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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

**COMMENTS OF NRTA AND OPASTCO**

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April 10, 2002

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The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) (the Associations) submit these joint comments in response to the Notice of Proposed Rulemaking (NPRM) in the above captioned-proceeding (FCC 02-41, rel. Feb. 15, 2002) regarding the universal service issues from the Ninth Report and Order remanded by the 10<sup>th</sup> Circuit Court of Appeals. NRTA is an association of incumbent local exchange carriers (ILECs) that obtain financing under Rural Utilities Service (RUS) and Rural Telephone Bank (RTB) programs. OPASTCO is a trade association representing over 500 small ILECs serving rural areas of the United States. All of the members of both associations are rural telephone companies as defined in 47 U.S.C. §153(37).

I. INTRODUCTION AND SUMMARY

NRTA and OPASTCO's purpose in these comments is to emphasize the need for the Commission not to prejudge or prejudice decisions about the nature of support mechanisms or adequate levels of federal support for rural carriers in this proceeding concerning federal

universal service programs for non-rural carriers. In this proceeding the Commission must resolve remanded issues concerning definitions, adequate explanations of the link between the definitions and conclusions about support sufficiency and reasonable comparability, and ensuring that the states provide their share of support for federal programs for non-rural carriers. Most of the questions have significantly different implications and most of the decisions will have significantly different impacts when applied to carriers with the primarily urban characteristics of non-rural providers than they would if applied to rural carriers. Rural carrier issues are not before the Commission here. The Tenth Circuit recognized not only that the Commission planned to decide rural carrier issues on a different timetable and perhaps to maintain a different plan, but also that there was concern that enough support remain available for the rural carriers, historically the central focus of federal support programs.

An exception to the significant areas of difference governs the question of defining “reasonably comparable” because the statute contemplates a nationwide, urban to rural comparison. Costs are a suitable and necessary surrogate for rates, but the definition of “rural” is different for the small and rural-only carriers the court noted are on a separate decision schedule and for carriers here that need to identify what portions of their mixed areas are rural and urban. The national average (perhaps frozen as it is for rural carriers because non-rural carriers no longer provide cost studies) is a reasonable “urban” benchmark, as the metropolitan lines far outweigh the rural lines in the non-rural carriers’ territories. Within-state rural to urban comparisons are not what the federal funding mechanisms are intended to address. Regardless of whether statewide averaging is a viable measure for the large non-rural companies, the Commission has acknowledged that it can have severe adverse impacts on comparing costs for rural carriers. And any benchmark must be rationally expected to keep rates and network

modernization reasonably in line, which will require separate scrutiny for small and rural carrier areas.

“Sufficient” means enough to achieve an end. The significant differences between the needs, customer bases, service conditions and regulatory status of non-rural carriers, rural carriers and CETCs totally preclude any across-the-board measure of “sufficiency” here. Averaging ability, the ability to achieve “critical mass” for a new technology or service and differences in incumbent and CETC obligations – and the necessity of limiting nationwide customer support payments to levels that are necessary -- must all be taken into account in separate determinations for what is sufficient for each group. Rural carrier questions are simply not at issue here and must not be decided.

Finally, while the Commission has decided not to substitute federal support for support the states are providing, it should not add significant burdens to states that will need to supply explicit support as competition erodes implicit intrastate state support. However, as steward for the nation’s ratepayers, the Commission should enforce §254(f) by requiring states to explain how they plan to fund the state obligations that will be incurred when they decide it is in the public interest to designate additional rural area CETCs. An additional part of the inducements policy should be to require states to explain in detail the factual basis for each certification under §254(e) for a carrier drawing support based on another carrier’s actual costs or a different technology.

## II. ACHIEVING “REASONABLY COMPARABLE” SERVICES AND RATES IN RURAL AND URBAN AREAS IS A NATIONWIDE STATUTORY STANDARD

Section 254(b)(3) provides that consumers in “rural, insular, and high cost areas” in “all regions of the Nation,” should have access to services that are “reasonably comparable” to those provided in urban areas at “reasonably comparable” rates. The Commission reasonably decided

to compare costs, rather than trying to sift through all the complexities inherent in an attempt to compare rates among states with diverse rate structures, carriers and operating conditions. The statute requires the Commission, as architect of the federal support mechanism, to compare the nation's urban costs and services to rural costs and services, not the rural and urban costs within each state. States remain responsible for their traditional role in keeping rural and residential rates reasonable and affordable and, pursuant to §254(f), must adopt support for any new definitions or standards they adopt.<sup>1</sup> The relatively large proportion of the access lines served nationwide that are urban probably justifies the Commission's continued use of a national average as the "urban" point of comparison. It adopted a frozen nationwide average on the Rural Task Force's recommendation, which may be an appropriate and explainable point of comparison to use for non-rural carriers, too.

