

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)	CC Docket No. 96-45
Service)	
)	
Access Charge Reform for Incumbent Local)	CC Docket No. 98-77
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)	

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
REPLY TO THE OPPOSITIONS TO
NTCA’S PETITION FOR RECONSIDERATION

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its reply comments to oppositions to its petition for reconsideration. NTCA will principally respond to oppositions filed by the Rural Consumer Choice Coalition (RCCC) and the Competitive Universal Service Coalition (CUSC).

¹ NTCA is a non-profit corporation established in 1954 and represents approximately 550 rate-of-return regulated rural telecommunications companies. NTCA members are full service telecommunications carriers providing local, wireless, cable, Internet access, satellite and long distance services to their communities. All NTCA members are small carriers that are defined as “rural telephone companies” in the Telecommunications Act of 1996 (Act). They are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

I. THE COMMISSION IS NOT REQUIRED TO ADOPT UNIVERSAL SERVICE RULES TO CREATE COMPETITION IN AREAS WHERE A COMPETITIVE MARKETPLACE WOULD NOT OTHERWISE EXIST

NTCA is not opposed to competition *per se* and objects to CUSC and RCCC's characterization of NTCA's petition as anticompetitive. Both RCCC and CUSC completely ignore universal service principles in their replies. They see universal service mechanisms aimed at rural and high cost areas as a means of promoting competition rather than ensuring, as the Telecommunications Act of 1996 (the Act) requires that rural consumers receive access to telecommunications information and advanced services at "rates that are reasonably comparable to rates charged for similar services in urban areas."² NTCA agrees that the goal of competition is a primary objective of the Act but universal service is as legitimate a goal as competition and support mechanisms are not a tool or handmaid of competition. In his Separate Statement released with the Second Report and Order in this proceeding, Commissioner Kevin Martin identified the problem, which this approach has created. He said:

...I have some concerns with the Commission's policy-adopted long before this Order-of using universal support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economics of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.

NTCA has similar concerns and is opposed to using universal service support to artificially induce competition. CUSC claims that making identical ICLS support available to companies that have no common line revenue requirement does not amount to an artificial means of creating competition.³ If support in excess of costs induces a

² 47 U.S.C. § 254 (b)(3).

³ CUSC Opposition at 6.

carrier to enter a service area it would not have in the absence of that windfall, that is artificially induced competition. CUSC cannot deny that the Commission will have no way of knowing whether carriers receiving identical support will receive windfalls.⁴ NTCA disputes CUSC's contention that carriers will necessarily use windfalls derived from excess support to reduce prices to consumers.⁵ There are no requirements and few incentives for this to happen as carriers continue to receive the same support that the ILEC does no matter what their costs or prices are.

A competitive carrier receiving support in excess of costs, can, in theory, lower its prices to a level just sufficient to drive the incumbent out of business. While this is often a natural result of the competitive marketplace, it is both inefficient and inequitable in the context of a system set up to promote universal service. The objective of Section 254 of the Act is not to create competition that drives incumbents out of business. Incumbent local exchange carriers, unlike new entrants, in fact, are usually saddled with carrier of last resort obligations that limit their exit options.

II. RCCC AND CUSC HAVE NOT SHOWN THAT MODIFICATION OF 47 C.F.R. SECTION 54.307(a)(1) IS REQUIRED ON THE BASIS OF POLICIES ADOPTED FIVE YEARS AGO.

A. The Portable ICLS Rule Does Not Achieve The Objectives The Commission Intended When It Adopted The Competitive Neutrality Principle

RCCC suggests that the Commission had no choice except to modify 47 C.F.R. Section 54.307(a)(1) because of the 1996 recommendations of the Universal Service Joint

⁴ In the same vein of argument, CUSC takes strong objection to suggestions it believes implies that competitive ETCs receiving identical support cannot be trusted. CUSC Opposition at 12. It is not a question of trust - if competitive carriers receive support in excess of their costs, they will put these funds to use elsewhere and it cannot be said then that the support is being used in accordance with the requirements of Section 254(e) of the Act.

⁵ CUSC at 9.

