

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMPETITIVE UNIVERSAL SERVICE COALITION
COMMENTS ON PETITIONS FOR RECONSIDERATION**

**COMPETITIVE UNIVERSAL
SERVICE COALITION**

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EXECUTIVE SUMMARY

Though several rural incumbent local exchange carrier (“ILEC”) coalitions ask the FCC to reconsider its decision to make the Interstate Common Line Support (“ICLS”) fund created in the *MAG Order* portable to competitive Eligible Telecommunications Carriers (“ETCs”), there is no basis for the FCC to abandon its bedrock commitment to the principle of portability for all universal service funding. The principle of portability is rooted in the dual commitment to competition and universal service enshrined in the Telecommunications Act of 1996, and has been recognized by the courts of as being indispensable to implementing the Act’s provisions aimed at opening local telephone markets to competition and ensuring the ubiquity of basic telecommunications services.

None of the rural ILEC arguments against making support mechanisms such as ICLS portable can be sustained. First, the ILECs contend that making universal service support portable is merely a means to “artificially” promote competition in rural areas. But it would be more accurate to characterize portability as removing pre-existing barriers to competition. As reviewing courts have affirmed on several occasions, the 1996 Act obligates the FCC to promote universal service and competition simultaneously, and to reform universal service policy to make it more consistent with competitive entry.

Second, the rural ILECs assert that portability, and a pro-competitive universal service system, do not benefit consumers. But the Commission itself has already evaluated this contention both generically and in the context of specific facts, and found that competitive entry, which portable universal service makes possible, unequivocally benefits consumers in rural areas.

Third, some of the ILECs suggest that, in order to prevent what they characterize as unwarranted windfalls, the FCC should provide support to competitive ETCs based on those carriers' own, presumably lower, embedded costs, rather than based on the ILECs' embedded costs. But as the Commission has recognized, providing entrants less support than ILECs would violate competitive neutrality and make entry impossible. While there is no reason to assume that ILECs' costs will always exceed those of new entrants, a better solution would be to fund all carriers based on the forward-looking cost of the least-cost technology.

Fourth, the ILEC Petitioners invoke Section 254(e) of the Act in their crusade against portability, levying a baseless accusation that competitive ETCs will falsely certify they will properly use support for the intended purposes. But the courts have held that portability is required precisely because of Section 254(e). In any case, the Commission's enforcement mechanisms are capable of deterring and punishing parties that file false statements.

Fifth, the ILEC Petitioners contend that making universal service support portable could drive rural ILECs out of business and leave consumers without service. The Commission has already rejected this far-fetched suggestion.

Finally, the Commission correctly decided to remove certain implicit subsidies from rural ILECs' access charges, by increasing Subscriber Line Charges, gradually eliminating Carrier Common Line charges, and reducing other excessive access charges paid by interexchange carriers ("IXCs"). The courts have affirmed repeatedly that implicit subsidies violate the Act.

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The Competitive Universal Service Coalition (“CUSC”), 1/ by counsel and pursuant to Section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, hereby comments on the petitions for reconsideration of the Commission’s order in the above-captioned proceedings. 2/

1/ The Competitive Universal Service Coalition includes a number of diverse wireless and wireline competitive carriers (and their trade associations) that provide universal service or are considering doing so.

2/ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 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) (“*MAG Order*” or “*MAG FNPRM*,” depending on section of document referenced); *see also Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2526 (Jan. 15, 2002), 67 Fed. Reg. 4430-31 (Jan. 30, 2002).

I. THE COMMISSION SHOULD ADHERE TO ITS BEDROCK PRINCIPLE OF MAKING ALL HIGH-COST SUPPORT EXPLICIT AND FULLY PORTABLE TO COMPETITIVE ENTRANTS

CUSC opposes the petitions by several groups of rural ILECs, who do not merely seek reconsideration of the *MAG Order*, but rather wish to turn back the clock on bedrock principles of post-1996 Act universal service reform. ^{3/} The ILEC Petitioners ask the FCC to jettison the principle of portability of funding to competitive entrants. This argument amounts to a fundamental attack on the basic premise, followed in every FCC universal service decision since 1996, that universal service reform must be consistent with – and promote – the advent of competition in the local telecommunications marketplace. Full portability of the explicit support funds that keep local telephone service affordable to all consumers is the only way to ensure the competitive neutrality and open markets contemplated by the 1996 Act.

