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October 4, 2001

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Federal Communications Commission
Office of Secretary
EX PARTE OR LATE FILED

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Presentation, CC Docket Nos. 00-256, 96-45, 98-77, 98-166, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*

Dear Ms. Roman Salas:

The Multi-Association Group (the "Group"), by its counsel, responds to the *ex parte* letter filed by counsel for AT&T, GCI, and Western Wireless on September 27, 2001, in the above-captioned proceeding (the "September 27 letter").[1]

Much of the September 27 letter is a rehash of earlier attacks on the Group's plan for regulatory reform for the non-price cap incumbent LECs (the "MAG plan") while supporting the so-called Rural Consumer Choice ("RCC") plan of AT&T, GCI, and Western Wireless.

The September 27 letter continues to argue for the imposition on non-price cap LECs of changes in access charges and universal service that mimic those for the price cap LECs without a principled basis for doing so. As in earlier presentations by AT&T, GCI, and Western Wireless, a fundamental flaw of the September 27 letter is its ongoing assumption that non-price cap LECs should be subject to the same access charge rules that apply to price cap LECs. The operating conditions and service territories of the price cap LECs differ dramatically from those of the non-price cap LECs. Non-price cap LECs should not be treated like price cap LECs without carefully considering their differences.

The Group has already addressed most of the points made in the September 27 letter in urging the Commission not to adopt the RCC plan.[2] The RCC plan wrongly

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[1] Letter from John T. Nakahata to Ms. Jane E. Jackson and Ms. Katherine Schroder, FCC, CC Docket Nos. 96-45, 98-77, 98-166 and 00-256 (filed Sept. 27, 2001).

seeks to insulate interexchange carriers from paying access charges, even on a flat-rated basis, for any part of the common line costs they cause. It also would create a type of "High Cost Fund III-Local Switching" mechanism that would subsidize traffic-sensitive ("TS") cost recovery in order to reduce TS access rates for switching and transport to an arbitrarily low level acceptable to interexchange carriers ("IXCs"). Such a mechanism would violate the requirement of section 254(e) that support be "sufficient," but not excessive, as well as section 254(k). Moreover, the RCC plan would include access charge restructuring similar to that of the price cap LECs that should not be imposed on non-price cap LECs.

At this point in the MAG proceeding, the Commission should issue a comprehensive further notice of proposed rulemaking in this proceeding, in which the Commission would present its plans for all MAG topics including access reform. With a prompt pleading cycle and the full participation of interested parties, this proceeding could be concluded in time for implementation in the July 1, 2002, access tariff filings. A comprehensive notice would permit parties to address the Commission's plans systematically, especially in light of the changed legal and economic circumstances since the Group filed the MAG plan last year.

Because the Commission's actions will affect more than 1300 small non-price cap LECs and their customers, the opportunity for structured comment is essential to avoid disrupting these carriers' business and facilities investment plans. As the economic climate has weakened since the MAG plan was filed, such notice will go far to reducing the increased uncertainty that these LECs are experiencing, which, as the trade press has noted, is limiting broadband growth.[3]

A comprehensive further notice also will allow the public to comment on the effects of the Commission's proposal on existing forms of universal service support such as Long Term Support and on the viability of the NECA pooling system, both of which the MAG plan sought to preserve.[4] The Group believes that there has been insufficient notice of the Commission's intentions with respect to these and other important issues, including the authorized rate of return, to issue a final order on them.

In the September 27 letter, however, AT&T, GCI, and Western Wireless oppose further comment "with respect to reform of interstate access charges and the implicit

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2 *See, e.g.*, Letter from William F. Maher, Jr. to Ms. Jane E. Jackson and Ms. Katherine Schroder, FCC, CC Docket Nos. 00-256, 96-45, 98-77, 98-166 (filed Sept. 5, 2001).

3 *See, e.g.*, Patrick Ross, *Attacks Said To Further Delay Telecom Economy Recovery*, Communications Daily (Wed. Sept. 26, 2001) at 6.