The rural comparison to the urban or national average must be on a relevant geographical basis for the carrier and customers. The purpose of the national policy of rural/urban comparability is to prevent rates and service offerings to rural consumers from reflecting higher rural costs. As the Commission recognizes, "[t]he federal mechanism operates by transferring funds among jurisdictions and has the effect of shifting money from relatively low-cost states to relatively high-cost states."<sup>2</sup> Put another way, the purpose of a federal support mechanism is to spread high rural costs - - that would otherwise result in higher rural rates and impaired network evolution - - among all consumers and areas throughout the country. Thus, it would be irrational to interpret the federal principle of reasonable comparability to mean that rates for rural customers would be higher or services less advanced in more rural states. Any consideration

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<sup>1</sup> The 10<sup>th</sup> Circuit held that there is nothing in §254 "requiring the FCC broadly to replace implicit support previously provided by the states with explicit federal support." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10<sup>th</sup> Cir. 2001) (*Qwest*).

<sup>2</sup> *NPRM*, ¶5(*footnote omitted*).

given to urban and rural cost comparisons within a state in implementing the national policy of rural and urban comparability should be confined to ensuring the state's ability to continue to absorb its historical part of the responsibility for supporting reasonably comparable rates.<sup>3</sup>

The court did not express a specific opinion on using statewide average costs for the non-rural carrier mechanism. However, it struck down the Commission's bare assumption that states would fulfill the support obligations it chose to leave for them, accepting the petitioners arguments that the Commission had not adequately explained how its plan would result in "reasonably comparable" rates in non-rural carriers' rural areas. The court particularly faulted the Commission for failing to evaluate information in the record about urban and rural costs. Consequently, the Commission will have to consider the effects on non-rural carriers' rural and urban costs of any proposed federal mechanism in combination with state programs it effectively preserves or "induces," make some projections about the impact on rates and explain why its plan achieves reasonable comparability.

NRTA and OPASTCO will leave it to the parties affected by the non-rural plan to debate the use of statewide averages and how to achieve comparability for those carriers' rates and services. However, if the Commission continues to use statewide averaging in its non-rural plan after this proceeding, it will provide yet another example of why the decisions here cannot prejudice or even guide subsequent decisions on rural carrier support. The Commission, in acting on the Rural Task Force recommendations and adopting the interim support mechanism for rural carriers, specifically pointed out that statewide averaging alone could account for significant adverse support impacts on rural carriers from using the proxy model.<sup>4</sup>

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<sup>3</sup> See Section V, *infra*.

<sup>4</sup> *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*, CC Docket Nos. 96-45, et al., FCC 01-157, 16 FCC Rcd 11244, ¶ 177 (May 23, 2001). The Commission noted that the 135% benchmark, too, played a significant role in showing that the model would not work for rural carriers. *Ibid*.  
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The definition of what is a “rural” area also has a significantly different context for non-rural carriers than for rural carriers. As the 10th Circuit observed, the statute has a definition of rural companies that includes both low-density and small companies. The court clearly distinguishes between “[r]ural carriers, . . . that serve only rural areas or that are small in size” and “[n]on-rural carriers such as Qwest [which] are larger and serve at least some urban areas.”<sup>5</sup> As the court explained, rural carriers are under an interim plan, and the Commission plans to develop a long-term plan. Non-rural carriers do not confront the problem of serving only high-cost, low-density areas or small areas with inherently limited economies of scale. The definition of “rural” necessary for comparing non-rural companies’ rural costs with the nationwide average requires differentiating parts of a single carrier’s service territory that are rural and non-rural. How the Commission defines “rural” to resolve that issue should not affect the rural carriers because they are not similarly situated.

### III. THE COMMISSION MUST BE ABLE TO EXPLAIN WHY ANY BENCHMARK IT CHOOSES MEETS THE GOALS OF REASONABLE COMPARABILITY AND SUFFICIENCY

The court addressed the benchmark issue because it had been a central focus of both petitioners. One petitioner challenged the 135% benchmark adopted for the non-rural carrier support mechanism because the “the use of statewide averages and a benchmark set at 135% of the national average do not satisfy the principle that rates in rural and urban areas be reasonably comparable or that federal funding be sufficient to achieve the purposes of the Act” (footnote omitted); the other argued that “the combination of a national average and a 135% benchmark provides too little funding.”<sup>6</sup> The court held that the Commission had not justified its finding that the benchmark reached the results its decision attributed to the plan. Indeed, the court

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<sup>5</sup> *Qwest* at 1196.

suggested pragmatically that an explanation that the plan's rates satisfied the standards could have made up for the Commission's failure to define the terms in light of the statutory principles.