The Commission has recognized this directive at every step along the way in making formerly implicit subsidies explicit, whether it be high-cost support for areas served by non-rural ILECs, ^{4/} high-cost support in rural ILEC markets, ^{5/}

^{3/} National Telephone Cooperative Association Petition for Reconsideration at 4-6 (“NTCA”); Petition for Reconsideration of the Alliance of Independent Rural Telephone Companies at 2-12 (“AIRTC”); Western Alliance Petition for Reconsideration at 7-16 (“Western Alliance”); South Dakota Telecommunications Association Petition for Reconsideration at 6-8 (“SDTA”) (together “ILEC Petitioners”).

^{4/} *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 11 FCC Rcd 8776, 8932-34, ¶¶ 286-90 (1997) (“*Universal Service First Report and Order*”).

^{5/} *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

[footnote continues]

or access charge reform for price cap carriers. 6/ Numerous reviewing courts have affirmed that the established FCC policy of making all universal service funding explicit, portable, and competitively neutral is not only permissible under the 1996 Act, but is actually mandated by the Act. For example, according to the Fifth Circuit, “portability is not only consistent with predictability, but also is dictated by 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 [universal service] support is intended.’” 7/ Portability is also consistent with long-standing Commission recognition that non-portable support is a barrier to entry. 8/ And as Chairman Powell most recently stated, “Universal service should be preserved in a manner that provides meaningful opportunities for competition. * * * Yet many cite shortcomings in the

Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11291, 11298-99, ¶¶ 114, 134 (2001) (*RTF Order*”).

6/ *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13039-40, ¶¶ 186-87 (2000) (“*CALLS Order*”).

7/ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000) (quoting 47 U.S.C. § 254(e)). *See also id.* at 617 (“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).

8/ *Western Wireless Corporation (Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934)*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227 (2000).

current system as one factor undermining economic viability of competition and new entry.” ^{9/}

Nonetheless, the ILEC Petitioners now ask the FCC to abandon its established commitment to portability and competitive neutrality. The Commission must reject these efforts. Now is not the moment to further entrench incumbent carriers – and erect bulwarks against new entrants – by reversing the decision to make the new support created in the *MAG Order* fully portable to competitive entrants. Rather, as noted in our Petition for Reconsideration in this proceeding, the Commission should focus on adjusting the *MAG Order* and *RTF Order* to ensure greater transparency and to foreclose potential anti-competitive abuses. Competitive entry in rural and high-cost areas is still in its infancy, and is still stymied by regulatory barriers such as the difficulty of obtaining designation as eligible telecommunications carrier (“ETC”) by state commissions. Eliminating funding portability at this point would have the effect of eliminating nascent competition in rural areas – precisely the result apparently sought by the rural ILECs.

Regardless of whether rural ILECs agree, Congress has spoken and the days of local telephone monopolies and guaranteed returns on investment are gone. Congress believes that the advent of competition will bring real benefits to consumers – including those in rural areas – and has enshrined that view in the

^{9/} Michael K. Powell, *Digital Broadband Migration – Part II* at 5 (Oct. 23, 2001) (available at <http://www.fcc.gov/Speeches/Powell/2001/spmcp109.pdf>). See also Competitive Universal Service Coalition, *White Paper: The Road to Competitive Universal Service Reform* (July 2001) (presented to National Association of Regulatory Utility Commissioners’ July 2001 conference, available at <http://www.naruc.org/committees/telecom/cusc.pdf>).

market-opening provisions of the 1996 Act. As such, the ILEC Petitioners' continuing efforts to forestall such competition, including their request for the Commission to reverse its decision to make ICLS fully portable, must be rejected.