Board, its 1997 decision in the First Report and Order⁶ deciding on basic principles and mechanisms for high cost support and subsequent decisions by the United States Court of Appeals for the Fifth Circuit. The elements involved in access reform are quite different from those at issue in the high cost docket. The Commission may not act arbitrarily but it is not required to remain immutably tied to each and every conclusion it reached in 1997.

The issues involved in access reform for rate of return carriers are different from those involved in reform of the high cost program and involve the need to balance a different set of principles than those at issue in the reform of high cost support mechanisms. There is, for example, no agreement among all interested parties in this proceeding that it is appropriate to rename the common line revenue requirement “subsidy” and provide for its collection through universal service, whereas throughout the course of “high cost” reform there was little dispute that the “implicit” high cost support system then in place was required to be made “explicit.” Rate structure rationalization is a central goal in this proceeding as is encouragement of investment and “stability for rate of return carriers.”⁷ In light of these different considerations, the Commission should certainly consider whether today’s circumstances and events that have occurred since 1997 merit a review of its five-year old policy of identical support before applying it to ICLS.

As Commissioner Copps stated in his dissenting statement, the major modifications involved in this proceeding warranted further comment from the parties

⁶ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8802 (1997)

⁷ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carrier and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order in CC Docket Nos. 98-77 and 98-166, FCC 01-304, at para. 3 and 128 (“*MAG Order*” or “*Order*”).

and further analysis by the Commission. The Commission can remedy the adverse effect of its failure to take further comment by suspending the implementation of the identical ICLS support rule until it has an opportunity to review application of its definition of competitive neutrality to access reform for rate of return regulated carriers. The Commission should suspend implementation now instead of later to avoid the consequences of a disruptive change after review and to prevent the harm and waste that will occur if the rule becomes effective in June 2002.

The modification to 54.307(a)(1) should not be implemented without a review because the ICLS identical support rule defeats the purposes the Commission intended when it adopted “competitive neutrality” as an additional principle to those stipulated in Section 254(b) of the Act. The Commission’s goal in 1997 was to minimize disparities so that “no entity receives an unfair competitive advantage that may skin the marketplace.”⁸ Just the opposite will result from the identical ICLS rule. Distortions will be maximized. Carriers with no loop costs and no lines *per se* will be able to receive the same per line support as carriers that have enormously expensive 10, 15, 30, 40 or 50 mile loops merely by filing customer lists that consists in some cases are no more than the customers’ billing address. The 1997 decision did not assume that multiple carriers would receive the same support. On the contrary, the Commission explained that its policy was intended to “ensure that no entity receives an unfair competitive advantage.”⁹ The Commission’s policy was based on assumptions that have not been borne out over the course of five years. It concluded, for example, that a competitive eligible telecommunications carrier (CETC) could not profit if it had lower costs because it must

⁸ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8802.

⁹ *Id.*

“provide and advertise the service throughout the entire service area, consistent with Section 214 (2)....”¹⁰ As a result of subsequent state and Commission action, CETCs are not required to provide service throughout entire rural telephone company service areas. In South Dakota, for example, it is not even necessary to serve a single customer to become certified under Section 214(e) and Commission rules permit CETCs to file loop counts regardless of whether they have loops and whether they serve the one most profitable customer or all.¹¹

The “competitive neutrality” rule was predicated on the assumption that the public would benefit from the efficiencies that follow competition. The identical ICLS support rule was summarily adopted on the same assumption.¹² There is no evidence that efficiencies have been gained by application of the principle to high cost or that they will be gained by the identical ICLS support rule. CUSC, of course, claims that benefits in the form of passed through savings will come, “enabled in part by portable ICLS.”¹³ NTCA does not dispute that the public benefits if a carrier can enter a market and provide an equivalent level of service at a lower price. However, lower prices that come at the expense of service degradation or of support in excess of costs do not benefit the public. As NTCA stated in its petition, ICLS has no relationship to the cost of carriers that are not rate of return regulated and the Commission cannot even determine whether they will receive support in excess of their total per line costs.¹⁴ The fact remains that the identical ICLS rule violates Section 254(e).

¹⁰ *Id* at 8993.

¹¹ *See, In Re Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 2001 SD 32, (South Dakota Supreme Court March 14, 2001), also 57 C. F.R. § 54.307(b).

