

**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)	

INITIAL COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

The Illinois Commerce Commission (“ICC”) hereby respectfully submits these Initial Comments in response to the Commission’s Further Notice of Proposed Rulemaking (“Further Notice”) released on January 12, 2001, which seeks comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (“Joint Board”) regarding a plan for reforming the Federal rural universal service support mechanism.¹ The ICC recommends that the Commission decline to adopt the Joint Board’s recommendation for reforming the Federal rural universal service support mechanism at this time for two reasons. First, the plan’s proponents have failed to show that the proposed reforms will not produce excessive Federal rural universal service funding. If excessive funding occurs, recipient carriers will have an incentive to engage in inefficient behavior and to utilize the funds for purposes other than those intended by section 254 of the Telecommunications Act of 1996 (“TA96”). Plus, excessive funding places an unnecessary monetary burden on contributing carriers and, ultimately, end users. Second, although the ICC

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 01-8 (rel. Jan. 12, 2001)(“FNPRM”).

supports the policy goal of consumers in all areas of the nation having access to advanced telecommunications and information services, the ICC does not believe that these services should be funded in rural areas through Federal universal service mechanisms at this time. In fact, it has not been shown that funding the deployment of these services in rural areas through increased universal service support at this time is consistent with the plain language and purpose of section 254 of the Telecommunications Act of 1996. Instead of prematurely requiring such funding, the Commission should rely on the marketplace to promote the deployment of advanced telecommunications and information services in rural areas at this time.

BACKGROUND

On September 17, 1997, the Joint Board appointed a Rural Task Force (“RTF”) to provide the Joint Board with a report that makes specific recommendations for the reformation of the Federal rural universal service support mechanism pursuant to TA96.² On September 29, 2000, the RTF submitted its report to the Joint Board entitled the *Rural Task Force Recommendation To The Federal-State Joint Board on Universal Service* (“RTF Recommendation”).³ In particular, the RTF Recommendation is a proposal for the distribution of Federal universal service support to rural carriers which is designed for immediate implementation and for continued application over a five-year period. The RTF recommended that its proposal be adopted on an integrated basis.⁴

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 00J-4 at ¶6 (rel. Dec. 22, 2000)(“Recommended Decision”).

³ *Id.*

⁴ *RTF Recommendation* at 3.

On October 4, 2000, the Joint Board released a Public Notice that sought comment on the RTF Recommendation.⁵ The ICC, along with the State commissions of New York, Connecticut and Maryland, submitted Comments in response to the Joint Board's Public Notice that recommended the Joint Board's rejection of the RTF Recommendation.⁶ These State Commissions noted that the RTF Recommendation had not been shown to produce sufficient, and only sufficient, Federal rural universal service support and that the Recommendation would prematurely provide significant additional funding to deploy advanced telecommunications and information services in rural areas without any showing that the statutory requirements for providing such funding were satisfied.

Nonetheless, on December 22, 2000, the Joint Board forwarded to the Commission the RTF Recommendation as a "good foundation" for reforming the Federal rural universal service support mechanism.⁷ Now, the Commission is seeking comment on whether the RTF proposal is a good foundation for reforming the Federal rural universal service support mechanism. The ICC continues to oppose the Commission's adoption of the RTF proposal for two reasons. First, the plan's proponents have continued to fail to demonstrate that the proposal will not produce excessive funding. Second, the provisioning of support to deploy advanced telecommunications and information services in rural areas is not consistent with the plain language and purpose of section 254 of TA96.

⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Public Notice, FCC 00J-3 (rel. Oct. 4, 2000).

⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Comments of the New York State Department of Public Service, Connecticut Department of Public Utility Control, Illinois Commerce Commission, and Maryland Public Service Commission (Nov. 3, 2000).

⁷ Recommended Decision at ¶2.

DISCUSSION

I. THE COMMISSION SHOULD NOT ADOPT THE RTF RECOMMENDATION BECAUSE THE RTF RECOMMENDATION IS LIKELY TO PRODUCE EXCESSIVE FEDERAL RURAL UNIVERSAL SERVICE FUNDING.

