

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

In the Matter of)	
)	
Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers)	CC Docket No. 00-256
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation)	CC Docket No. 98-77
)	
Prescribing the Authorized Rate of Return For Interstate Services of Local Exchange Carriers)	CC Docket No. 98-166
)	

**REPLY COMMENTS OF
THE STATE OF HAWAII**

The State of Hawaii (the “State”),¹ by its attorneys, hereby submits reply comments on the Commission’s Notice of Proposed Rulemaking (“*NPRM*”), regarding the Petition for Rulemaking submitted by the Multi-Association Group (“MAG Petition”).² As noted in the *NPRM*, the MAG Petition proposes an interstate access reform and universal service support structure for incumbent local exchange carriers (“LECs”) subject to rate-of-return regulation.³ The MAG plan

¹ These comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

² *Petition for Rulemaking of the LEC Multi-Association Group*, RM No. 10011 (Oct. 20, 2000) (“MAG Petition”).

³ See *NPRM*, ¶ 1.

includes provisions to ensure rate and service comparability in urban and rural areas pursuant to the rate integration and geographic averaging requirements of Section 254(g) of the Communications Act.⁴ One of these provisions obligates interexchange carriers (“IXCs”) to offer consumers in rural and urban areas the same optional calling plans.⁵

The State submits reply comments in this proceeding for the sole purpose of bringing to the Commission’s attention the fact that IXCs are *already* subject to a statutory and regulatory obligation to offer consumers in rural and urban areas the same optional calling plans. This obligation is inherent in the geographic averaging and rate integration requirements of Section 254(g). Furthermore, the Commission did not waive this obligation when it decided in August 1996 to forebear from applying the geographic averaging requirements of Section 254(g) to IXCs in certain very limited situations.⁶

Section 254(g) of the Communications Act includes two independent requirements. First, Section 254(g) directs the Commission to mandate geographic rate averaging by requiring IXCs to charge rates in rural areas that are no higher than the rates they charge in urban areas.⁷ Second, Section 254(g) directs the Commission to enforce rate integration by adopting rules that require IXCs to provide services to their subscribers in each State at rates no higher than the rates

⁴ See 47 U.S.C. § 254(g).

⁵ See *NPRM*, ¶ 13.

⁶ See *Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934 as Amended*, FCC 96-331 (Aug. 7, 1996) (“*Rate Averaging Order*” or “*Order*”).

⁷ 47 U.S.C. § 254(g); see also 47 C.F.R. § 64.1801(a) (1999).

charged to their subscribers in any other State.⁸ These provisions are now also embodied in the Commission's rules at Section 64.1801.

Obviously, the clear language of each of these requirements – whether considered together or independently – obligate carriers to offer consumers in both rural and urban areas the same optional calling plans. A more difficult question is whether the geographic averaging requirement of Section 254(g) mandates that all rate structures be identical, potentially prohibiting optional calling plans, which by their nature include discounts from an IXC's basic calling plan.⁹

The Commission considered this question in its 1996 *Rate Averaging Order* and expressed its opinion that at least some alternative pricing structures are arguably permissible under the geographic averaging requirement of Section 254(g) because the Commission has always required that such offerings “be available to similarly situated customers throughout the carrier's service area.”¹⁰ Thus, in the Commission's opinion, arguably no forbearance from Section 254(g) was needed. The Commission observed, however, that the Conference Report for the 1996 Telecommunications Act suggested that some alternative pricing structures are “permissible exceptions to geographic rate averaging that could be authorized through forbearance.”¹¹

Deferring to the legislative history, the Commission forbore from applying the geographic rate averaging requirement of Section 254(g) “to the extent necessary” to allow carriers to make

⁸ 47 U.S.C. § 254(g); *see also* 47 C.F.R. § 64.1801(b) (1999)..

⁹ *See Rate Averaging Order*, ¶ 22. Optional calling plans involve discounts from basic rate schedules, subject to terms and conditions specified in the optional calling plan. *See id.*, ¶ 20.

¹⁰ *See id.*, ¶ 22.

¹¹ *Id.* (*emphasis added*) (citing S. Rep. No. 230, 104th Cong., 2d Sess. 1, 132 (1996)).

available optional calling plans, contract tariffs, Tariff 12 offerings, temporary promotions and private line services.¹² In adopting this forbearance, the Commission never suggested that it would permit carriers to make optional calling plans, contract tariffs or Tariff 12 offerings available in limited geographic areas. Instead, the *Rate Averaging Order* expressly noted that carriers must make these services “available to all similarly situated customers, regardless of their geographic location.”¹³

The sole exception to the Commission’s forbearance decision involved temporary promotional offerings.¹⁴ The Commission concluded that it would “permit carriers to offer promotions that may be ‘geographically limited,’ provided that the promotions are temporary.”¹⁵ The Commission then imposed a 90 day limit on temporary promotions and cautioned that it expects that

carriers’ temporary promotions will not, when viewed over a number of years, reflect a pattern of undue discrimination against rural or high-cost areas. Thus, we expect that, viewed over time, temporary promotions will be offered in rural and high-cost areas, as well as to urban customers.¹⁶

The Commission’s exception for temporary promotions does not extend to other types of calling plans such as optional calling plans, which last more than 90 days.

