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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, Room 5-C450
Washington, D.C. 20554

Re: CC Docket Nos. 96-45, 00-256, 98-77 and 98-166

Dear Ms. Attwood:

On behalf of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the United States Telecom Association (USTA) (the Associations), this letter responds to written ex parte communications submitted by AT&T, Sprint, Western Wireless and GCI (the Parties) on April 13, 2001 and April 18, 2001 in the above-captioned proceedings.[1] The Parties proffer an amended proposal, supposedly (p.1) to "fully implement all parts of the Rural Task Force (RTF) and Federal State Joint Board recommendations ... and undertake those reforms that are legally required." GCI (p. 1) echoes the demand for action "implementing all aspects of the Rural Task Force ... plan, including both universal service and access charge reform" (emphasis in the original). The proposal seeks immediate implementation of the universal service recommendation of the RTF and Joint Board, supplemented by interim adoption of a version of "access reform" for non-price cap local exchange carriers (LECs) that would gut the comprehensive Multi-Association Group (MAG) plan under consideration in CC Docket No. 00-256. The Associations oppose the Parties' proposal.

[1] Letters to Dorothy Attwood from Joel Lubin et al. dated April 13, 2001 and April 18, 2001; Letter to Dorothy Attwood from Jimmy Jackson, dated April 13, 2001. References to "the Parties" include the proponents in both letters seeking adoption of the RTF proposal and selected slivers of the Associations' plan.

In our April 6, 2001 written ex parte letter, the Associations demonstrated that the RTF deliberately decided not to recommend or agree that any access charge changes should or could take place upon initial adoption of the RTF universal service plan. Instead, the RTF adopted principles to govern a universal service mechanism called High Cost Fund III (HCF III), to be established whenever the FCC might reform access charges for rural LECs. We do not repeat our earlier discussion here, but focus this response on the Parties' last minute proposal and rationale for departing from the express RTF and Joint Board decision not to impinge on this Commission's interstate access charge deliberations in connection with the MAG plan, except by consulting with the Commission regarding the universal service issues in the MAG proceeding.[2]

The Parties assert that: (1) complete implementation of the universal service proceeding requires the Commission to add access reform specifics; (2) the Commission can base access prescriptions in the universal service decision on record support for a radically different set of proposals in a separate proceeding; (3) consumers will be better off with the Parties' proposed access charge additions to the RTF proposal; and (4) rate of return LECs will not be hurt by immediate substitution of the Parties' scheme for the comprehensive MAG plan, pending further proceedings. However, as we show, the Parties' plan and reasoning fail to justify, let alone legally compel, the Commission to fundamentally change the RTF/Joint Board proposal, the MAG proposal and the Commission's own process and schedule -- solely to provide expedited, selective relief of the Parties' choosing.[3]

In spite of their unsupported claims that full implementation of the RTF plan must include access reform, the Parties concede (p. 2), as they must, that the RTF "was unable to determine the specifics for implementation of HCF III." Consequently, the Commission did not compile a record on specific access charge prescriptions in the RTF and Joint Board recommendations.[4] The Parties seek to extract and modify snippets of the MAG plan and its supporting record from the MAG proceeding and use them to concoct a "record" for their temporary access reform and HCF III measure. In fact, the Parties try to dignify their one-sided proposal (p. 4) as a "measured compromise step" to permit the "entire RTF Recommendation for comprehensive universal service ... to take place promptly on July 1, 2001." However, the proposals in the separate MAG proceeding that the Parties would plunder to compensate for the

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[2] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 00J-4, para. 20 (released December 22, 2000).

[3] RTF members representing both AT&T and Western Wireless participated in the RTF's consensus decision, including adopting HCF III principles but stopping short of specific access charge recommendations.

[4] Earlier in the RTF proceeding, AT&T tried to make the Commission graft a different access reform proposal onto the universal service recommendations. It proposed a .95 cent carrier access rate simply because it had been applied to some price cap carriers in CALLS, although AT&T provided no explanation of why a rate for the few carriers able to adopt price cap regulation voluntarily would suit hundreds of diverse carriers that have not been able to move to price cap regulation.

missing access specifics and record in the universal service reform proceeding are significantly different from the Parties' proposal, and the MAG record accordingly does not support or even pertain to their plan.

