

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	
ACS of Fairbanks, Inc.'s	)	CC Docket No. 96-45
Petition For Declaratory Ruling	)	
and Other Relief	)	
	)	

**OPPOSITION OF AT&T CORP.**

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**OPPOSITION OF AT&T CORP.**

Pursuant to the Commission’s *Notice*,<sup>1</sup> AT&T Corp. (“AT&T”) submits this opposition to ACS of Fairbanks, Inc.’s (“ACSF’s”) Petition seeking to cease the disbursement of the high-cost loop support (“HCLS”) for lines served by certain competitive eligible telecommunications carriers (“CETCs”), and to disburse those funds instead to the incumbent local exchange carrier (“LEC”).

**INTRODUCTION AND SUMMARY**

ACSF’s Petition seeks a “declaratory ruling” that would deny its competitors what the Commission has determined to be necessary for local competition to develop in rural jurisdictions – portable high-cost loop support. The Commission’s current rules are clear: a competitive eligible telecommunications carrier (“CETC”) that wins a customer from an incumbent LEC is eligible to receive the same amount federal universal service support that was received by the incumbent LEC formerly serving that line.<sup>2</sup> ACSF now asks the Commission to

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<sup>1</sup> Public Notice, *Wireline Competition Bureau Seeks Comment On ACS of Fairbanks, Inc. Petition For Declaratory Ruling and Other Relief*, CC Docket No. 96-45, DA 02-1853 (released August 1, 2002) (“Notice”).

<sup>2</sup> See 47 C.F.R. § 54.307. The only significant limitation on universal service support portability is that a CETC providing service to a high-cost line exclusively through UNEs will receive the lower of the universal support for the high-cost line or the cost of the UNEs used to provide the supported services. See 47 C.F.R. § 54.307(a)(2). As demonstrated in AT&T Petition for Reconsideration of the Commission’s Ninth Report & Order And Eighteenth Order On Reconsideration, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd. 20432 (1999) (“*Ninth*”).

effectively repeal these rules through a “declaratory ruling” that “no competitive eligible telecommunications carrier (“CETC”) shall receive interstate high-cost loop support (“HCLS”) if its loop costs lie below the FCC high-cost standard, set at approximately \$23.00 per line per month.”<sup>3</sup>

ACSF’s Petition should be denied, because it would undermine the pro-competitive goals of the 1996 Act, and would reverse well-established Commission policy, which has been fully upheld by federal courts. Indeed, under ACSF’s proposal, (1) ACSF would be the only carrier that could receive high-cost support from the USF, (2) a CETC would be denied USF support even though it is using the same ACSF loop, and (3) worst of all, the CETC’s subsidy would be given to *ACSF*, because under the Commission’s existing rules, the amount of universal service that would otherwise have been paid to the CETC would be given to the incumbent LEC.<sup>4</sup>

The Commission’s existing portability requirements have been a cornerstone of its universal service policies since the passage of the 1996 Act, and those policies have been upheld by the Fifth Circuit.<sup>5</sup> ACSF does not advance any sound basis for dismantling the Commission’s existing and well-established universal service portability rules. ACSF’s claim that a “declaratory ruling” is necessary to avoid a conflict between the Commission’s universal service portability rules and § 254(e) of the Act is meritless; to the contrary, the Fifth Circuit has held

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*R&O*”), the Commission should remove even this limitation and make the full amount of universal service support available to the competitive carrier serving the line, regardless of whether that carrier serves the line exclusively through UNEs or using some combination of UNEs and its own facilities. See AT&T Petition for Reconsideration and Clarification, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed January 3, 2000).

<sup>3</sup> See *ACS of Fairbanks, Inc. Petition for Declaratory Ruling and Other Relief*, CC Docket No. 96-45, at 1 (filed July 24, 2002) (“Petition”).

<sup>4</sup> 47 C.F.R. § 54.307.

<sup>5</sup> Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, ¶¶ 286-290, 311-313 (1997) (“*First R&O*”).

that § 254(e) *requires* portability. And ACSF's further claims that rule changes are necessary to ensure competitively neutrality and to serve the public interest are equally meritless.

Indeed, ACSF's Petition is procedurally improper. A declaratory ruling is appropriate only where necessary to "terminat[e] a controversy or remov[e] uncertainty."<sup>6</sup> Where "there is no uncertainty to be removed or controversy to be terminated . . . a declaratory ruling is . . . unwarranted,"<sup>7</sup> and a Petition seeking a declaratory ruling "in stark contravention of a clear, comprehensive rule"<sup>8</sup> must be denied. The Commission's existing federal universal service support rules requiring portability are clear and certain, and ACSF's attempts to manufacture the requisite "uncertainty" by claiming that the Commission's universal service support mechanism conflicts with § 254(e) of the Act is baseless. Accordingly, ACSF's Petition must be rejected as an improper collateral attack on a valid Commission rule where the time for review has expired.