II. WERE THE COMMISSION TO ABANDON PORTABILITY, AS THE ILEC PETITIONERS ARGUE, IT WOULD VIOLATE THE ACT AND HARM CONSUMERS

As we show in greater detail below, the ILEC Petitioners' arguments for reconsideration of the *MAG Order's* decision to make ICLS fully portable have no support in the Act or sound policymaking. The ILEC Petitioners' arguments either misunderstand, mischaracterize, or simply renounce the underpinnings of the 1996 Act. They also espouse a view of competitive markets that has no basis in reality or valid market expectations. In view of these shortcomings, the Commission must deny the petitions for reconsideration and adhere to its pro-consumer, pro-competition policy that all support must be explicit and portable.

A. The Act Obligates the Commission to Promote Competition and Universal Service Simultaneously

The ILEC Petitioners' requests for reconsideration rest in large part on a mischaracterization of the relationship between competition and universal service reform under the 1996 Act. ^{10/} As the Fifth Circuit put it, "Alongside the universal service mandate is the directive that local telephone markets be opened to competi-

^{10/} For example, even though it is clear, as noted above, that Congress enshrined competition as the mechanism for bringing better service, lower prices and technological advances to consumers nationwide – including those in rural and high-cost areas – *see supra* at 4-5, the ILEC Petitioners suggest that the FCC is somehow free to disregard legislative intent and substitute mechanisms other than competition for advancing these objectives. *See, e.g., AIRTC* at 4-5.

tion. The FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition.” 11/

Thus, contrary to the position taken by the ILEC Petitioners, when the Commission adopts rules for providing support that are rooted in portability and competitive neutrality, it is not using universal service support as a means of artificially “creating competition” in high cost areas. 12/ Rather, the Commission’s portable funding rules are intended to dismantle artificial impediments to competition that were inherent in the pre-existing system’s implicit subsidies that historically were available only to the local monopolists. The Act requires elimination of such monopolies and replacing such implicit subsidies with the explicit, portable support appropriate to competitive markets. 13/

The ILEC Petitioners’ concern about portability, however, appears to be driven by a fear that ILECs could lose both support revenue and retail customer revenue to new entrants who successfully compete and attract customers away from the ILECs. This, the ILEC Petitioners argue, will interfere with their return on investment – and perhaps ultimately require increasing prices for their remaining

11/ *Alenco*, 201 F.3d at 615 (citing 47 U.S.C. §§ 251-253; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406, 412 (5th Cir. 1999) (“*TOPUC I*”).

12/ *Western Alliance* at 7; *AIRTC* at 4.

13/ *Alenco*, 201 F.3d at 616.

customers – under the rate-of-return regime in which they currently operate. ^{14/}
However, guaranteed returns on investment are inconsistent with the 1996 Act,
which, the Fifth Circuit has found:

does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. . . . So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act[.] ^{15/}

In sum, the Commission’s decision to make ICLS funding portable to competitors is well-grounded in the pro-competitive mandates of the 1996 Act.

B. Portability Removes a Barrier to Competition, Which Will Benefit Rural Consumers

There is no merit to the ILEC Petitioners’ assertion that competition in high-cost areas enabled by portable support will not benefit consumers. ^{16/} The FCC examined the same contention in specific factual contexts, and in each case

^{14/} *E.g.*, AIRTC at 19.

