

**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
)	

**COMMENTS OF
THE STATE OF HAWAII**

The State of Hawaii (the “State”),¹ by its attorneys and pursuant to Section 1.429(f) of the Commission’s rules, hereby comments on two of the Petitions for Reconsideration that were filed in the above captioned proceeding,² along with certain conclusions reached by the Commission in its Second Report and Order (“*Order*”).³ These comments are intended to help clarify certain

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs. While the State is captioning this pleading as providing “Comments,” the State requests that, if the Commission deems it necessary under the literal requirements of Section 1.429(f) of the Commission’s rules, the Commission should treat these Comments as an Opposition.

² See *Petition for Reconsideration of the The Alliance of Independent Rural Telephone Companies*, CC Docket No. 00-256, et. al (Dec. 28, 2001) (“*AIRTC Petition*”); *Rural Consumer Choice Coalition Petition for Reconsideration*, CC Docket No. 00-256, et. al (Dec. 28, 2001) (“*RCCC Petition*”).

³ See *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, et al.*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256; Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001)(“*Order*”).

issues involving Section 254(g) of the Commission’s Act, which are likely to be addressed when the Commission makes its determination on the petitions.

I. THE COMMISSION WAS CORRECT IN ITS CONCLUSIONS REGARDING THE GENERAL SCOPE AND SPECIFIC REQUIREMENTS OF SECTION 254(g) OF THE COMMUNICATIONS ACT.

In its *Order*, the Commission carefully articulated and reaffirmed that interexchange carriers (“IXCs”) must comply with Section 254(g) of the Communications Act (along with Section 64.1801 of the Commission’s rules) when making available Option Calling Plans to their customers.⁴ The clarity employed by the Commission in reaffirming this obligation left no room for misinterpretation, which is evidenced by the fact that no party sought reconsideration of the Commission’s conclusions on this issue.⁵

The Commission also strongly reaffirmed its commitment to the general principles of Section 254(g), along with its specific requirements. The Commission acknowledged its goal of “working to ensure that rural Americans receive the benefits of competition and choices in the interexchange services market” and its commitment “to enforcing our long and well-established policy of geographic rate averaging and rate integration in that regard.”⁶ In light of the clarity of the Commission’s statements, the RCCC had no basis for suggesting in its petition that Section

⁴ *See id.*, ¶¶ 179, 182-185.

⁵ While no party sought reconsideration of the Commission’s conclusions in this regard, AIRTC argued that the Commission should actively enforce Section 254(g), especially with regard to the equal availability of optional calling plans. *See AIRTC Petition* at 11 n.27. The State obviously supports the active enforcement of Section 254(g), particularly in response to any evidence of violations that is brought before the Commission.

⁶ *Order*, ¶ 182.

254(g) might be “no longer necessary” or the subject of forbearance.⁷ In fact, the RCCC specifically disclaimed that it was seeking forbearance from Section 254(g) in its petition.⁸

The State supports fully the Commission’s conclusions regarding the statutory requirements of Section 254(g). The State also believes that the issue should not, and need not, be addressed further as a part of this proceeding. The Commission initiated this proceeding to consider interstate access charge and universal service support reform for non-price cap carriers. The geographic rate averaging and rate integration requirements of Section 254(g) are not affected by these issues and, aside from the clarifications requested below, further consideration of Section 254(g) is unnecessary.

II. THE COMMISSION SHOULD CLARIFY THAT SECTION 254(g) DID NOT FORM THE BASIS FOR ANY OF THE ACCESS CHARGE OR UNIVERSAL SUPPORT REFORMS THAT WERE ADOPTED IN ITS *ORDER*.

As noted above, aside from the impact of Section 254(g) on Optional Calling Plans, the geographic rate averaging and rate integration requirements of Section 254(g) arguably are outside the scope of the instant proceeding. Certain parties injected Section 254(g) into this proceeding in an attempt to justify many of the access charge and universal support reforms that were before the Commission for consideration.

The State is frequently concerned about incidental references to Section 254(g) in unrelated proceedings because the dicta that often result may produce unintended precedent for later attacks on the statute, or its enforcement by the Commission. Section 254(g) has its own

⁷ *RCCC Petition* at 11.

⁸ *See id.* at 11 n.27.

complexities – as indicated by the proceedings in which it was directly addressed. Accordingly, reference to Section 254(g) in unrelated proceedings appropriately should be avoided.

As the Commission explained in its *Order*, Section 254(g) includes two obligations, which were embodied by the Commission in Section 64.1801 of its rules.⁹ First, IXCs must comply with geographic rate averaging by charging rates in rural areas that are no higher than the rates they charge in urban areas.¹⁰ Second, IXCs must comply with the statute’s rate integration requirement by providing services to their subscribers in each State at rates no higher than the rates charged to their subscribers in any other State.¹¹

Importantly, Section 254(g) requires IXCs to average rates *because* disparities exist in the cost of providing service in different regions and states, not *in case* of such disparities. In codifying Section 254(g), Congress was fully aware that cost disparities existed and mandated that IXCs internalize the disparities by averaging rates.

Thus, while the State certainly has no objection to efforts by the Commission to “reduce such disparities” and help “facilitate compliance” with Section 254(g),¹² the Commission should acknowledge that this is not the purpose of this proceeding and, more importantly, the Commission is under no obligation under Section 254(g) to reduce disparities in IXC costs.¹³

⁹ See *Order*, ¶ 179.

