entities to which the rule will apply" (5 U.S.C. § 604(a)(3)) is equally flawed. SBA faults the Commission for failing to identify end users. But it is well settled that the only small entities "to which the rule will apply" are those directly regulated by the agency; customers of regulated entities fall outside the provision'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 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).

SBA also criticizes the Commission for failing to single out resellers as small entities. As 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 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 SBA's claim that the Order will affect resellers in a fundamentally different manner than it will affect UNE-based and facilities-based CLECs.

Similarly, SBA's challenge to the Commission's failure to separately identify small IXCs is baseless. Small IXCs will be affected no differently than larger IXCs, and the Commission's Order deals extensively with the impact on IXCs. There is thus no merit to SBA's assertions.

**IV. The Commission Fully Discussed "Alternatives . . . Which Affect The Impact On Small Entities."**

SBA also claims that the Commission "failed to consider . . . many of the significant alternatives proposed by participants in the rulemaking." SBA Sept. 12, 2000 Ex Parte at 7. There is no truth to this claim.

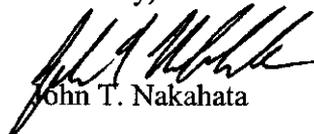
The Commission's Order makes plain that the Commission considered each of the alternatives that SBA asserts are significant. *See* SBA Sept. 12, 2000 Ex Parte at 8. For example, the Order discusses, in detail, proposals to combine the multiline business PCCC with the SLC (*see* Order ¶¶ 107-112), proposals 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.<sup>10</sup>

SBA's complaint thus again amounts to nothing more than an issue of presentation; SBA believes that the Commission was required to discuss each of the proposed alternatives in the FRFA, rather than in the body of the Order (*see* SBA Sept. 12, 2000 Ex Parte at 7-10). However, as explained above, there is no requirement that such discussions – which the FRFA incorporated by reference (*see* Order ¶ 60) – must be fully reproduced in the FRFA. Accordingly, the Commission should reject SBA's criticism.

**V. A Stay Would Only Harm The Interests SBA Seeks To Protect.**

Finally, regardless of the merits of SBA's criticism of the Sixth Report and Order's FRFA, the relief SBA seeks – a stay of the Order – would only harm the interests SBA seeks to protect. As discussed above, the Sixth Report and Order has brought immediate and substantial savings to small businesses, and it will continue to do so. A stay of the Order would delay or reverse these benefits, increasing small businesses' costs.

Sincerely,



John T. Nakahata

*Counsel to the Coalition for Affordable Local  
and Long Distance Service (CALLS)*

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<sup>10</sup> *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.").