The differences go to the heart of the MAG plan and record. The Parties' plan would impose mandatory carrier access charge reductions to a "maximum transitional target" rate of 1.6 cents per minute on all rate-of-return LECs as an adjunct to the universal service recommendation by the RTF and Joint Board. But the MAG plan applies the roughly-equivalent composite access rate (CAR) only to Path A LECs because the great diversity of the rate of return LECs precludes uniform treatment. Even the Parties' seeming incorporation of the 1.6 cent MAG target access rate is misleading, since they propose it as a one-year interim charge to begin on July 1, 2001, which they then apparently hope to reduce. In contrast, the MAG plan proposes a CAR of 2.2 cents per minute to be prescribed at the beginning of the plan, with a reduction after one year to 1.8 cents per minute and a reduction after two years to 1.6 cents per minute. The Parties thus propose as a starting point for access reductions a rate level that is the end point of reductions under the MAG plan.

Moreover, the MAG access structure, rate levels and implementation schedule are inter-related components of the Associations' integrated MAG proposal. All are within the scope of an internally consistent plan to modify both the way the National Exchange Carrier Association (NECA) pooling system collects charges to cover the combined costs of the members and the way the pool distributes an appropriate share of the collected revenues to each individual member. Unlike the price cap LECs, most rate of return LECs find it essential to participate in pooling administered by NECA to avoid the burden of individual tariffs for the 1,300 study areas and to counter the risks of serving small, often geographically and economically isolated places. Thus, all aspects of reform proposals for rate of return LECs must be coordinated and compatible with NECA pooling and joint tariffing. In contrast, the Parties attempt to sell their "refined plan" as taking care of universal service and access issues "without rushing to resolve more difficult incentive regulation and access rate level issues" and reserving "separable access reform issues" to later MAG proceedings. The Parties fail to recognize that the primary reason for a comprehensive reform plan for rate of return LECs is that "separable" piecemeal decisions tend to conflict with one another, defeating the overall goals of any reform plan and introducing major regulatory uncertainty for rate of return LECs and their customers.

In addition, the "compromise" 1.6 cent rate proposed by the Parties (joint letter, p.4) is for traffic sensitive cost recovery, and the Parties specify that the carrier common line (CCL) charge would transition to zero[5]. In contrast, the MAG plan's CAR is for a single consolidated access charge target, and the ultimate level of the common line element depends on what costs

[5] The April 18 ex parte seems to assume that there will be no residual Common Line revenue requirement to be recovered through a Carrier Common Line (CCL) charge. Since the HCF III it contemplates is for traffic sensitive costs only and the April 18 ex parte does not provide for an ongoing CCL charge, there is no support for CCL costs that are not fully offset by the SLC increases.

are included in the common line element and the SLC and on the level to which price cap carrier access charges are permitted to rise.[6] There is also dispute in the MAG record about whether interexchange LECs should be able to sidestep all responsibility for common line costs.[7] The information in the MAG record reflects the entire, integrated MAG cost recovery mechanism and estimates the impacts based on assumptions about carrier elections taking into account the characteristics of the MAG plan. The MAG record, plan and assumptions are wholly at odds with the Parties' one-size-fits-all access reform prescription for all rate of return LECs.[8] Thus, the record for the MAG proposal is simply irrelevant to the self-serving scheme the Parties advocate.

As these fundamental differences also demonstrate, the Parties' supposed "compromise" is not only inconsistent with the MAG plan, but also prejudges crucial MAG access and incentive regulation issues, not surprisingly substituting results that the Parties prefer. The Parties are careful to confine the prejudgment in their proposal to portions of the MAG plan they oppose. For example, just in case their interim "compromise" might be thought to convey actual acceptance of even the 1.6 cent rate, the Parties warn that their letter "in no way concede[s] that the rate is appropriate" or even that "the current methods of regulating the rates charged by rate-of-return LECs should continue unaltered indefinitely." Thus, the "compromise" declines to endorse rate of return regulation for Path B LECs, an essential component of the MAG proposal, or to compromise on any other MAG issues.

The Parties' concern for the impact on consumers is also hollow. They assert (p. 3) that their plan will provide a "much gentler consumer transition," since it begins to raise these rural consumers' SLC rates to price cap companies' SLC levels on July 1, 2001. But the Parties do not show the same solicitude for rural consumers when they refuse to commit to pass through lower rates to rural consumers based on the proposed reductions and when they fail to offer optional calling plans throughout their service territories, as the MAG plan would enforce.

The Parties claim that consumers would be spared from a steeper rate hike to catch up with the CALLS levels at a later date when the comprehensive MAG issues would have been decided. It is true that a transition to buffer rate increases is often beneficial to consumers, and the MAG plan specifically provides for one. However, any intelligent consumer can calculate

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[6] In its comments and reply comments on the MAG plan, AT&T requests that the Commission raise the SLC rates to the CALLS caps even if the CALLS SLCs are not permitted to rise above $5 and seeks to include the recovery of carriers' universal service contributions in the SLC.