¹² Second Report and Order, para. 151

¹³ CUSC at 8.

¹⁴ NTCA Petition for Reconsideration in this docket at 3-5 and 7-9.

B. The Commission Has The Discretion To Suspend And Change The ICLS Identical Support Rule.

In its Petition, NTCA asked the Commission to review its definition of competitive neutrality and suspend application of the identical ICLS rule in the interim. NTCA argued that the new rule would aggravate distortions that have begun to appear as a result of the Commission's other portability rules. RCCC and CUSC cite *Alenco v. FCC*¹⁵ as authority for their claims that the decision to adopt the identical ICLS rule is not discretionary. Many of the references to *Alenco* are dicta. In any event, the fact is that the Commission's ability and obligation to design rules that comply with the "use" provisions in Section 254(e) were not at issue in *Alenco*. In that case, petitioners argued that portability violates the Section 254(b)(5) principle of "predictability" and the statutory mandate of "sufficient" funding in Section 254(e). The *Alenco* Court said it could not conclude that portability violated "sufficiency" or "predictability."¹⁶ The "use" language was not at issue. NTCA is not making the *Alenco* petitioners' argument. Section 254(e) of the Act requires that "[a] carrier that receives ... support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." The point at issue is whether Section 254(e) is violated by a rule, which gives CETCs identical access support or ICLS, which is designed to replace a rate structure that recovered a common line revenue requirement attributable to the embedded costs of rate of return carriers. A different way of looking at this issue is

¹⁵ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, (5th Cir. 2000). Oppositions also rely on *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998), *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) and *Comsat Corporation v. FCC*, 250 F.3d 931 (5th Cir. 2001). None of these cases addressed the issue NTCA raises.

¹⁶ *Alenco* at 621.

whether it is arbitrary and capricious to adopt a rule which assumes that carriers with no loops will use ICLS for the purposes intended considering the Commission's statements that, among other things, it is intended to provide stability for rate of return carriers and rationalize rate of return carriers interstate access rate structures.¹⁷

C. Other Parties Agree That The Commission Should Grant NTCA'S Petition

Other parties agree that the Commission's identical ICLS rule precludes proper enforcement of the Act's requirements to restrict the use of support to the statute's intended purposes, to limit support to sufficient, not excessive levels, and to prevent carriers from using non-competitive services to provide implicit subsidies for competitive services.¹⁸

The South Dakota Telecommunications Association and Townes Telecommunications, Inc. point out that guaranteeing competitive carriers support based on the ILECs' often higher costs could lead to the creation of "war chests" for the competitors.¹⁹ They agree with NTCA and ask that the Commission review its definition of competitive neutrality and immediately suspend application of the portability rules to the ICLS.

NRTA, OPASTCO, and USTA agree "wholeheartedly" that the Commission needs to review the issue. These associations urge the Commission to open a separate proceeding as soon as possible to reexamine the issue and remedy "the detrimental consequences of the Commission's current portability policies."²⁰

¹⁷ *MAG Order*, paras. 128-138.

¹⁸ 47 C.F.R. § 254(k).

¹⁹ *Opposition to Petitions For Reconsideration of the South Dakota Telecommunications Association and Townes Telecommunications, Inc.*, at 3.

²⁰ *Reply of NRTA, OPASTCO, and USTA to Petitions for Reconsideration*, at 14.

D. FCC Should Reject RCCC's Opposition to NTCA's Proposal to Phase in the Multi-line Business SLC and Forego the SLC increase on Centrex Lines to Public Institutions.

RCCC's reasons for opposing the NTCA's proposal to phase in the multi-line business subscriber line charge (SLC) increase over three years and forego the SLC increase on Centrex lines to public service institutions should be rejected. RCCC claims that NTCA's proposal would create an unlawful implicit subsidy, because it would shift recovery of these costs to other interconnecting IXCs or as part of ICLS.²¹ In fact, each of these alternative recovery methods is permissible and has been upheld by the U.S. Court of Appeals.