^{15/} *Alenco*, 201 F.3d at 620. The Commission should reject Western Alliance’s effort to pat itself on the back for its “excellent” past service while at the same time hurling the criticism that the advent of competition will “place the responsibility for the future telecommunications service of many . . . in the hands of . . . unproven newcomers.” *Id.* This self-congratulatory effort ignores that, for all the years rural ILECs were serving their monopoly territories, others were essentially barred from providing equivalent or better service due to the very regulatory impediments the ILEC Petitioners are chastising the FCC for removing. Moreover, the Commission has made express findings when authorizing competitive entry in rural areas that the “unproven newcomer” has there wherewithal to meaningfully provide service. *See, e.g., Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming*, 16 FCC Rcd 48, 55, ¶ 17 (2000) (“*Wyoming ETC Order*”).

concluded that consumers in rural areas will unequivocally benefit from the introduction of competition. ^{17/} As the Commission clearly recognized, competition “benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies,” including “not only . . . the deployment of new facilities and technologies,” but also “incentive[s] to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to [] consumers.” ^{18/} The Commission also observed that “competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.” ^{19/}

All these benefits can arise, however, only if new entrants can penetrate rural ILEC markets, which in turn can occur only if support mechanisms like ICLS are portable so ILECs do not have a competitive leg up on newcomers. All the recognized benefits of competition, enabled in part by portable ICLS funding, will come about notwithstanding misplaced ILEC fears that competitive carriers providing service at lower costs will not pass along savings to rate-paying end

^{16/} *E.g.*, Western Alliance at 14-15.

^{17/} *Federal-State Joint Board on Universal Service; Guam Cellular and Paging, Inc., d/b/a Guamcell Communications, Petition for Designation as an Eligible Telecommunications Carrier in the Territory of Guam*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 02-174, ¶ 15 (CCB Jan. 25, 2002); *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 01-283, ¶¶ 11-15 (Oct. 5, 2001); *Wyoming ETC Order*, 16 FCC Rcd at 55, ¶ 16.

^{18/} *Wyoming ETC Order*, 16 FCC Rcd at 55, ¶ 17.

^{19/} *Id.* at 57, ¶ 22.

users. 20/ This notion is inconsistent with basic economics and how firms behave in competitive markets. Competitive ETCs that qualify for universal service funding, including ICLS, will be forced to pass along savings in the form of lower rates if they are to have any chance of capturing customers from entrenched incumbents. Thus, regardless of whether the ILEC Petitioners' objection to portable ICLS comes from concerns about the benefits to consumers, or concerns about the ILECs' bottom line, 21/ there is no basis for reversing the decision to make ICLS portable. 22/

C. Providing Support to Competitive ETCs Based on Their Own Embedded Costs Would Violate the Act and the Public Interest, and Would Be Unworkable

There is no truth to the ILEC Petitioners' suggestion that making ICLS fully portable will result in a windfall for competitive ETCs, 23/ and no merit to their argument that competitive ETCs should receive support based on their own

20/ See, e.g., SDTA at 7; *cf.*, Western Alliance at 14 (suggesting competitors may enter rural markets primarily to divert support from the pre-existing ILEC).

21/ If the real concern is that, once new entrants realize such savings they will be able to undercut an ILEC's rate-of-return-driven rates, it is just another reason for transitioning carriers from rate-of-return regulation to a form of incentive regulation more consistent with competition. See CUSC Comments on Further NPRM (filed contemporaneously with the instant comments).

22/ Given the public benefits Congress anticipated, and the Commission and the courts have recognized, as arising from opening local telephone markets to competition by making all implicit subsidies explicit and portable, it cannot be the case that "[t]he public interest favors a suspension of the rule making ICLS portable." NTCA at 10. There is also no basis for considering NTCA's suggestion of suspending the portability of ICLS so the Commission can "review of its definition of competitive neutrality," *id.* at 6, especially given how deeply ingrained the principle has become in universal service policy. See, e.g., *Alenco*, 201 F.3d at 622.

23/ Western Alliance at 11.

embedded costs rather than those of the ILECs. 24/ The ILEC Petitioners appear to be terrified that competitive ETCs – particularly wireless carriers – will incur much lower costs to provide service to their customers, and therefore will receive a wind-fall if their support is based on ILEC embedded costs. But there is no basis for this assumption.