[7] Comments of the National Association of State Utilities Consumer Advocates (NASUCA), pp. 5-6, filed February 26, 2001.

[8] The Parties' implementation proposal of April 18, 2001, adds to the confusion. That ex parte contemplates different methods of apportionment for the HCFIII for cost and average schedule companies. Apportionment for cost companies would be based on revenue requirement shortfall and apportionment for average schedule companies would be based on relative access minutes. The MAG Plan contemplates similar distribution methodologies for its proposed rate averaging support (RAS) for cost and average schedule companies based on a study area's revenue requirement minus whatever it bills as CAR revenue and receives as existing support, i.e., LTS and LSS.

that it costs more to start paying a SLC increased by $1.50 on July 1, 2001 and to jump to a further increased level at a later date than to have no increase at all until the later date, even if the jump to the new level is more abrupt. It is also misleading to presume that consumers are better off if they begin to pay even higher SLCs or separate new end user surcharges to recoup their ILECs' universal service contributions on July 1, 2001. Unlike the Parties' proposal, the MAG plan will enforce geographic rate averaging and nationwide availability of Optional Calling Plans, providing direct benefits to consumers. Instead, those of the Parties that are interexchange carriers (IXCs) take the position, like other IXCs, that they cannot or should not be made to pass access charge savings through to their customers if they obtain the prescribed access charge reductions and SLC increases their proposal seeks.[9]

The Parties clearly intend their one-year interim prescription to be followed by further per-minute access charge reductions. Thus, inserting this one-year interim plan to benefit the Parties also further delays the kind of regulatory certainty consistent with sound business planning and investment which the MAG plan would provide. Rural consumers will be better off, therefore, if the Commission does not add access charge prescriptions to the HCF III principles recommended by the RTF now and subsequently adopts SLC and carrier access charge reform in conjunction with the MAG plan's commitment to enforce the statutory rate averaging and optional calling plan availability requirements. In short, the only "step[s] in the right direction" that the Parties are trying to have implemented on an expedited basis are the ones that benefit themselves, not consumers.

The Parties also claim that their plan "would provide an airtight safeguard against any possible revenue shortfall" for rate-of-return LECs. This claim conflicts directly with the record in the MAG plan proceeding from which the Parties seek to draw record support for their scheme. For example, a group of rate of return LECs from Nebraska made an ex parte presentation to the Common Carrier Bureau Chief on April 17, 2001.[10] They explained, inter alia, that reducing their CAR to 1.6 cents per minute and recovering the shortfall via portable universal service support would place their access rates far below their costs. As a result, they believe that competitors will have perverse entry incentives, and will enter their areas for the opportunity to arbitrage that support level, not for valid economic reasons. Loss of access and universal service revenues for these small rate of return LECs would impede their continued performance of their carrier of last resort responsibilities. For a wireless company such as Western Wireless (one of the Parties), which is aggressively seeking eligible telecommunications carrier (ETC) designations, the excessive support generated by immediately reducing the highest cost LECs' rates to 1.6 cents would present an even more attractive arbitrage opportunity because HCF III support would flow to them from the nation's ratepayers to replace "implicit"

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[9] Comments of Sprint Corporation, pp. 10-11, filed February 26, 2001; AT&T Comments on MAG NPRM, p. 20, filed February 26, 2001.

[10] See, letter to Magalie Roman Salas from Lisa M. Zaina, CC Docket No. 00-256, dated April 18, 2001.

support in today's access charges, when wireless carriers have never received or paid access charges.

Perhaps aware that their efforts to find record support and consumer benefits for their proposal are fruitless, the Parties wrongly rely on the Fifth Circuit's Alenco case[11] in attempting to concoct a legal requirement for the Commission to adopt their proposal. Alenco upheld the Commission's interim rules implementing section 254 pending further proceedings concerning universal service reform for rural LECs, and the court agreed that the Commission is supposed to ensure that its universal service program "survives in the new world of competition." However, that is a far cry from the Parties' claim (pp. 1, 4) that Alenco holds that there is an "unequivocal statutory directive" that the Commission immediately remove all implicit subsidies and that the Parties' proposed "reforms are required by the 1996 Act." The Parties have omitted the true holding in the case from their quotation (p. 4). After the first sentence the Parties quote, rather than holding that the Commission has to take any specific, pre-ordained course in fulfilling its statutory duties, the court went on to hold exactly the opposite:

> Because Congress has conferred broad discretion on the agency to negotiate these dual mandates [universal service and competition], courts ought not lightly interfere with its reasoned attempt to achieve both objectives. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 842-44, 104 S Ct 2778, 81 L Ed 2d 694 (1984); 5 USC §706(2)(A).