In *Southwestern Bell v. FCC*, the Court found that the FCC had the discretion when implementing access charge reform for large local exchange carriers to retain portions of CCL charge while gradually increasing the flat-rate PICC imposed on IXCs over time.²² The Court rejected arguments that the phase-in approach created an implicit subsidy in violation of section 254. Similarly, NTCA's proposed phase-in of the multi-line business SLC for small local exchange carriers is nothing more than a gradual phasing-out of the CCL charge while gradually increasing the flat-rate SLC imposed on end-users.

With regard to foregoing the SLC increase on Centrex lines to public service institutions, as long as the forgone SLC revenues are recovered through the ICLS, their recovery is explicit and consistent with section 245(e). Since the proposed recovery of these costs would not be through per-minute access rates, it does not violate the Court's

²¹ RCCC's Opposition Comments, p. 25 (February 14, 2002).

²² *Southwestern Bell v. FCC*, 153 F.3d 523, 539 (U.S.C.A. 8th Cir., 1998).

prohibition against recovering universal service subsidies in access rates either on a permissive or mandatory basis.²³

III. CONCLUSION

For the above stated reasons, the Commission should grant NTCA's petition for reconsideration.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory
L. Marie Guillory

By: /s/ Daniel Mitchell
Daniel Mitchell

By: /s/ Jill Canfield
Jill Canfield

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

February 25, 2002

²³ *COMSAT v. FCC*, 250 F.3d at 938 (U.S.C.A. 5th Cir., 2001).

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply to the Opposition to Petitions for Reconsideration of the National Telecommunications Cooperative Association in CC Docket No. 00-256, FCC 01-304 was served on this 25th of February 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail C. Malloy

Gail C. Malloy

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

William F. Caton, Acting Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Lisa M. Zaina
Wallman Strategic Consulting, LLC
1300 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036

Stephen G. Kraskin, Esq.
Sylvia Lese
Kraskin, Lese & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Richard D. Coit, General Counsel
South Dakota Telecommunications
Association
P.O. Box 57
Pierre, SD 57501

Benjamin H. Dickens, Jr., Esq.
Mary J. Sisak, Esq.
Douglas W. Everette, Esq.
Blooston, Mordkofsky, Dickens, Duffy
& Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

David L. Sieradzki, Esq.
Michele C. Farquhar, Esq.
Ronnie London, Esq.
Hogan & Hartson LLP
555 13th Street, N.W.
Washington, D.C. 20004

Richard A. Askoff, Esq.
Regina McNeil, Esq.
National Exchange Carrier Association,
Inc.
80 South Jefferson Road
Whippany, NJ 07981

Margot Smiley Humphrey
Holland & Knight
2099 Pennsylvania Avenue, Suite 100
Washington, D.C. 20006

John F. Jones, Vice President
Federal Government Relations
CENTURYTEL, INC.
100 Century Park Drive
Monroe, Louisiana 71203

Karen Brinkmann, Esq.
Richard R. Cameron
Latham & Watkins
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004-1304

Gerald J. Duffy, Esq.
Blooston, Mordkofsky, Dickens, Duffy
& Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Michele C. Farquhar, Esq.
David L. Sieradzki, Esq.
Angela E. Giancarlo, Esq.
Hogan & Hortson LLP
555 13th Street, N.W.
Washington, D.C. 20004

David Cosson, Esq.
Stephen G. Kraskin, Esq.
Steven E. Watkins, Principal,
Management Consulting
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

John T. Nakahata, Esq.
Timothy J. Simeone, Esq.
Harris, Wiltshire & Grannis LLP
1200 18th Street, N.W.
Washington, D.C. 20036

James R. Jackson, Esq.
General Communications, Inc.
2550 Denali Street, Suite 1000
Anchorage, Alaska 99503

Mark C. Rosenblum, Esq.
Judy Sello, Esq.
AT&T
295 North Maple Ave., Room 1135L2
Basking Ridge, NJ 07920

Gene A. DeJordy, Esq.
Mark S. Rubin, Esq.
Western Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, D.C. 20004

Joe D. Edge, Esq.
Tina M. Pidgeon, Esq.
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005

Samuel E. Ebbesen
President and Chief Executive Officer
Innovative Telephone
P.O. Box 6100
St. Thomas, U.S. Virgin
Islands 00801-6100

Gregory J. Vogt, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

