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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

AUG 28 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Multi-Association Group (MAG) Plan	)	CC Docket No. <u>00-256</u> /
for Regulation of Interstate Services	)	
of Non-Price Cap Incumbent Local	)	
Exchange Carriers and	)	
Interexchange Carriers	)	

REPLY COMMENTS OF THE  
COMPETITIVE UNIVERSAL SERVICE COALITION

COMPETITIVE UNIVERSAL  
SERVICE COALITION

Association for Local Telecommunications Services  
 Competitive Telecommunications Association  
 Dobson Communications Corporation  
 Nucentrix Broadband Networks, Inc.  
 Personal Communications Industry Association  
 Smith Bagley, Inc.  
 U.S. Cellular Corporation  
 Verizon Wireless  
 VoiceStream Wireless Corporation  
 Western Wireless Corporation

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**REPLY COMMENTS OF THE  
COMPETITIVE UNIVERSAL SERVICE COALITION**

The Competitive Universal Service Coalition (“CUSC”), 1/ by its attorneys, hereby replies to the comments filed on the Further Notice of Proposed Rulemaking associated with the Fourteenth Report and Order and Twenty-Second Order on Reconsideration in the captioned proceedings. 2/

**INTRODUCTION AND SUMMARY**

CUSC strongly opposes the efforts by a number of associations that represent incumbent local exchange carriers (“ILECs”) to convert a *Further Notice*

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1/ The Competitive Universal Service Coalition includes the following companies and associations: Association for Local Telecommunications Services; Competitive Telecommunications Association; Dobson Communications Corporation; Nucentrix Broadband Networks, Inc., Personal Communications Industry Association; Smith Bagley, Inc.; U.S. Cellular Corporation; Verizon Wireless; VoiceStream Wireless Corporation; and Western Wireless Corporation.

2/ *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report & Order and Twenty-Second Order on Reconsideration in CC Docket No. 96-45 and Report and Order in CC Docket No. 00-256, FCC 01-157 (rel. May 23, 2001) (“RTF Order” or “Further Notice,” depending on section of document referenced).*

on narrow, technical issues into a full-fledged assault on the fundamental principle of funding portability. <sup>3/</sup> While CUSC did not file initial comments on the technical issue on which the *Further Notice* sought comment, it believes that the Commission must firmly reject the ILECs' arguments to abandon funding portability.

CUSC submits that, to carry out the will of Congress to establish a universal service system that is consistent with the development of competition, the Commission must continue to ensure that all universal service support is portable. Portability means that identical amounts of support per customer must go to all eligible telecommunications carriers ("ETCs") in each geographic area, including competitive ETCs as well as ILECs. Portability is critical regardless of whether support is computed based on forward-looking economic costs or based on the historical, embedded costs of the ILEC. And contrary to the ILECs' arguments, portability is fully consistent with – and indeed, is compelled by – the Act. Thus, the Commission must reject the ILECs' alternative proposals to impose anti-competitive restrictions on the funding that competitive ETCs may receive.

CUSC also concurs with the ILECs that there is no need at this time for the Commission to take any action on the proposals in the *Further Notice*. Instead, the Commission should adhere to its decisions in the *RTF Order* to base the amount of support in each rural area on ILEC costs and not to freeze the level of support upon competitive entry.

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<sup>3/</sup> United States Telecom Association ("USTA") Comments; Comments of the National Telephone Cooperative Association ("NTCA"); Comments of the National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("NRTA/OPASTCO").

## I. ALL UNIVERSAL SERVICE FUNDING MUST BE FULLY PORTABLE

Portability of all universal service funding – *i.e.*, ensuring that a consumer's service is supported by the same amount regardless of whether he or she chooses to take service from an ILEC or a competitive entrant – is a fundamental principle in the Commission's implementation of the universal service provisions of the Telecommunications Act of 1996. Portability and competitive neutrality have been a core part of every major Joint Board recommendation and every FCC decision on universal service since the *First Report and Order*. <sup>4/</sup>

The Commission has clearly explained the critical need for portability to ensure that a universal service program is consistent with competitive entry. In the context of a state universal service program that provided substantially greater funding to ILECs, based in part on their historical costs and revenues, than to competitive ETCs, the Commission said:

A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the . . . government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. \* \* \* \* A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from ILECs rather than competitors. \* \* \* \* Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253(a). <sup>5/</sup>

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<sup>4/</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("*Universal Service First Report and Order*").