¹⁰ See 47 U.S.C. § 254(g); see also 47 C.F.R. § 64.1801(a) (2001).

¹¹ See *id.*

¹² *Order*, ¶¶ 64, 80.

¹³ Compare *AIRTC Petition* at 22-23 (arguing that Section 254(g) clearly requires that IXCs must average long distance rates, and the Commission does not have the authority to shift a portion of this burden on rural carriers by eliminating Carrier Common Line (“CCL”) charges and reducing rural access rates to below cost). While the State agrees that the Commission should not have eliminated CCL charges and reduced access charges solely to help facilitate IXC compliance with Section 254(g), the State observes that the Commission expressly made these changes pursuant to its requirements under Section 254(a) - (e) of the Act. See *Order*, ¶¶ 62, 76. As a result, any impact involving Section 254(g) was simply consequential or incidental.

Arguably, the elimination of *all* such disparities would obviate the need for IXC rate averaging, in a sense undermining Congress' explicit intent in codifying the averaging requirements in Section 254(g).

The State is aware of concerns expressed by some IXCs that the rate averaging requirements of Section 254(g) place pressure on IXCs providing nationwide service that may be less significant for IXCs providing regional service.¹⁴ The Commission concluded, however, that the measures adopted in the *Order* will relieve these pressures sufficiently and any further reductions are not necessary “to ensure the continued ability” of IXCs to comply with section 254(g).¹⁵ The State observes that nationwide IXCs enjoy significant economies of scale that are not enjoyed fully by regional IXCs. These economies should be taken into account when considering such issues as whether incentives really exist for nationwide IXCs to break up into unaffiliated companies serving different regions.¹⁶

Finally, the State notes some confusion over the Commission's statement that “[i]t is unclear whether section 254, read as a whole, directs the Commission to make explicit the support for toll rate averaging and rate integration provided for under section 254(g).”¹⁷

Obviously, the requirement of ‘explicitness’ that is included in Section 254(e) of the Act does not

¹⁴ See *RCCC Petition* at 7, 11 & 14 (arguing that a failure to provide further relief from the requirements of Section 254(g) “will lead to the demise of interexchange rate averaging and rate integration” and could cause IXCs to divide into separate, unaffiliated companies – those originating traffic in price cap regions and those originating traffic in non-price cap regions).

¹⁵ *Order*, ¶ 89. The access charge reforms that the Commission adopted in the *Order* were two-fold. First, the Commission eliminated the CCL charge, which it had eliminated previously for price cap carriers. Second, the Commission shifted some of the costs of the rural local loop from the traffic sensitive, to the non-traffic sensitive category, eliminating them from the calculation of access charges that are levied on IXCs.

¹⁶ See *RCCC Petition* at 7, 11 & 14.

¹⁷ *Order*, ¶ 89.

apply to Section 254(g). Section 254(e) refers to “universal service support” received by “eligible telecommunications carriers” (meaning *local exchange carriers* that provide universal service to customers).¹⁸ In contrast, Section 254(g) applies solely to IXCs, which, by their nature, do not receive universal service support.

Furthermore, it appears that the RCCC may not have been suggesting in this proceeding that IXCs should receive explicit support for compliance with Section 254(g). Instead, the RCCC appears to have argued in its petition that all forms of universal service support received by LECs pursuant to Section 254(e) must be explicit, and this requirement cannot be minimized by reference to the rate averaging requirements of Section 254(g).¹⁹

The RCCC appears to have made this argument in order to suggest that the comparatively high access charges levied by rural LECs on IXCs constitute implicit universal service support, which the RCCC argued is prohibited under Section 254(e).²⁰ The Commission responded fully to this argument, however, by concluding in its *Order* that rural carriers have legitimately higher costs than non-rural carriers and that these higher costs are appropriately reflected in higher access charges.²¹ The Commission also observed that access charges should be “cost-based” and it would be inappropriate to prescribe “below-cost rates.”²²

¹⁸ 47 U.S.C. §§ 214(e), 254(c) & (e) (2001).

¹⁹ See *RCCC Petition* at 11-13.

²⁰ See *id.* In arguing for a reduction in rural access charges, the RCCC also observed that Section 254(e)’s requirement of explicitness was the basis for the Commission’s elimination of the CCL charge. The Commission indicated in its *Order*, however, that it was eliminating CCL charges not because they provide an implicit subsidy to rural LECs, but instead because they provide a subsidy between heavy and light consumers of long distance services. See *Order*, ¶ 62.

²¹ *Order*, ¶¶ 86-88.

²² *Id.*, ¶ 88.

III. CONCLUSION

The Commission's *Order* provides important reenforcement for the geographic rate averaging and rate integration requirements of Section 254(g) of the Communications Act. The State has intervened, however, in order to seek clarification that the Commission did not rely on the rate averaging requirements of Section 254(g) to justify the access charge and universal support reforms that were adopted in its *Order*. While the State has no objection to efforts by the Commission to facilitate compliance with Section 254(g) through the elimination of certain rate disparities between urban and rural areas, the Commission should acknowledge that it is under no obligation to do so. Furthermore, aside from the impact of Section 254(g) on Optional Calling Plans, the statutory obligation of Section 254(g) is appropriately outside the stated scope of this proceeding.

Respectfully submitted,

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Certificate of Service

I, Clare Henley, do hereby certify that on this 14th day of February, 2002, I have caused a copy of the foregoing "Comments of The State of Hawaii" in CC Docket Nos. 96-45, 98-77, 98-166 and 00-256 to be served by first class mail to:

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