DOCKET FILE COPY ORIGINAL ORIGINAL

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

RECEIVED
FEB 25 2002
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

REPLY TO OPPOSITIONS TO THE PETITION FOR RECONSIDERATION OF THE ALLIANCE OF INDEPENDENT RURAL TELEPHONE COMPANIES

Lisa M. Zaina
Wallman Strategic Consulting, LLC
1300 Connecticut Ave., NW, Suite 1000
Washington, DC 20036
(202) 347-4964

Stephen G. Kraskin
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
(202) 296-8890

Its Attorneys

February 25, 2002

No. of Copies rec'd 0+4
List A B C D E

The Alliance of Independent Rural Telephone Companies ("Alliance") respectfully submits this reply to the Oppositions to the Alliance Petition for Reconsideration (the "Petition") of the Commission's Order issued in the above-referenced proceeding.[1] The only opposing references to the Alliance Petition are set forth in the Comments of the Competitive Universal Service Coalition ("CUSC") and the Opposition of the 'Rural Consumer Choice Coalition' ("RCCC").[2] The references of both CUSC and RCCC to the Alliance Petition are scant. Neither the CUSC nor the RCCC directly address the three specific issues and supporting legal arguments raised by the Alliance in its Petition. Instead, these parties attempt to dismiss the Alliance Petition with broad-brush generalizations that ignore the arguments set forth by the Alliance.

I. The Opposing Parties Did Not Provide Any Meaningful or Specific Opposition to the Alliance Petition. In Fact, the Opposing Parties Failed to Address the Specific Issues Raised by the Petition.

In its Petition, the Alliance sets forth both the factual and legal basis that requires the Commission to reconsider and rescind the adoption of rule modifications regarding three specific *MAG Order* determinations:

> (1) the *MAG Order* improperly requires that all non-traffic sensitive ("NTS") carrier common line ("CCL") costs must be recovered from either end user charges or a new form of universal service support mechanism;
>
> (2) the *MAG Order* improperly requires that subscriber line charge ("SLC") caps for rate-of-return carriers should be increased to the levels established for price-cap carriers; and

---

[1] *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* ("*MAG Order*") released in the above-captioned proceeding on November 8, 2001.

[2] CUSC and RCCC are collectively referred to herein as "the Opposing Parties."

(3) the *MAG Order* improperly requires rural rate-of-return LECs to recover universal service contributions only through end user charges.

The Alliance respectfully refers the Commission and the Opposing Parties to the Petition. Commission Orders and resulting rules and policies that ignore the specific issues raised in the Petition by the Alliance cannot and will not be sustainable.[3]

At issue in this proceeding are two fundamental questions:

(1) whether the factual circumstances that exist in rural incumbent rate-of-return carrier service areas support the *MAG Order* determination that the Commission can mandate that a rural rate-of-return LEC can only establish a rate assessed to its end user customer to recover its interstate allocated NTS costs and universal service contribution; and

(2) whether interstate costs in excess of a prescribed limit on the end user rate can only be recovered by the rural LEC as a "subsidy" from a new and portable universal service mechanism.

While these issues are fully set forth in the Alliance's Petition, the Opposing Parties have taken an "out of sight, out of mind" approach. As discussed in Section II, infra, in those few instances where the Opposing Parties acknowledge the existence of the Alliance Petition, their references are either merely anecdotal or misleading and inaccurate.

II. The Opposing Parties Incorrectly Characterize the Alliance Petition and Improperly Rely on Proceedings that Did Not Consider Rural Rate of Return Carrier Characteristics.

A. The Opposing Parties Ignore the Difficult Reconsideration Matters Raised by the Alliance and Wrongly Attempt to Deflect the Commission's Attention Away from the Issues that the Commission Must Ultimately Address.

---

[3] The Alliance recognizes that the Opposing Parties may, as they have, tactically choose to disregard the difficult issues posed by the Petition. The Alliance recognizes also that neither the Administrative Procedure Act nor the Commission's Rules and Regulations award automatic victory to a Petitioner whose arguments go unanswered by other parties. The Alliance submits, however, that the Opposing Parties could not have substantively rebuked the reconsideration request set forth in the Petition. The Alliance respectfully anticipates that the Commission will not disregard the specific issues and discussions raised in the Alliance Petition, and that the Commission's reconsideration of these matters will rectify the flaws in the *MAG Order*, as requested by the Alliance.