The purpose of section 254 is to establish mechanisms to provide funding for carriers to utilize “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁸ Section 254 of TA96 requires the Commission to adopt a Federal universal service support mechanism that is designed to provide a level of funding that is “sufficient” to achieve this purpose.⁹ Previously, when interpreting section 254’s sufficiency requirement and while recognizing that the term “sufficient” requires that any funding mechanism produce enough support to achieve the purposes of section 254, the Commission held that support is “not to be any larger than is necessary to achieve the various goals of section 254.”¹⁰

In the First Report and Order on Universal Service, the Commission advanced three reasons that support the Commission’s interpretation of section 254’s sufficiency requirement.¹¹ First, funding in excess of that required to fulfill the purposes of section 254 would unnecessarily and unreasonably increase the burden on all contributors to Federal universal service funding mechanisms. Second, the imposition of such an unnecessary monetary burden on fund contributors “would also unnecessarily reduce the demand for other telecommunications services” because the monetary burden would increase the cost to consumers of obtaining all telecommunications services. Third, excessive funding “would enable the carriers providing the supported services to use the excess to offset inefficient operations and for purposes other than

⁸ 47 U.S.C. §254(e)(emphasis added).

⁹ *See, Id.* at §254(b), (d), (e).

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306 at ¶59 (rel. Nov. 2, 1999)(“Ninth Report and Order”).

‘the provision, maintenance, and upgrading of facilities and services for which the support is intended.’”¹² In other words, the establishment of a universal service support fund that collects contributions from contributing carriers in excess of the amount necessary for supported carriers to provide, maintain and upgrade facilities and services for which the support is intended is contrary to the purpose and plain language section 254 of TA96.

In this case, the RTF Recommendation calls for a significant increase in the amount of current rural universal service support. The RTF Recommendation would obtain this increase through two means. First, the RTF Recommendation would expand the existing Federal high cost support mechanism by removing the effects of various caps previously placed on the fund.¹³ The removal of the existing caps, in total, would increase the rural funding mechanism by approximately \$132 million in the first year.¹⁴ This amount would then be allowed to grow annually in proportion to both line growth and inflation.¹⁵ Second, the RTF Recommendation would expand the existing Federal high cost support mechanism by allowing the rural fund to recover the following additional, previously unsupported costs:

- 1) the costs of catastrophic events;¹⁶
- 2) a portion of additional costs incurred when rural carriers’ plants in service grow by more than 14% annually;¹⁷ and

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report & Order, FCC 97-157 at ¶225 (rel. May 8, 1997)(“First Report & Order”).

¹² *Id.*

¹³ *RTF Recommendation* at 23-29.

¹⁴ *Id.* at 20 n.40, 24 n.46 (reporting that removing the cap on the HCL would increase the fund by approximately \$83.9, that the removal of the corporate operations expense limitation would increase the fund by \$34.6 million, and that the removal of the cap on acquired exchanges would increase the fund by \$12.8 million)(citing *Universal Service Fund 1999 Submission*, NECA (Oct. 1, 1999)).

¹⁵ *Id.* at 24-25.

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 26-27.

- 3) an undefined amount of additional funding for rural carriers' investments made after acquiring exchanges from other carriers.¹⁸

The RTF proposal does not provide any analysis or estimate of the increase to the Federal rural universal service support fund that would result from the inclusion of these additional costs that have traditionally been unsupported by Federal universal service.

The Commission should not adopt the RTF Recommendation to implement these significant increases to the size of the Federal rural universal service fund at this time because the record evidence does not support the recommended increases. The RTF has not provided any analysis or empirical evidence to support a Commission finding that the current level of rural funding is insufficient to support the provisioning, maintenance, and upgrading of facilities and services for which the support is intended. Without any analysis, the Commission cannot conclude that the additional levels of support will not produce significant excesses in rural universal service funding. To the extent that such excesses would result from the RTF recommendation, section 254's sufficiency requirement would be violated.

In addition, such excessive funding would be likely to produce all of the harms identified by the Commission in the First Report and Order. Specifically, excessive funding would impose unnecessary monetary obligations on contributing carriers, who can be expected to pass the costs of these contributions on to end users. As a result, the overall demand for telecommunications services would likely decline because the expense of the universal service funding would make core telecommunications services more expensive for all consumers. Also, providing excess funding is likely to give those carriers receiving the funds the incentive to engage in inefficient behavior and to use the funds for purposes other than those intended by Congress.

¹⁸ *Id.* at 29.