¹² *Id.*, ¶ 27.

¹³ *See id.*, ¶ 27; *see also id.*, ¶ 13 (noting that this same approach has been previously used for AT&T’s tariffs).

¹⁴ Temporary promotions involve temporary discounts from basic rate schedules as well as limited sign-up periods for the promotional discount rates. *See id.*, ¶ 20.

¹⁵ *Id.*, ¶ 27.

¹⁶ *Id.*, ¶ 30.

Furthermore, in the same 1996 *Order*, the Commission did not forbear from applying the *rate integration* requirements of Section 254(g) to optional calling plans and other alternative pricing structures.¹⁷ Accordingly, in addition to the requirement that carriers must make optional calling plans available to all similarly situated customers regardless of their geographic location, carriers must also make optional calling plans available in every state where the carrier provides service. Obviously, any optional calling plan that is offered by an IXC in a limited geographic area would violate the rate integration requirement.

When the Commission's *Rate Averaging Order* was issued, at least one major IXC acknowledged the limits of the Commission's forbearance decision. AT&T filed a Petition for Reconsideration, which acknowledged that in the *Rate Averaging Order* "the Commission declined to adopt an exception to its general rate averaging rule that would permit national carriers to offer geographically specific rates."¹⁸

Despite the existing statutory and regulatory restrictions of geographically specific optional calling plans, four major carriers filed comments on the MAG Petition for Rulemaking opposing MAG's proposal that IXCs be required to offer consumers in rural and urban areas the same optional calling plans.¹⁹ Two of the carriers mistakenly claimed that the Commission's 1996 *Rate Averaging Order* gave them the right to market optional calling plans without making them

¹⁷ *Id.*, ¶ 52.

¹⁸ *AT&T Corp.'s Petition for Reconsideration*, CC Docket No. 96-61, at 2 (Sept. 16, 1996).

¹⁹ *See AT&T Comments on MAG Proposal* at 19-20; *Worldcom Comments* at 20; *Comments of Sprint Corporation*, at 11-12; *Comments of Global Crossing North America, Inc.*, at 9-11.

available in both rural and urban areas.²⁰ Obviously, this view cannot be reconciled with the Commission's directive that optional calling plans must be made available to all similarly situated customers, regardless of their geographic location.

The consequences of this apparent confusion extend well beyond the instant proceeding. The State is concerned that if major IXC's incorrectly interpreted the Commission's 1996 *Rate Averaging Order* while preparing comments for this proceeding, then IXC's may be applying incorrectly the Commission's rate averaging rules in their daily business activities. In other words, IXC's may be marketing optional calling plans and other alternative pricing services to some of their customers without making them available to similarly situated customers regardless of their geographic location. This would be a clear violation of the statutory requirements of Section 254(g) of the Communications Act, and the rules adopted in the Commission's *Rate Averaging Order*.

The Congress and the Commission considered carefully the adoption of Section 254(g) and the policies that it embodies. The decision was based on the premise that the mandates are necessary, even when there is competition in the market,²¹ to ensure that all Americans, including those in rural and remote locations, receive the benefits of competition. Accordingly, the State

²⁰ See *Sprint Comments* at 11 (arguing that in the *Rate Averaging Order* the Commission decided "to exempt optional calling plans from the geographic averaging requirements of Section 254(g) of the Act"); *Global Crossing Comments* at 10 (arguing that in the *Rate Averaging Order* the Commission concluded that optional calling plans are permissible and fully consistent with the rate averaging provisions of the Commission's Act).

²¹ See *Order*, ¶ 39 (observing that "Congress knew at the time the 1996 Act was passed that all IXC's were nondominant and we find that Congress would not have required us to adopt rules to implement geographic rate averaging if it had intended us to abandon this policy with respect to all IXC's so soon after enactment").

urges the Commission to not retreat in this proceeding from the requirements of Section 254(g). As the Commission has long held, “geographic rate averaging furthers our goal of providing a universal nationwide telecommunications network” and “ensures that ratepayers share in the benefits of nationwide interexchange competition.”²²

Respectfully submitted,

THE STATE OF HAWAII

By: /s/ Herbert E. Marks

Gregg J. Kinkley
Department of Commerce
And Consumer Affairs
STATE OF HAWAII
250 South King Street
Honolulu, Hawaii 96813

Herbert E. Marks
Bruce A. Olcott
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

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²² *Id.*, ¶ 6 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3132 (1989); Erratum, 4 FCC Rcd 3379 (1989); Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665 (1991); *Guidelines for Dominant Carriers’ MTS Rates and Rate Structure Plans*, Notice of Proposed Rulemaking, 100 FCC 2d 363, 375 (1985); *Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3450-51 (1988)).