Instead of responding to the issues raised by the Alliance, the Opposing Parties focus on arguments that apparently attempt to misdirect the Commission's reconsideration process away from the specific issues raised by the Alliance Petition. For example, the Opposing Parties wrongly claim that the reconsideration focus of all of the advocates of the rural incumbents is to challenge the portability of universal service funding.[4] The claim is incorrect with respect to the Alliance which offered a far different set of specific legally supported issues for reconsideration. While the Opposing Parties may opt to disregard the difficult and specific issues raised by the Alliance, the Commission should not countenance their egregious effort to misstate the very specific focus of the Alliance reconsideration request.

The Alliance will not repeat the arguments fully set forth in its Petition, but the focus of the Petition was not USF portability, as wrongly claimed by the Opposing Parties. In order, however, to demonstrate factually the extent of the absurdity of the ploy of the Opposing Parties, the Alliance offers the following quote from its Petition:

> **The Alliance recognizes that the issue of "portability," as established by 47 CFR §§ 54.307, is not formally at issue in this proceeding.**[5]

The Alliance respectfully implores the Commission to review the full discussion incorporating this quote and the entire Alliance Petition in the context of the attempted misdirection by the Opposing Parties. At minimum, the Commission obviously must not assume that the characterization of the Alliance Petition by the Opposing Parties is accurate in any way.

---

[4] CUSC at pp. 2-15; RCCC at pp. 1-2 and 2-16.

[5] Petition at fn. 20. The Alliance did forcibly and clearly set forth the flaws inherent in a system that would force a carrier to recover a significant portion of its costs from a portable universal service fund. Contrary to the sophistry of the Opposing Parties, however, the focus of the Alliance Petition is on the wrongful *MAG Order* determination that would require the rural rate-of-return carrier to recover additional significant costs from a universal service fund rather than from rates charged for services provided.

B. The Opposing Parties Avoid Confronting the Issues Raised in the Alliance Petition By Repetition of Arguments and Citations to Past Proceedings that Did Not Consider the Characteristics Of Rate-of-Return Carriers.

In reconsidering the *MAG Order* issues challenged by the Alliance Petition, the Alliance respectfully suggested that the Commission should be guided by three fundamental established policy principles:

> (1) a rural rate-of-return LEC should be permitted to establish rates for interstate access services that recover its interstate access costs;
> (2) rural customers should not pay rates that unreasonably support services provided to other customers; and
> (3) rates for services should reflect a carrier's costs in order to provide appropriate market signals that enable prospective entrants to assess whether to enter a particular market.

The Opposing Parties have failed to address the incongruity of the *MAG Order* to these principles, just as they have failed to address the fundamental issues raised by the Alliance Petition. Instead of addressing these basic principles, the Opposing Parties merely repeat the flawed foundation of those aspects of the *MAG Order* with respect to which the Alliance seeks reconsideration.

For example, rather than addressing the right of the rural carrier to establish rates to recover its costs, the CUSC merely reiterates the mantra that the Commission should "eliminate unlawful implicit subsidies" from access charges.[6] The issue of what constitutes "unlawful implicit subsidies" to rural rate-of-return carriers has not been addressed, nor has a record to address the matter been created. Repetition of the mantra does not substantively answer the issues raised in the Alliance Petition.[7]

Nor are Alliance reconsideration issues addressed by the mere citation of Commission

---

[6] CUSC at pp. 15-16.

[7] *See, e.g.*, Petition at 9-10, 17-20.