The RTF Recommendation urges the Commission to adopt increased funding to provide incentives for investment in advanced services capabilities.¹⁹ However, merely increasing the Federal rural universal service fund is not likely to actually provide such incentives. No part of the RTF Recommendation ties carriers' receipt of the excess funds to the carriers' use of the funds to upgrade the rural infrastructure. Accordingly, recipient carriers are likely to utilize the funds to support any number of alternative activities other than to fund investments to upgrade the rural infrastructure, as intended by the RTF. Specifically, while carriers would be able to receive funds to support a number of expenses, such as increased salaries or corporate expenses, carriers would not necessarily receive funds for undertaking upgrades to the network if the carriers' overall costs were relatively low.

Accordingly, the ICC requests that the Commission decline to adopt the RTF Recommendation until such time as sufficient evidence is provided to support a Commission finding that the increased funding is necessary to produce a "sufficient" Federal rural universal service support mechanism. In the absence of such a finding, it is likely that the funds will be used inefficiently and inappropriately, at significant costs to consumers. Only by requiring this factual showing will the Commission ensure that the Federal rural universal service fund provides recipient carriers with the proper incentives and is utilized in a manner consistent with Congressional intent.

¹⁹ *Id.* at 14-15, 21-23.

II. THE COMMISSION SHOULD NOT ADOPT THE RTF RECOMMENDATION TO EXPAND UNIVERSAL SERVICE FUNDING TO SUPPORT ADVANCED TELECOMMUNICATIONS AND INFORMATION SERVICES IN RURAL AREAS AT SERVICE LEVELS AND RATES EQUAL TO THOSE IN URBAN AREAS.

As stated above, the purpose of section 254 is to provide sufficient funding “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”²⁰ The services for which the support is intended constitute “universal service” and are established periodically by the Commission pursuant to subsection 254(c).²¹ Currently, the set of services established by the Commission to constitute universal service do not include access to advanced telecommunications and information services.²² The RTF Recommendation would expand the scope of the Federal rural universal service mechanism to fund these services in rural areas, as well as the likely significant infrastructure investments necessary to provide those services in rural areas, at service levels and rates equal to those in urban areas.²³ Although the ICC supports the policy goal of consumers in all areas of the United States having access to advanced telecommunications and information services, the ICC believes that the Commission should decline to adopt the RTF Recommendation that these services be funded in rural areas through Federal universal service mechanisms at this time. Instead of prematurely requiring such funding, the Commission should rely on the marketplace to promote the deployment of advanced telecommunications and information services in rural areas at this time.

²⁰ 47 U.S.C. §254(e).

²¹ *Id.* at §254(c).

²² *First Report and Order* at ¶56.

²³ *RTF Recommendation* at 21-23.

A. Subsection 254(b) Does Not Require that the Commission Fund Access to Advanced Telecommunications and Information Services in Rural Areas.

The RTF urges the Commission to include advanced telecommunications and information services in the set of services covered by the Federal rural universal service fund by arguing that section 254 *requires* that the Commission include these services for funding in rural areas.²⁴ To advance this argument, the RTF relies on subsections 254(b)(2) and (b)(3), which provide as follows:

Universal Service Principles. - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

...

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

47 U.S.C. §254(b)(2), (3)(emphasis added).

The Commission should reject the RTF's construction that subsections 254(b)(2) and (b)(3) impose a *requirement* that the Commission fund through universal service mechanisms access to advanced telecommunications and information services in rural areas. Congressional intent controls the determination of whether statutory language is directory or mandatory. In this case, Congress' intent that subsections 254(b)(2) and (b)(3) be directory rather than mandatory is clear for two reasons. First, Congress used the term "should," which is directory in nature, rather

than the term “shall,” which is mandatory in nature, to describe the nature of the Congressional direction in both subsections. Second, a statutory inconsistency would exist if the language of subsections 254(b)(2) and (b)(3) imposed mandatory requirements on the Commission. Pursuant to subsection 254(c), the Commission is to determine the set of services that are to be funded by Federal universal service mechanisms after considering certain, enumerated guidelines.²⁵ It would be inconsistent for Congress to mandate the support of specific services while, at the same time, providing the Commission with the authority to establish the set of services that are to be given support within the constraints of the enumerated guidelines. The only construction that avoids such an internal inconsistency is a construction that the principles enumerated in subsection 254(b) are directory. Indeed, such a construction has been made by the United States Court of Appeals for the Fifth Circuit, which has directly stated that the principles enumerated in subsection 254(b) are not “specific statutory commands.”²⁶

B. The RTF Has Not Shown that Advanced Telecommunications and Information Services Satisfy the Congressional Guidelines for Support Enunciated in Subsection 254(c).