First, it is just as likely that competitive ETCs' embedded costs will be *higher* than those of the rural incumbents. This is particularly true when examined on a per-line basis, since competitive ETCs that have recently entered a market typically will have relatively few customers over whom to spread costs. Indeed, CLECs and wireless carriers face a higher cost of capital than ILECs, and must incur significant start-up costs (of marketing, customer acquisition, construction of new facilities such as cellular towers and so on) to enter new local markets. Taken to its logical, but ludicrous, conclusion, the ILEC Petitioners' argument would entitle competitive ETCs to have universal service funding subsidize their market entry costs.

However, if the ILEC Petitioners are correct and wireless and other competitive ETCs incur lower per-customer costs than rural ILECs to serve the same customer base, the solution is not to give the ILECs a higher subsidy than their competitors. Rather, the subsidy amount for all carriers should be reduced to a level based on the forward-looking costs of the most efficient technology. 25/ If

24/ *E.g., id.* at 13; SDTA at 6-8.

25/ To be sure, as an ideal, theoretical matter, portability is most consistent with a system in which all providers receive identical amounts of per-line funding based on forward-looking costs. The Commission recognized in the *MAG Order* that the

[footnote continues]

ILECs' embedded cost structures are really as inefficient as their representatives apparently think they are, then their excess costs should either be disallowed or should be competed away in the crucible of a competitive marketplace.

What the ILEC Petitioners really seek is something the 1996 Act denies them – a guaranteed revenue stream and assured economic prosperity. Universal service is designed to “provide sufficient funding to customers,” not carriers, and the law does not guarantee incumbent carriers or anyone else “protection from competition.” 26/ Rather, the Act “is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete.” 27/

Determining competitive ETCs' “embedded costs” also would require the kind of arduous, intrusive proceedings the FCC long ago deemed inappropriate for competitive carriers. 28/ In addition, basing support on each carrier's individual costs would require the FCC and USAC to undertake a much greater administrative effort than required, with the burden multiplying with each new ETC designated to serve a rural market. In any event, the provisions of Parts 32, 36, 64, and 69 of the

embedded cost-based mechanisms that it (and the *RTF Order*) perpetuate are, at best, a transitional stop-gap that ultimately will be replaced by a system based on forward-looking costs. *MAG Order* at ¶ 129.

26/ *Alenco*, 201 F.3d at 619, 622.

27/ *Id.* at 620.

28/ *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); *See also generally Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

FCC's rules (under which ILEC embedded costs are measured, allocated, separated, and categorized), rely on ILEC network designs and historical regulated accounting systems that do not lend themselves to new entrants (especially wireless carriers). Finally, prospective entrants need to know exactly how much support will be available in order to make reasoned business decisions about entry, and such reasoned decisions would be impossible if prospective entrants had to undergo a rate case prior to knowing how much support they could expect to receive. 29/

D. Portability is Consistent With Section 254(e), and Competitive ETCs Will Use Support Dollars Only for the Intended Purposes

There is no basis for the ILEC Petitioners' contention that extensive fact-finding or other burdensome regulatory procedures are needed to verify competitive ETCs' certifications that they are in compliance with Section 254(e) of the Act. 30/ The ILEC Petitioners' suspicions are totally unfounded. First, the Commission routinely relies on carriers' certifications of compliance, and has ample enforcement mechanisms in place to punish violators and deter others from possible misrepresentations. 31/ CUSC takes strong exception to these parties' suggestions that competitive ETCs receiving portable support generically cannot be trusted. The Commission should reject this unfounded and offensive allegation.

29/ 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).

30/ Western Alliance at 12-13; NTCA at 4-6, 9-10.

31/ See *SBC Communications, Inc.*, File No. EB-01-IH-0339, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091 (2001) (proposing to impose \$2,520,000 forfeiture for SBC's alleged material misrepresentations).

Moreover, 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. As noted above, competitive ETCs' costs are just as likely to exceed those of the incumbent as to be lower. More fundamentally, contrary to the apparent presumption of the ILEC Petitioners, explicit support subsidizes only a portion of the costs that any ETC incurs – whether it is a competitive entrant or an ILEC – to provide, maintain, and upgrade facilities. For ILECs, the rest comes from rates charged to consumers and/or implicit sources of support, such as the access charges that were the subject of the *MAG Order*. ^{32/} Similarly, while competitive ETCs do not receive implicit subsidies, in most cases they are likely to recover the bulk of their needed revenues from customers, not from universal service support, regardless of the basis used for computing the amount of support.