Orders and Court decisions that are not fully applicable to the facts and circumstances of the rural rate-of-return carriers. For example, both CUSC and RCCC incorrectly cite the *Access Charge Reform First Report and Order*, 12 FCC Rcd. 15982 (the "*Access Charge Reform* proceeding") as support for the notion that all NTS costs recovered from access charges constitute "implicit subsidy."[8] The Opposing Parties fail to counter or even to acknowledge the facts and distinctions raised by the Alliance with respect to misplaced reliance on the *Access Charge Reform* proceeding.[9] That proceeding purposefully reflected no consideration either of the characteristics of the rural areas served by rate-of-return carriers or how those characteristics may be addressed by proper rate design. Moreover, the rural rate-of-return carriers were assured that the results of that proceeding would not be automatically applied to them, and that, instead, the Commission would initiate a separate proceeding to consider the particular facts associated with rural rate-of-return carriers.[10]

RCCC employed a similar tactic to avoid squarely confronting the issue of the wrongful conclusion of the *MAG Order* that all rural rate-of-return carrier NTS interstate costs should be removed from access charges. Instead of addressing the issues and specifics raised by the Alliance Petition,[11] RCCC misleadingly cites two decisions of the U.S. Court of Appeals to support its contention that the FCC may choose to recover all interstate NTS costs from the end user.[12] These cases dealt specifically with Commission proceedings regarding the larger local

---

[8] CUSC at p. 16, RCCC at p. 10.

[9] Petition at pp. 20-22.

[10] *Access Charge Reform* proceeding at paras. 330-332. *See also*, p. 7, *infra.*

[11] Petition at pp. 17-22.

[12] RCCC at p. 11 citing *Southwestern Bell Tel. Co. v. FCC*, 153 F. 3d 523 (8th Cir. 1998)
(continued...)

exchange carriers that are not rural or subject to rate-of-return regulation.[13]

The Alliance maintains that RCCC's reliance on these decisions to rebut the Petition is incredibly misleading because the Alliance specifically did not argue merely whether the Commission had authority over the rate design for the recovery of interstate costs. The Alliance questioned the exercise of the authority and specifically demonstrated that a record has not been established to warrant the determination made by the *MAG Order*:

> The Alliance does not take issue with the Commission's discretion to establish rate design or to recategorize interstate costs. It takes issue with the decision to the extent that it denies the rural LEC the opportunity to recover its costs through the establishment of rates for its services. If the existing rate design mechanism for rural carriers is determined "inefficient" on the basis of consideration of rural LEC service area characteristics and needs, it should be corrected. Correction of the rate design can be achieved, however, without sacrificing fundamental universal service principles and arbitrarily labeling cost recovery as "subsidy." [14]

The RCCC's citation to *Southwestern* and *TOPUC II* and reliance thereon in no way addresses the issue quoted above that was fully developed in the Alliance Petition. Neither the RCCC nor any party could address this argument because, in fact, the *MAG Order* does not reflect any consideration of the issues raised by the Alliance.

The remainder of the RCCC's discussion of this issue is especially curious. RCCC ignores all arguments set forth in the Alliance Petition (at pp. 17-22) and cavalierly states that the Alliance has "not - and cannot - explain how substituting explicit universal service payments for

---

[12](...continued)
(*Southwestern*) and *Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001) (*TOPUC II*).

[13] *Southwestern* addressed issues raised in the *Access Reform Proceeding* which, as previously addressed, dealt specifically with non-rural carriers. *TOPUC II* addressed increased end user charges for price cap carriers. Reliance on *TOPUC II* is wholly misplaced. *See*, Petition at n. 55.

[14] Petition at n. 43.

payments by end users could suddenly render that recovery 'arbitrary.'"[15] The Alliance respectfully replies to the RCCC that the tired tactic of declaring a statement as truth without regard to the facts will not work here. The Alliance has fully demonstrated that no rational basis exists within the record of the *MAG Order* upon which to sustain the conclusion that all rural NTS costs must be recovered from rural end users or a universal service fund.[16]

While the RCCC would undoubtedly cite the *Access Charge Reform* proceeding and retort that "no NTS costs can be recovered from access charges," it is that very position that has not been established for rural rate-of-return carriers. Neither the RCCC, any other party, nor the Commission can reasonably state that this matter has been decided for rural rate-of-return carriers. In fact, the Alliance respectfully asks that the Commission specifically address the propriety of any reliance in this proceeding on the decision reached in the *Access Charge Reform* proceeding wherein the Commission stated:

> **the scope of this proceeding should be limited to price cap incumbent LECs . . .**[17]
>
> **We recognize that small and rural rate-of-return LECs face unique circumstances... A separate proceeding for small and rural rate-of-return LECs will provide us with the opportunity to conduct a comprehensive review of the circumstances and issues unique to these carriers.**[18]

The Commission's words quoted above would be rendered meaningless if their intent was simply to later apply the same results of the *Access Charge Proceeding* to the rural rate-of-return carriers without any consideration or application of their unique circumstances and issues. Rural

---

[15] RCCC at p. 11.