Subsection 254(c) makes clear that the Federal universal service support mechanisms are only to be used to fund those services that the Commission determines to fall within the parameters of the Congressionally enumerated guidelines.²⁷ Clearly, requiring services to satisfy the enumerated guidelines places a limit on the number of services that will be funded through Federal universal service mechanisms. Such a limit implies a Congressional balancing act.

²⁴ *Id.* at 21-22 (stating that “[t]he provision of access to advanced services is required under Section 254(b) and is separate and distinct from the actual provision of advanced services when and if they have been added to the supported services defined periodically by the FCC under Section 254(c)”).

²⁵ 47 U.S.C. §254(c).

²⁶ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*.

²⁷ 47 U.S.C. §254(c).

Funding the Federal universal service mechanisms requires monetary contributions²⁸ that are likely to be passed on to end users. Congress placed a limit on the size of the monetary contributions that will be required to fund the Federal universal service support mechanisms by limiting the set of services that will be entitled to support. The guidelines that Congress enacted in subsection 254(c) serve to accomplish the Congressional objective of limiting the set of services that qualify for support. The Commission directly recognized the underlying rationale that supports the need to engage in this Congressionally mandated balancing act in the First Report and Order when the Commission stated as follows: “[W]e are concerned that supporting an overly expansive definition of core services could adversely affect all consumers by increasing the expense of the universal service program and, thus, increasing the basic cost of telecommunications services for all.”²⁹

While advanced telecommunications and information services may eventually satisfy all of the criteria necessary to qualify for support, at this time evidence has not been produced to support a finding that these services satisfy subsection 254(c)’s criteria for funding. In particular, subsection 254(c)(1)(B) provides that supported services should “have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.”³⁰ This criteria indicates that the set of telecommunications services supported by Federal universal service mechanisms will evolve in relation to the extent that given services become standard residential services throughout the nation. Although the provisioning of advanced telecommunications and information services is progressing, no evidence has been provided that these services are currently subscribed to by a substantial majority of residential

²⁸ 47 U.S.C. §254(d).

²⁹ *First Report and Order* at ¶64.

³⁰ 47 U.S.C. §254(c)(1)(B).

customers. For example, subscribership levels to xDSL services, a popular form of advanced services, has just passed the two million mark, that is less than 2 % of end-user lines in the country.³¹

The flaw in the RTF reasoning in this regard is highlighted by the evidence relied upon by the RTF to support funding of access to information services at a rate of 28.8 kilobits per second.³² The RTF cites to Comments recently filed by the Rural Utilities Service (“RUS”) to support a request for the Commission to redefine “voice grade access” to include a bandwidth capable of supporting access to the internet at a speed of 28.8 kilobits per second for purposes of Federal universal service. In particular, the RTF notes the RUS’ assertion that “[a]bout two-thirds of urban customers are in areas served by plant capable of receiving these services at a rate of at least 28.8 kilobits per second.”³³ While such a statement would support a finding that the deployment of advanced telecommunications and information services is progressing pursuant to market forces, the statement would not support a finding that a substantial majority of residential consumers currently subscribe to services that allow access to the internet at a rate of 28.8 kilobits per second. Accordingly, this information would not support a Commission finding that the criteria for Federal universal service funding is satisfied for advanced telecommunications and information services.

³¹ TeleChoice fourth quarter 2000 survey data.

³² *RTF Recommendation* at 23.

³³ *Id.* (citing *In The Matter of Requests to Redefine “Voice Grade Access” For Purposes of Federal Universal Service Support*, CC Docket No. 96-45, Comments of the Rural Utilities Service (filed Jan. 19, 2000)).

C. Even if Advanced Telecommunications and Information Services Satisfied the Congressional Criteria for Federal Universal Service Funding, Subsection 254(b) Evidences a Congressional Purpose to Only Fund Such Services in Rural Areas at Service Levels and Rates that Are Reasonably Comparable to Those in Urban Areas.

As noted above, subsection 254(b) does not impose mandatory requirements. However, the principles enumerated therein are directory and should be considered by the Commission in determining at what levels and rates services that constitute core universal services should be supported. In the case of establishing funding for rural areas, subsection 254(b)(3) provides that advanced telecommunications and information services should only be funded at *reasonably comparable* service levels and *reasonably comparable* rates.³⁴

Although the clear statutory standard for funding these services in rural areas is reasonable comparability, the RTF Recommendation consistently proposes that the Commission require such services to be funded at “comparable” levels. For example, when discussing the level of access to Information Services that should be supported, the RTF states that “for this access to be comparable to urban areas, it should be at a bit rate equal to that received by urban customers.”³⁵ In other words, the RTF Recommendation appears to remove the standard of “reasonable comparability” and insert a standard of equality. The Commission must decline to substitute a standard of equality for the clear statutory standard of reasonable comparability.