The ILEC Petitioners' anti-portability arguments based on Section 254(e) are nothing more than an attempt to impose unnecessary costs on their

^{32/} Cf., FEDERAL AND STATE UNIVERSAL SERVICE PROGRAMS AND CHALLENGES TO FUNDING, U.S. General Accounting Office, Report to the Ranking Minority Member, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, at 14-18 (February 2002) (available at <http://www.gao.gov/new.items/d02187.pdf>) (finding that all 51 states (including D.C.) admit to maintaining various types of implicit support, including business rates that far exceed residential rates; rates for rural areas that are either geographically averaged with, or in some instances even lower than, rates in urban areas (even though costs are higher in rural areas); and in about half the states, excessive access charges that cross-subsidize residential rates).

competitors and set up another barrier to entry. Indeed, the Fifth Circuit has held that portability of universal service funding is “dictated” by Section 254(e). 33/

E. The ILEC Petitioners’ Suggestion That Portability May Drive Them Out of Business Is Patently Implausible

Finally, the Commission should pay no heed to the fanciful suggestion advanced by the ILEC Petitioners that portable support will lead ILECs to abandon rural markets. 34/ There is no evidence that rural ILECs are even considering leaving the market, even where competitive carriers have been designated to receive support in the service area. 35/ This is true even where competitive carriers have received ETC designation and have begun to serve customers. Ironically, the ILEC Petitioners make these threats to abandon the market at the same time they claim new entrants will leave consumers high and dry after the purported “wind-fall” support decreases or disappears. To date, prospective competitive carriers have done nothing but express eagerness at finally being afforded a fair opportunity to penetrate and serve markets formerly closed to them due to the intricate and inequitable system of implicit subsidies that has existed to date. In any case, any real risk of an ILEC leaving the market, 36/ as well as any suggestion that a non-incumbent is gaming the system, 37/ should be dealt with on a case-by-case basis

33/ *Alenco*, 201 F.3d at 622.

34/ *E.g.*, *Western Alliance* at 7.

35/ *Wyoming ETC Order*, 16 FCC Rcd at 55, ¶ 17.

36/ *Western Alliance* at 7.

37/ *AIRTC* at 7.

when – and if – it happens. The Commission cannot allow universal service and access charge reform to be guided by chimerical ILEC speculation.

III. THE COMMISSION PROPERLY REMOVED IMPLICIT SUBSIDIES FROM RURAL ILEC ACCESS CHARGES

Contrary to the arguments of some of the ILEC Petitioners, the Commission should not retreat from its efforts in the *MAG Order* to eliminate unlawful implicit subsidies by increasing the Subscriber Line Charge (“SLC”), eliminating the Carrier Common Line (“CCL”) charge, and reducing other excessive interstate access charges paid by interexchange carriers. ^{38/} To the extent the ILEC Petitioners profess concern about how rural consumers will realize benefits from reduced access charges, ^{39/} it is clear that consumers across the country will benefit from the elimination of the artificial, unwarranted implicit subsidy, through a more competitive long-distance marketplace. The inconsistency between the low access charges of large ILECs and the much higher access charges of rural ILECs was unjustifiable and unsustainable. By removing implicit subsidies from rural ILEC access charges, the Commission has enhanced the ability of long distance carriers to compete to provide customers with the best service and prices. At the same time, establishing explicit, portable ICLS funding in place of such implicit subsidies has the effect of dismantling a barrier to competitive local telephone service providers’ ability to provide customers with similar benefits.

^{38/} *E.g., id.* at 17-19; SDTA at 3-5; CenturyTel, Inc., at 2-6 (seeking reversal of reform of federal SLC and CCL levels to account for state access pricing policies); NTCA at 13-14 (seeking implicit subsidy in the form of reduced SLCs for Centrex lines to specified institutions).