The second expansive general statement the Parties quote (p. 4) is actually only the court's description of principles the Commission followed in interpreting the 1996 Act. In fact, if taken literally as a judicial interpretation of the law, the Fifth Circuit's words that "implicit subsidies" must be replaced with "government grants that cause no distortion to market prices" would invalidate HCF III, since it is clearly not a "government grant" proposal.[12]

Such a harsh conclusion is not warranted, however, because the Alenco decision merely decided that the Commission's rules at issue there were within its broad discretion in interpreting the Telecommunications Act. Since the Alenco court was applying the Chevron review standard and the FCC order under review was transitional, the court's scrutiny of the Commission's actions was extremely deferential.[13] That the particular Commission actions before the court were permissible under the Commission's broad discretion in implementing the law simply

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[11] Alenco Communications Inc. v. FCC, 201 F..3d 608 (5th Cir. 2000) (Alenco).

[12] Nor were any of the Commission support mechanisms the Alenco court upheld "government grants." See letter from Robert G. Damus, General Counsel, Office of Management and Budget, to Christopher Wright, General Counsel, FCC, dated April 28, 2000 (USF not "governmental or public money"); (see also, Texas Office of Public Utility Counsel v. FCC, 183 F3d 393 (5th Cir. 1999) and Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1313-1315 (D.C. Cir. 1988), cert. denied, 481 U.S. 1013 (1987) (pre-and post-1996 universal service funding not a tax).

[13] Alenco at 619.

cannot be twisted into a holding that those actions or any other "reforms are required by law," as the Carriers claim.

Moreover, the Fifth Circuit certainly did not hold that the Commission could only implement the law so as to remove all implicit subsidies immediately. Indeed, elsewhere in the same decision, the court observed that Congress has given the Commission the ability to act incrementally and set its own implementation schedule for universal service implementation.[14] The Commission's leeway is still greater with respect to access charge reform, since section 251(g) expressly keeps access rules, including compensation, in effect unless "explicitly superseded" by new post-1996 Act regulations. In sum, the Fifth Circuit's decision provides no legs at all for the Parties' contention that the Commission has a legal obligation to graft the Parties' access reform proposal onto the RTF and Joint Board universal service plan and adopt the resulting hybrid without even compiling a pertinent record.

Indeed, the Parties fail to show any authority for the prescription of access rates for rate of return carriers that they seek. The Commission has not made any finding that the access charges of all of these carriers are "unjust and unreasonable," as section 205(a) requires, let alone any finding that any rate above 1.6 cents is excessive and 1.6 cents is the appropriate level for these carriers or the NECA pool.[15] There is no record basis for the presumption, necessary to prescribe access charges, that a 1.6 cent per minute rate is "just and reasonable" for all rate of return carriers, including Path B companies for which the MAG plan does not even propose this rate level as part of a comprehensive package. This is not a review of carrier-initiated rates or a compromise among parties where the rate prescription is, in effect, acquiesced in by the affected carriers. The Commission did not even give notice sufficient to satisfy due process and the Administrative Procedure Act that it might prescribe access charges in its universal service proceeding.

The Commission should summarily reject the Parties' last ditch effort to bootstrap their access reform agenda, which is still under consideration in the MAG proceeding, into the universal service proceeding, which is ripe for the Commission's decision. There is no sound reason or record for their proposal to fill in the access "unit prices" and factual basis deliberately omitted from the HCF III principles in the RTF's "delicately-crafted comprehensive reform package." There is even less justification for doing so by commandeering and reshaping access charge pieces from the even more "delicately crafted and comprehensive" MAG plan for reform of the access charge and pooling mechanism, rate of return regulation, jurisdictional separations and universal service. The Associations urge the Commission to adhere to the processes it has set in motion to:

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[14] Id., fn 6 and accompanying text.

[15] See, Sprint Communications Company v. MGC Communications, Inc., 15 FCC Rcd 14027 (2000).

- decide universal service issues raised by the RTF and the Joint Board on the basis of their recommendation and the record gathered in that proceeding, but

- save its decisions on access charges for consideration, as planned, in connection with the record on the comprehensive MAG plan for integrated reforms.

We would be happy to discuss this ex parte presentation further with you or any of the Common Carrier Bureau staff.

Respectfully submitted,

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