Said the court,

the FCC has failed to explain how its 135% benchmark will help achieve the goal of reasonable comparability or sufficiency. As noted above, the FCC has substituted a comparison of national and statewide averages for the statutory comparison of urban and rural rates. If, however, the FCC's 135% benchmark actually produced urban and rural rates that were reasonably comparable, however those terms are defined, we likely would uphold the mechanism.<sup>7</sup>

NRTA and OPASTCO will not attempt to suggest what benchmark the Commission should adopt on remand for the non-rural carrier support mechanism. NRTA's and OPASTCO's concern is with maintaining the proper limits on this proceeding and leaving open the determinations the court anticipated the Commission would make specifically for rural carriers in its post-interim proceeding. In that context, the "benchmark" and "reasonably comparable" issues both boil down to elements of the "sufficiency" issue, which we discuss in detail in the next section.

#### IV. THE DETERMINATION OF WHAT SUPPORT IS "SUFFICIENT" DEPENDS ON THE CHARACTERISTICS OF THE AFFECTED CARRIERS

The court found that the Commission had failed to define "sufficient" at all, let alone to explain its declaration that the non-rural support mechanism would generate sufficient support for the non-rural carriers. It also held that the question of overall support sufficiency could not be decided until the Commission finished designing a post-interim plan for the rural carriers.

The meaning of the term "sufficient" itself is not elusive. The Merriam-Webster Collegiate Dictionary defines it as "enough to meet the needs of a situation or a proposed end."<sup>8</sup>

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<sup>6</sup> *Id.* at 1198.

<sup>7</sup> *Id.* at 1202.

<sup>8</sup> See <http://www.m-w.com/cgi-bin/dictionary>

Here, Congress has specified the proposed ends: Section 254(b)(5) calls for “sufficient Federal and State mechanisms to preserve and advance universal service” and §254(e) states that federal support “should be explicit and sufficient to achieve the purposes of this section.” Thus, both the “mechanisms” and the resulting federal support levels must meet the sufficiency test. The statutory purposes include reasonable and affordable rates, as well as reasonably comparable rates and services, including access to advanced and information services.

Where the Commission went wrong was in failing to provide a rational basis for the conclusion – or assumption -- that the non-rural support mechanism would achieve the statutory purposes. Lacking sound definitions or substituting its own, the Commission was not pursuing purposes consistent with what the statute provides. And it was counting on state support that it had no basis for presuming would be available. Its task now is to finish the job of defining and explaining how its plan achieves the statutory purposes for non-rural carriers and their customers.

The court expressly recognized that the decisions it remanded “do not address funding for ‘rural carriers,’ which will be covered by later orders.”<sup>9</sup> The remand does not cover rural issues and should not decide them. Indeed, while a definition that support basically means enough to fulfill the statute applies to non-rural and rural carriers alike, the “Federal and State mechanisms” (§254 (b) (c)) “and Federal ... support” (§254 (e)) that will meet the test, even apart from the issue of the cost methodologies, cannot be presumed to be the same. “Sufficient” support to permit a large carrier with urban and metropolitan core areas to provide its rural customers services and rates that are reasonably comparable to rates and services available to urban customers does not take into account critical differences in rural carriers’ circumstances. Rural carriers do not have the densely populated, diverse, geographically-dispersed markets that anchor

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<sup>9</sup> *Qwest* at 1204.

non-rural companies' operations. The population in rural areas tends to be older and to have lower income levels, on the average, than the population served by the non-rural carriers. Rural carriers serve a significantly smaller proportion of businesses, and especially of large businesses, than non-rural carriers. Consequently, a plan that may permit the Commission to expect reasonable, affordable and reasonably comparable urban and rural rates in a non-rural carrier's very large and varied service area may well be far from "sufficient to achieve the purposes" of §254, as Congress intended, if applied to radically different rural carrier markets. The difference in how much support is "sufficient" is even more pronounced taking into account the statutory purposes of fostering comparable "access to advanced telecommunications and information services." For example, in solely rural or small carrier markets, "critical mass" is much more difficult to achieve for new technology and new services. Just as the Commission wants to account for the differing resources of states in its non-rural support mechanism, the Commission must account for the differences in rural and non-rural carriers and their customer bases in developing a plan that will provide sufficient support for rural carriers' communities.

The question of what "mechanism" and what "support" levels are "sufficient" for competitive Eligible Telecommunications Carriers (ETCs) involves wholly different considerations than what is sufficient for either the non-rural carriers at issue here or the rural incumbent carriers. CETCs are not held accountable under the "purposes of ... section [254]," are not supported based on levels that are sufficient to permit their rates or services to be "reasonably comparable" to a nationwide or any other standard, and in fact are often not subject to any rate supervision. They are not even required to show how they use support, even though it is based on the costs of different carriers, and in the case of wireless ETCs, the costs of an entirely different technology. Most telling of all in the sufficiency equation, when a CETC is designated, it receives support for even the lines it has been providing profitably at the same

rates in the past without any support. What is “sufficient” support for CETCs’ rural customers’ needs -- and not a windfall, and thus an unnecessary burden on the end users that ultimately bear the costs -- is a difficult question the Commission has not yet tackled.