<sup>5/</sup> *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Service Fund*, 15 FCC Rcd 16227, ¶ 8 (2000).

Portability is critical in order to establish a level playing field for competition, regardless of whether universal service support is computed based on the forward-looking economic costs of an efficient provider, or based on the historical, embedded costs of the ILEC. To be sure, as an ideal, theoretical matter, portability is most consistent with a system in which all providers receive an identical amount of per-line funding based on forward-looking costs. Indeed, the importance of portability may be one reason why the Commission devoted so much effort to devising a universal service system based on forward-looking costs for non-rural carriers. But portability is no less important in a transitional regime, such as that adopted in the *RTF Order*, in which support is computed based largely on the historical costs of the incumbent carrier. For this reason, the Commission required that all explicit support be portable to competitive ETCs beginning in 1998, for both rural and non-rural carriers, at a time when support for both types of carriers was based on ILECs' embedded costs. That approach properly continues today.

There is no merit to the ILECs' arguments that providing support to competitive ETCs based on the embedded costs of the ILECs is inconsistent with Section 254(e)'s requirement that ETCs use support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." <sup>6/</sup> There is no reason to suppose that the support received by competitive ETCs will exceed the amount of costs they incur to provide, maintain, and upgrade the facilities they use to provide universal service. To the contrary, there is no truth to the ILEC associations' presumption that competitive ETCs' costs will

always be lower than those of the ILECs – chances are just as good that competitive ETCs' costs will be higher. This is particularly true when examined on a per-line basis, in that competitive ETCs, especially those that have just entered the market, are likely to have relatively few customers over which to spread their costs.

Furthermore, contrary to the apparent presumption of the ILEC associations, explicit universal service support funds only a portion of the costs that any ETC incurs to provide, maintain, and upgrade facilities. For ILECs, the remainder comes from rates charged to consumers and/or implicit sources of support, such as access charges. <sup>7/</sup> Similarly, while competitive ETCs do not receive implicit subsidies, in the vast majority of cases they are likely to recover the bulk of their needed revenues from customers, not from universal service support. This is true regardless of the basis used for computing the amount of support. In any case, competitive ETCs (like ILECs) are required to comply with Section 254(e), and the Commission is capable of directly enforcing any violations of that obligation. But

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<sup>6/</sup> 47 U.S.C. § 254(e); *see* USTA at 3.

<sup>7/</sup> Several reviewing courts have confirmed that implicit universal service subsidies violate the Act. *See, e.g., Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 617 (5th Cir. 2000) (“the Act requires that all universal service support be explicit [so] the program must treat all market participants equally – for example, subsidies must be portable”) (citation omitted); *id.* at 622 (“portability is not only consistent with predictability, but also is dictated by the principles of competitive neutrality and the statutory command that universal service support be spent only for the provision, maintenance, and upgrading of facilities and services for which the support is intended”) (internal quotation omitted); *Qwest Corp. v. FCC*, 2001 WL 864222, \*9 (10th Cir. July 31, 2001) (“§ 254(e) requires federal support to be explicit and § 254(k) prevents carriers from using non-competitive services to provide implicit subsidies for competitive services”).

withholding portable support to prevent potential violations of Section 254(e) is like burning down the house to protect against the possibility of termites. 8/

## II. THE COMMISSION SHOULD REJECT RURAL ILEC PROPOSALS AIMED AT PRECLUDING ENTRY BY COMPETITIVE ETCs

The ILECs offer several baseless alternative proposals to bolster their crusade against funding portability and competitive neutrality. The Commission should reject each of these anti-competitive proposals.