[16] The Alliance respectfully notes that the RCCC Opposition is void of any discussion of the specific facts and arguments set forth in the Alliance Petition at pp. 17-22.

[17] *Access Charge Reform* proceeding at para. 330.

[18] *Id.* at para. 332.

carriers relied on the Commission's words quoted above. The Alliance respectfully urges the Commission to inform the RCCC and CUSC that their reliance on the *Access Charge Proceeding* decision in this proceeding is totally misplaced. By this action, together with the necessarily resulting reconsideration of the *MAG Order* sought by the Alliance, the Commission may concurrently let it be known to rural rate-of-return carriers, and to all parties, that reliance on the Commission's very specific words is not misplaced.

The absence of facts set forth in the *MAG Order* that address the application and ramification of the *MAG Order* rule changes to the **"circumstances and issues unique to these (rural rate-of-return) carriers"** is beyond question. Even the RCCC affirms this fact, albeit as a byproduct of its attempt to bolster the position of its "Rural Choice" coalition members at the expense of rural ratepayers. RCCC casually and recklessly suggests that all of the NTS costs of a rural rate-of-return carrier serving a high cost to serve area could possibly be recovered from the end user. In proffering this suggestion, the RCCC notes that "[t]he FCC has yet to conduct a full evaluation of the levels of the SLC (subscriber line charge) that would affect affordability for non-Lifeline customers. . . ."[19] The RCCC, the Alliance and all parties can most certainly agree on this one single fact: the record before the Commission does not contain any evaluation of the impact of increases to the end user charges of rural carrier customers. Moreover, the Alliance respectfully notes that the record includes no factual evaluation of the impact on the unique issues and circumstances of rural carriers of any of the *MAG Order* decisions with respect to which the Alliance has sought reconsideration.

CONCLUSION

It is both ironic and appropriate that the CUSC Comments and the RCCC Opposition offer

---

[19] RCCC at p. 12.

an opportunity for the Alliance to conclude this Reply with reference to the preface of the Alliance Petition. The Alliance framed its Petition under the umbrella of the preamble to the Telecommunications Act of 1996:

> **AN ACT To promote competition and reduce regulation <u>in order to secure lower prices and higher quality services</u> for American telecommunications <u>consumers</u> and <u>encourage</u> the rapid deployment of new telecommunications technologies.**

In so doing, the Alliance stated:

> The Alliance has set forth above the very words that constitute the preamble to the Telecommunications Act of 1996 with underscoring to emphasize the intent of the statute. Too often, both within and outside of the context of the MAG Order, members of the Alliance have observed an institutional tendency by the Commission to consider fully only whether its actions may be deemed "to promote competition," as though competition were a goal in itself, rather than a potential means to an end.
>
> The preamble to the 1996 Act, however, makes clear that the promotion of competition alone is not an objective. As established by the 1996 Act and reflected specifically by the preamble, the statute provided the tools to promote competition and reduce regulation in order to achieve specific goals: **to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.**[20]

Both the CUSC and the RCCC apparently did note the inclusion of the preamble to the Act in the Alliance Petition.[21] On the basis of their pleadings, however, it is not clear that these parties reviewed either the specific discussion set forth in that portion of the Petition quoted above or many other aspects of the specific issues raised by the Alliance on Reconsideration. [22]

---

[20] Petition at p. 4.

[21] CUSC at p. 5; RCCC at p. 9.