In short, the Commission’s decision about the “definition” of “sufficient” need not, and cannot, prejudge the broader question of what mechanism and support levels must be made available for rural carriers. The Commission should clearly express the limits of its decision on these non-rural issues.

As noted, in its discussion of overall sufficiency, the court acknowledged that the issues for carriers within the definition of “rural telephone company,” which it summarized as carriers “that serve[ ] rural, sparsely populated areas or that [are] small in size,” were the subject of separate Commission proceedings.<sup>10</sup> According to the court, it could not determine whether “the total level of federal support for universal service” will be “sufficient” until rural carrier support is determined. The court’s opinion points to former Commissioner Furchtgott-Roth’s concern in his dissent that, since “support for universal service historically has been targeted mostly at rural carriers” and the non-rural support order ‘substantially increased’ the funding for non-rural carriers, ... no money would be left for rural carriers.” Also still unknown, the court explained, was how the Commission would deal with replacing implicit access support.

The court said the Commission would have to “explain further its complete plan for supporting universal service” before the question of sufficiency could be answered. However, it did not “require the FCC to resolve finally all of these issues at once.” The Commission has taken advantage of this deference to its scheduling of decision-making and has deferred its further proceeding on a post-interim support plan for rural carriers.<sup>11</sup>

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<sup>10</sup> *Qwest* at 1201-03.

<sup>11</sup> *NPRM*, ¶ 1.

V. THE COMMISSION SHOULD GENERALLY LIMIT “STATE INDUCEMENTS” TO EXPECTING STATES TO REPLACE ANY IMPLICIT SUPPORT THEY MAKE EXPLICIT, BUT SHOULD ENFORCE §254(f) WHEN STATES HAVE A ROLE IN IMPOSING ADDED SUPPORT OBLIGATIONS

The Commission has decided, with judicial approval, that states must shoulder a fair share of support for universal service. Thus, the federal support mechanisms will not be expected to pick up the costs of replacing implicit support in the state rates and rate structures. However, the Commission should keep in mind the costs that the state universal service mechanisms will eventually have to absorb as competition erodes the sustainability of traditional intrastate modes of keeping rural and residential rates reasonable and affordable. Demands on state resources will be heavy, and disproportionately so in the most rural states. Consequently, the Commission must be extremely cautious in adding more federal support obligations for the states.

The Commission has an important role as steward for the resources of the nation’s ratepayers, who will eventually bear the burden of all support mechanisms. In this regard, the commission is obligated to adhere to §254(f), which establishes clear policy that states must pay for universal service obligations that they cause and may not “rely on or burden Federal universal service support mechanisms.” It should induce adequate state support by enforcing this requirement. For example, the Commission must require each state to explain how the extra money will be generated from its state universal service mechanism to fund intrastate universal service payments to CETCs when a state designates any rural CETC under the section requiring a public interest determination for rural area designation.

And, finally, as part of ensuring that states fulfill their universal service burdens and, again in its role as trustee for the public that underwrites all universal service mechanisms in the final analysis, the FCC should require each state to explain the factual basis for each certification

under §254(e) for CLECs that draw support based on ILECs' actual costs or costs that are not based on their own technology.

## VI. CONCLUSION

The court recognized that the decision on rural carrier support mechanisms would come later than the decision on these remand issues for the non-rural carrier support mechanisms and that overall sufficiency evaluations must await the conclusion of the post-interim rural carrier proceeding. Accordingly, although "reasonably comparable" requires a nationwide component, the Commission must avoid prejudging rural carrier support issues or even the applicability of definitions to rural carriers in the course of its non-rural carrier remand proceeding and more comprehensive review. Moreover, when the Commission determines the rural carrier issues at a later date, the court has given the Commission the clear signal that it must be able to explain why its rural carrier support is "sufficient" and lay to rest the former Commissioner's fears that, once the non-rural mechanisms and support levels are adopted, insufficient "money [could be] left for rural carriers." In inducing states to shoulder a sufficient share of support obligations, the Commission must be aware of increasing calls on state resources to replace implicit support as competition develops. However, to protect nationwide ratepayers from excessive universal service costs, states should account under §254(f) for supporting the intrastate support burdens

caused by their CETC designations in rural service areas. States must also be required to produce a factual basis for certifications of CETC compliance with §254(e) to ensure that support based on costs of other carriers or other technologies is being used only for the purposes for which it is intended.

Respectfully submitted,

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