4 *See* September 27 letter at 2.

subsidies contained therein."[5] These parties continue to stress the Commission's need to comply with the Fifth Circuit's decision in *COMSAT Corp. v. FCC*.[6] In doing so, they neglect to mention the compliance measures that the FCC has already taken with respect to the non-price cap LECs.[7] But these parties also attempt to soft-pedal the impact on this proceeding of two more recent appellate decisions, *Qwest Corp. v. FCC*[8] and *Texas Office of Public Utility Counsel v. FCC*,[9] that remand portions of the Commission's orders on universal service and access reform for non-rural and price cap LECs.

On July 31, 2001, in *Qwest Corp.* v. *FCC*, the Tenth Circuit found that the Commission did not articulate a satisfactory explanation for several aspects of its *Ninth Order* on universal service support for non-rural LECs. Among other things, the Tenth Circuit found that in attempting to ensure that rates in rural and urban areas are "reasonably comparable," the Commission failed to define adequately the key term "reasonably comparable."[10] Similarly, the Tenth Circuit found that the Commission did not define what it means for federal universal service support to be "sufficient."[11] How the Commission defines these terms is, if anything, even more important for the rural incumbent LECs involved in the MAG proceeding than for non-rural LECs. This is especially crucial because of the RCC plan's attempt to inflate universal service support far beyond the level "sufficient" to make implicit support explicit. Further public comment on the Commission's definition and implementation of these terms is essential to a sound framework for regulation.

The *Qwest* court also held that the Commission did not provide sufficient information about the full extent of federal universal service support, noting the interrelationships of the Ninth Order with other Commission proceedings, including the one to be conducted regarding rural carriers.[12] To avoid these infirmities with respect to

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5 *See id.* at 1.

6 250 F.3d 231 (5th Cir. 2001).

7 *See Waiver of Sections 69.3(a) and 69.4(d) of the Commission's Rules*, CCB/CPD 01-15, Order (Comm. Car. Bur. rel. Jun. 4, 2001).

8 258 F.3d 1191 (10th Cir. 2001).

9 2001 U.S. App. LEXIS 19974, No. 00-60434 (5th Cir. filed Sept. 10, 2001).

10 *See* 258 F.3d at 1201-1202.

11 *See id.*

12 *See id.* at 1204-1205.

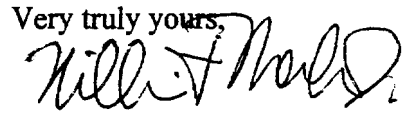
universal service for non-price cap LECs, further comment on the Commission's plans for these LECs is essential.

Even more recently than the *Qwest* decision, on September 10, 2001, in *Texas Office of Public Utility Counsel v. FCC*, the Fifth Circuit reviewed the Commission's *CALLS Order* and remanded it in part. The Fifth Circuit found that the Commission failed to exercise independent judgment in establishing the size of the CALLS interstate access universal service support fund.[13] The Fifth Circuit remanded to the Commission for further analysis and explanation with respect to the size of that fund. Further systematic comment on the Commission's plans for creating explicit support mechanisms for the non-price cap LECs is essential for the Commission to avoid the pitfalls identified by the Fifth Circuit in the *CALLS Order*.

A hallmark of both the *Qwest* and *Texas Office of Public Utility Counsel* decisions is the courts' insistence that the Commission explain adequately its actions with respect to universal service and access charge reform. The best way for the Commission to test the adequacy of its plans for the non-price cap LECs is for it to publish those plans, subject them to public comment, and then act in time for the July 1, 2002, tariff filings to reflect its conclusions and any rule changes.

As a written ex parte presentation, eight copies of this letter have been submitted pursuant to section 1.1206 of the Rules, and copies have been distributed to the Commission staff listed below. Please do not hesitate to contact me with any questions or comments.

Very truly yours,



William F. Maher, Jr.
Counsel for the Multi-Association Group

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[13] *See Texas Office of Public Utility Counsel v. FCC*, 2001 U.S. App. LEXIS 19974 at *33-*36. The Fifth Circuit also remanded for further justification the CALLS X-factor, *see id.* at *37. The Court's issues with that X-factor call into question the legality of similar X-factors that some parties have sought to apply to the type of incentive regulation proposed in the MAG plan.

cc: Jane E. Jackson
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