Pursuant to the reasonable comparability standard, the Commission should consider the costs that would be incurred if the Commission were to adopt the RTF Recommendation to fund the development of a plant architecture in rural areas that would support 28.8 kilobits per second modem access. As recently explained by the ICC in Comments in the Voice Grade Access Proceeding, while access to information services can occur over the frequency range that

currently supports voice grade access, significant upgrades would need to be made to the rural network to support access to information services at speeds of 28.8 kilobits per second.³⁶ Copper loops are generally longer than 18,000 feet in rural areas because many customers are located more than 18,000 feet from serving wire centers in rural areas, a characteristic that does not hold true for most urban areas. As a result, copper telecommunications loops that serve rural subscribers are generally longer than 18,000 feet. Since the capability of loops to carry voice transmissions declines when loops exceed 18,000 feet, rural loops typically have devices attached to improve voice transmission capability. These devices include load coils, bridge taps, low-pass filters and range extenders.

Unfortunately, these devices have the adverse effect of restricting the capability of loops to carry data transmissions at the speeds recommended by the RTF because the devices decrease bandwidth capacity. Therefore, significant upgrades to the network infrastructure would need to be made in rural areas to provide advanced telecommunications and information services at the service levels that the RTF recommends. The necessary upgrades to the rural network could be accomplished either by removing the devices that are designed to improve voice capability or by replacing the existing plant facilities with large gauge wire, coax or fiber optics. Clearly, the cost of undertaking either of these activities would be extremely high. Further, if the upgrades are accomplished through the removal of the devices that are designed to improve voice capability, then the quality of voice transmissions in rural areas is going to decline.

The substantial costs that would be imposed to upgrade the current rural network would have two effects on the Federal rural universal service support mechanism. First, as explained

³⁴ 47 U.S.C. §254

³⁵ *RTF Recommendation* at 23.

above, universal service mechanisms are supported by contributions from telecommunications carriers,³⁷ which will likely be passed on to end-users. The increased cost of providing support for advanced telecommunications and information services in rural areas would place greater obligations on top of already significant universal service obligations imposed on contributing telecommunications carriers and, ultimately, on end users in net contributing states.

Second, carriers have an obligation to provide all of the services that comprise universal service in order to receive support.³⁸ Many rural carriers would need to either incur the costs of upgrading their networks or forgo support. A choice to forgo support would inhibit the achievement of one of section 254's goals which is to provide sufficient support such that the core set of services defined by the Commission as universal service are available at just, reasonable and affordable rates.³⁹ Also, such a choice could result in a barrier to other carriers serving the rural market and, as a result, could inhibit the development of a competitive market.

Considering these substantial costs, the principle of reasonable comparability indicates that the Commission should not fund advanced telecommunications and information service in rural areas through Federal universal service support mechanisms at this time. Instead, as an alternative, the Commission could rely on the marketplace to promote the deployment of these services in rural areas. The ICC notes that the level and speed of technological change in the telecommunications industry has been remarkable and appears to be increasing. The marketplace has driven this change. If consumer demand for advanced telecommunications and information services in rural areas exists, then such demand should encourage new and existing carriers to

³⁶ *In The Matter of Requests to Redefine "Voice Grade Access" For Purposes of Federal Universal Service Support*, CC Docket No. 96-45, Comments of the Illinois Commerce Commission (filed Jan. 19, 2000).

³⁷ 47 U.S.C. §254(d).

³⁸ *Id.* at §214(e)(1)(A).

³⁹ *Id.* at §254(b)(1).

devise new ways to provide these services at market supportable costs rather than through universal service. Contrarily, the RTF Recommendation is not technology neutral. Under the RTF Recommendation, the entrance of carriers using alternate technologies such as fixed wireless and satellite would be substantially hindered because the ILECs' receipt of universal service funding would subsidize the ILECs' provisioning of advanced telecommunications and information services, thereby placing any new competitors deploying alternative technologies to provide these services at a substantial competitive disadvantage.

CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission decline to adopt the recommendations of the Rural Task Force and Federal-State Joint Board on Universal Service for reform of the Federal rural universal service support mechanism, and for any and all other appropriate relief.

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Respectfully submitted,

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