First, there is no merit to the ILECs' suggestion that competitive ETCs should receive support based on their own embedded costs rather than those of the ILECs. 9/ This suggestion is little more than a smokescreen for the ILECs' apparent wish that competitive ETCs receive no support at all. Determining the "embedded costs" of competitive ETCs would require the kind of arduous, intrusive proceedings that the FCC long ago decided were not appropriate for competitive carriers. 10/ Moreover, Parts 32, 36, 64, and 69 of the FCC's rules, which are used to measure, allocate, separate, and categorize the ILECs' embedded costs, are keyed to ILEC network designs and historical regulated accounting systems that simply

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8/ Consistent with Section 254(e), both ILECs and competitive ETCs provide both supported and non-supported services using network facilities that are needed to provide supported services and functionalities. *See RTF Order*, ¶ 201 ("Modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services. High-cost loop support is available . . . to maintain existing facilities and make prudent facility upgrades. Thus, although the high-cost loop support mechanism does not support the provision of advanced services, our policies do not impede the deployment of modern plant capable of providing access to advanced services.") (internal quotation and footnote omitted).

9/ NTCA at 2-5; NRTA/OPASTCO at 5-8; USTA at 5-6.

10/ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980).

do not lend themselves to being applied to competitive ETCs (especially wireless carriers). Carriers also must know exactly how much support will be available in a high-cost area in order to make reasoned business decisions about entry. Only a system of already-established, publicly-available support, such as the one the Commission adopted based on ILEC costs, fits the bill. <sup>11/</sup> Finally, providing support on the basis of each carrier's individual costs would require the FCC and USAC to undertake a much greater administrative effort than is presently required, and the burden would multiply with each competitive ETC designated to serve a rural market.

Second, the Commission should also reject the ILECs' suggestion to limit competitive ETCs to receiving support only for lines they capture or add *after* being designated. <sup>12/</sup> It is clear that this "proposal" has no aim other than to preclude potential competitive ETCs from entering high-cost rural markets – indeed, the ILECs do not even attempt to give a principled reason for adopting such a blatantly unfair rule. Nor could they. If a telecommunications provider is already providing the services and functionalities required of ETCs prior to seeking designation, there is no reason the carrier should not receive the support to which it is legally entitled for providing those services and functionalities once it completes the administrative task of being designated as an ETC. This is particularly true given that the designation process can be much longer and more onerous for compe-

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<sup>11/</sup> This is also consistent with the statutory directive that the Commission's universal service program be "specific and predictable." See 47 U.S.C. § 254(b)(5).

<sup>12/</sup> USTA at 5-6; NRTA/OPASTCO at 5-6.

titive ETCs than it was for ILECs. <sup>13/</sup> Receiving support for all eligible high-cost customers served is part and parcel of universal service support being fully portable and “sufficient,” as the Act requires. <sup>14/</sup> The Commission should not deviate from that course now.

### III. THE COMMISSION SHOULD NOT “FREEZE” SUPPORT UPON ENTRY BY A COMPETITIVE ETC

The Commission should reaffirm its conclusion, which was amply supported by sound reasoning, that it is not necessary to freeze high-cost loop support when a competitive carrier has been designated as an ETC and begins providing universal service in a rural study area. CUSC concurs with the Commission’s view that “the proposal may be of limited benefit [and possibly] contribute to fund growth by freezing support at higher levels than [ ] warranted,” and that “the indexed cap on the high-cost loop fund will operate as a check on excessive fund growth.” <sup>15/</sup> CUSC also agrees that the proposed freeze would “hinder competitive entry in rural areas by creating an additional incentive for incumbents to oppose” designation of competitive ETCs, and that “the proposal would require complex and administratively burdensome implement[ation].” <sup>16/</sup> As such, CUSC agrees that, rather than adopting any “freeze” rules, the proper course for the short term is for the Commission to monitor fund growth.