It is abundantly clear that excessive access charges paid by IXC's, such as a per-minute CCL that recovers non-traffic-sensitive local loop costs through per-minute charges to IXC's, and ultra-low SLCs that do not come near recovering the associated loop costs, constitute implicit subsidies. 40/ It is no less clear that such implicit subsidies are unlawful under the 1996 Act. 41/ The Commission correctly moved toward eliminating them in the *MAG Order*.

IV. THE ILEC PETITIONERS' ANTI-COMPETITIVE CHALLENGE TO WIRELESS CARRIERS' ELIGIBILITY IS MISPLACED

The *MAG Order* did not even address the Commission's well-established policy that wireless carriers are fully qualified to provide universal service as ETCs, and that universal service proceedings cannot be abused to impose ILEC requirements on wireless carriers (or other competitive entrants).

Nonetheless, the ILEC Petitioners, in their Petitions for Reconsideration of the *MAG Order* – the *Fifteenth* Report and Order in CC Docket No. 96-45 – challenge a policy established five years ago in the *First* Report and Order in this docket. 42/

Besides being barred by the Act and the FCC's rules governing out-of-time

39/ *E.g.*, AIRTC at 11.

40/ *See, e.g., Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16012, ¶ 75 (1997), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *CALLS Order*, 15 FCC Rcd at 12971-72, ¶ 23.

41/ *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001) ("*TOPUC II*"); *Alenco*, 201 F.3d at 616; *TOPUC I*, 393 F.3d at 425.

42/ *Compare* Western Alliance at 10 (complaining of portable per-line support based upon rural ILEC costs for wireless ETCs because the latter "operate in a wholly different regulatory and cost environment") *with Universal Service First Report and Order*, 11 FCC Rcd at 8858-59, ¶¶ 145-147.

reconsideration petitions, 43/ the ILEC Petitioners' arguments in this regard are wrong on the merits. It makes no sense to seek to impose rate, entry or other ILEC-like regulation simply because the wireless provider has entered a market served by an ILEC and been designated as an ETC. 44/ Moreover, given that, so far, it has largely been wireless ETCs who have made the effort (and some inroads) to enter rural ILEC markets, 45/ the anti-competitive intent behind the ILEC Petitioners' ongoing effort to categorically disqualify wireless carriers from some or all of the universal service support that is essential to competing in high-cost areas could not be clearer.

43/ 47 U.S.C. § 402(a), (c); 47 C.F.R. §§ 1.429(d); see also, e.g., *Implementation of the AM Expanded Band Allotment Plan*, MM Docket No. 87-267, Memorandum Opinion and Order, 13 FCC Rcd 21872, 21873-74, ¶ 6 (1998) (denying petition for reconsideration because “the Commission previously considered and rejected every argument raised . . . in [the] Petition” so “the time to reconsider [the] issue [had] long since passed” and any “effort to seek further reconsideration of [the] same issues at a latter stage of the same proceeding” was improper).

44/ Indeed, the Commission has recognized in the wireless context that regulatory parity does not require it to apply the same regulatory framework to all market participants without regard to how much – or how little – market power they possess. *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1474, ¶ 162 (1994). In any case, the question of when a given wireless provider can be subject to regulation as a LEC must be made on a case-by-case basis after a specific showing by state regulatory authorities. See 47 U.S.C. § 332(c)(3)(A).

45/ See *Western Alliance* at 9 (“there is virtually no competition between wireline rate-of-return LECs and wireline [CLECs]” but “there has been substantial effort by . . . Western Wireless and other [wireless] carriers”).

V. CONCLUSION

For the foregoing reasons, the Commission should decline to reconsider the *MAG Order* in the manner requested by the ILEC Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cecelia Burnett, hereby certify that on this 14th day of February, 2002, copies of the Comments on the Petition for Reconsideration were served on the parties listed below by hand delivery or first class mail.

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