[22] *Id.* The Alliance notes that, in contrast to the treatment of the Alliance Petition by the Opposing Parties, the Alliance has fully addressed all arguments raised by the CUSC and RCCC that may be considered even remotely pertinent to the Alliance Petition. The Alliance has addressed every reference of the Opposing Parties to the Alliance Petition except those references by the CUSC to the Petition that are wholly incidental and set forth in footnotes citing the Alliance Petition only anecdotally. *See*, CUSC at footnotes 10, 14, 37, and 39.

The Alliance understands that it cannot require any opposing party to either review or respond to its Petition and the specific issues that have been set forth. The Alliance does, however, respectfully ask that the Commission give thorough and expedient consideration to the Petition. Although most aspects of the *MAG Order* will not be implemented until July 1, the decision has already created instability and uncertainty. The *MAG Order* determinations, as demonstrated in the Alliance Petition, are contrary to the principles that form the foundation for the 1996 Act. In the absence of the requested reconsideration, the *MAG Order* results in increased rates charged to rural consumers (without providing any tangible offsetting benefit) and discourages investment in advanced technology in rural service areas. As discussed herein, nothing argued in any Opposition or Comment filed in response to the Alliance Petition rebuts any aspect of the Petition - nothing could. The Alliance respectfully asks that the Commission address the *MAG Order* issues raised by the Alliance in its Petition, grant the requested reconsideration and issue a Further Notice of Inquiry to afford the Commission and all parties with the opportunity to develop a record of facts related to rural LEC service area characteristics and the impact of the existing rate structures on the fulfillment of the multiple objectives of the 1996 Act.

Respectfully submitted,

Alliance of Independent Rural Telephone Companies

By: John G. Kraskin

Stephen G. Kraskin
Sylvia Lesse
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
(202) 296-8890

Lisa M. Zaina
Wallman Strategic Consulting, LLC
1300 Connecticut Ave., NW, Suite 1000
Washington, DC 20036
(202) 347-4964

February 25, 2002

Its Attorneys

CERTIFICATE OF SERVICE

I, Cathy Douthit, Office Manager of Kraskin, Lesse & Coson, LLP., 2120 L St. N.W., Washington, D.C. 20037, do hereby certify that the foregoing "Reply to the Oppositions to Petitions for Reconsideration" was served on this 25 th day of February 2002, to the individuals and parties set forth below:

Cathy Douthit

Cathy Douthit

Office of Chairman Michael Powell *
Federal Communications Commission
445 12 th Street, SW, Room 8-B201
Washington, DC 20554

Office of Commissioner Michael J. Copps *
Federal Communications Commission
445 12 th Street, SW, Room 8-A302
Washington, DC 20554

Office of Commissioner Kathleen Abernathy *
Federal Communications Commission
445 12 th Street, SW, Room 8-A204
Washington, DC 20554

Office Commissioner Kevin Martin*
Federal Communications Commission
445 12 th Street, SW, Room 8-C302
Washington, DC 20554

Dorothy Attwood, Chief, Common Carrier Bureau *
Federal Communications Commission
445 12 th Street, SW, Room 5-C450
Washington, DC 20554

Qualex International (U.S. mail)
445 12 th Street, SW
Room CY-B402
Washington, DC 20554

John T. Nakahata (U.S.mail)
Timothy J. Simeone
Harris, Wiltshire & Grannis, LLP
1200 18 th Street, NW
Washington, DC 20036
Counsel for RCC

Mark C. Rosenblum (U.S. mail)
Judy Sello
AT&T CORP.
Rm. 1135L2
295 North Maple Ave.
Basking Ridge, NJ 07920

James R. Jackson (U.S. mail)
GENERAL COMMUNICATIONS INC.
2550 Denali Street
Suite 1000
Anchorage, AK 99503

Gene A. DeJordy (U.S. mail)
Mark S. Rubin
WESTERN WIRELESS CORP.
401 9 th Street, NW
Suite 550
Washington, DC 20004

Michele C. Farquhar (U.S. mail)
David L. Sieradzki
Angela E. Giancarlo
HOGAN & HARTSON, LLP
555 13 th Street, NW
Washington, DC 20004
Counsel for Competitive Universal Service Coalition

* indicates hand delivery