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<sup>13/</sup> See CUSC, WHITE PAPER: THE ROAD TO COMPETITIVE UNIVERSAL SERVICE REFORM, July 2001, at 10 (available at <http://www.naruc.org/Committees/telecom/cusc.pdf>).

<sup>14/</sup> See 47 U.S.C. § 254(b)(5).

<sup>15/</sup> Further Notice, ¶ 208.

<sup>16/</sup> Id.

However, if the Commission does decide to adopt some measure in response to the proposals in the *Further Notice*, it should keep in mind that competitive entry often has the effect of expanding the total number of lines served, rather than simply transferring lines from ILECs to competitive entrants. Competitive entrants often attract new customers who did not previously have any service, or additional business of existing customers (*e.g.*, customers who had a single residential line with the ILEC decide to purchase their second line from the competitive entrant, rather than from the ILEC, but retain their initial ILEC line). Competitive entry also leads to service improvements and rate reductions by the ILEC as well as the entrant, which stimulates further increases in demand. Thus, the Commission should not assume that competitive entry will mean that the ILEC loses customers.

The *Further Notice* seeks comment on whether to establish some sort of “freeze” triggered by a particular increase in the competitive ETC’s overall market share, or a reduction in the ILEC’s overall market share. <sup>17/</sup> But market share changes, *per se*, have no effect on per-line support based on historical costs. Rather, the amount of per-line support will increase by an undue amount *only* in the case where the ILEC loses a substantial number of customers. If the competitive ETC’s growth does not come at the expense of ILEC lines, then the amount of support will not increase. For example, if the ILEC starts with 100 customers and receives a total of \$5,000 per month in support, the per-line amount is \$50. If a competitive ETC garners 100 customers, but the ILEC does not lose any customers,

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<sup>17/</sup> *Id.* at ¶ 210.

then the per-line amount of embedded cost-based support remains constant, even though the two carriers each have market shares of 50%.

CUSC agrees with the ILECs and with the Commission that, during the next five years, it is unlikely that ILEC customer losses will reach such a critical mass that the per-line support amount rise sufficiently to pose a threat of excessive fund growth. Capping support in any other circumstances would do little to encourage investment in rural infrastructure – either by ILECs or competitive ETCs – nor would it promote competitive entry. To the extent the Commission entertains any proposal to freeze support based on some targeted penetration level by new entrants, the Commission must ensure that (i) the plan does not include hidden disincentives to competitive entry, and (ii) any circumstance that triggers a freeze of support is tied to an actual, substantial increase in per-line costs. 18/

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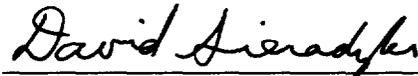
18/ The Commission should reject NTCA’s effort to revive consideration of “the potential for stranded investment.” NCTA at 6-7; *accord*, Nebraska Rural Independent Companies at 6-8. As CUSC has already shown in this proceeding, to the extent ILECs seek compensation from the high-cost fund, the RTF did “not reach agreement on the stranded cost issue,” and moreover, assuming high-cost fund payments for stranded costs would not be portable to competitive ETCs, they would not be competitively neutral and therefore should be rejected. See CUSC Reply Comments on the RTF Recommendation at 20-21, filed Nov. 30, 2000 (corrected copy Dec. 11, 2000) (citing *RTF Recommendation* at 27 n.51).

## CONCLUSION

For the foregoing reasons, the FCC should re-affirm the fundamental principle of funding portability, reject the ILECs' anti-competitive arguments to restrict funding to competitive ETCs, and decline to impose a freeze of high-cost loop support on a per-line basis in rural carrier study areas when a competitive ETC enters the market.

Respectfully submitted,

**COMPETITIVE UNIVERSAL  
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August 28, 2001

## CERTIFICATE OF SERVICE

I, Venita Otey, hereby certify that on this 28<sup>th</sup> day of August, 2001, copies of the Reply Comments were served on the parties listed below by hand delivery or first class mail.



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