**I. ACSF'S PROPOSAL IS INCONSISTENT WITH PRIOR COMMISSION RULES AND ORDERS, IS NOT COMPETITIVELY NEUTRAL, AND WOULD CONTRAVENE THE PUBLIC INTEREST.**

The Commission rule that ACSF attacks is clear and unambiguous. The amount of per line universal service support available to rural carriers in a particular geographic area is determined by comparing the incumbent LEC's embedded costs in that area to a national benchmark of incumbent LEC embedded costs (currently \$23).<sup>9</sup> Once that amount is established it is fully portable, *i.e.*, the per line support is available to *any* eligible telecommunications

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<sup>6</sup> 47 C.F.R. § 1.2.

<sup>7</sup> *In Re Application of Abundant Life, Inc.; For A Construction Permit for a New FM Station at Hattiesburg, Mississippi*, 17 FCC Rcd. 4006, ¶ 7 (2002).

<sup>8</sup> *See Order, Petition to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, 66 F.C.C.2d 1021, ¶ 9 (1977).

<sup>9</sup> Fourteenth Report and Order, *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45 *et al.*, 16 FCC Rcd. 11244, ¶¶ 24-120 (2001).

carrier a serving a line in that area, regardless of any particular carriers' individual cost.<sup>10</sup> In addition, that universal service support is portable both to UNE-based and facilities-based competitors.<sup>11</sup> The Commission has explained that “paying the support to a CLEC that wins the customer’s lines or adds new subscriber lines would aid the emergence of competition,” and that full portability of support is necessary “[i]n order not to discourage competition in high cost areas.”<sup>12</sup>

ACSF’s Petition seeks the effective repeal of these rules, which would substantially limit the portability of universal service support for all CETCs in all rural areas of the country. In particular, ACSF seeks a Commission ruling that “no competitive eligible telecommunications carrier (“CETC”) shall receive interstate high-cost loop support (“HCLS”) if its loop costs lie below the FCC high-cost standard, set at approximately \$23.00 per line per month.”<sup>13</sup> ACSF reasons that if a CETC purchases UNE-loops at rates below the universal service benchmark of \$23.00, it should be denied universal service support.<sup>14</sup> According to ACSF, this rule change is necessary to (1) avoid a conflict between the Commission’s universal service portability rules and § 254(e) of the Act; (2) ensure competitively neutrality; and (3) serve the public interest. These “justifications” for dismantling the Commission’s existing universal service support portability rules are flatly inconsistent with Commission and federal court precedent, and are predicated on misstatements of the law, inaccurate facts, and apples-to-oranges comparisons.

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<sup>10</sup> *See id.*; *see also First R&O* ¶¶ 286-287.

<sup>11</sup> *See First R&O* ¶ 287 (“in order to avoid creating a competitive disadvantage for a CLEC using exclusively unbundled network elements, that carrier will receive universal service support for the customer’s line, not to exceed the cost of the unbundled network elements used to provide the service”).

<sup>12</sup> *Id.* ¶ 287.

<sup>13</sup> Petition at 1.

<sup>14</sup> Petition at 3.

**A. The Commission’s Existing Universal Service Support Portability Rules Are Consistent With § 254(e) Of The 1996 Act.**

ACSF claims that its proposed rule change is necessary to address a purported conflict between the Commission’s existing portability rules, which make universal service support fully portable to any CETC regardless of the CETC’s costs, and § 254(e) of the 1996 Act, which requires all carriers that receive federal universal service support to “use that support only for the provision, maintenance, and upgrading of facilities and services for which the support was intended.”<sup>15</sup> According to ACSF, a competitive LEC that purchases unbundled loops from an incumbent at rates below the national benchmark (\$23.00) has not demonstrated that it requires high-cost loop support, and that “perforce” such a carrier cannot be using that support to provision, maintain, and upgrade the facilities and services for which the support was intended, as required by Section 254(e).<sup>16</sup> The Commission and federal courts, however, have expressly and properly rejected that argument and, moreover, the Commission has instituted safeguards to ensure that *all* carriers that receive federal universal service support use those funds in a manner that is consistent with § 254(e) of the Act.

In the *First R&O*, the Commission determined that universal service support should be fully portable to *all* CETCs, and noted that such portability does *not* preclude CETCs from complying with Section 254(e). To the contrary, the Commission expressly held that “[w]hile the CETC may have costs different from the ILEC, the CETC must also comply with Section 254(e).”<sup>17</sup> Whether a carrier can (and will) use universal service support to provision, maintain, and upgrade facilities has nothing to do with that carrier’s current loop costs relative to

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<sup>15</sup> 47 U.S.C. § 254(e); *see also* 47 C.F.R. 54.314.

<sup>16</sup> Petition at 4-5.

<sup>17</sup> *See First R&O* ¶ 289.

that of other carriers. Here, the CETC would obviously “use the support” for the provision of the facilities and services for which it is intended, which in this case is local service provided over an unbundled loop obtained from the ILEC – *i.e.*, the subsidy is to be applied against the CETC’s loop costs, which is the rate for the unbundled loop. There is no conceivable violation of Section 254(e).

Similarly, the Commission has implemented specific safeguards to protect against the use of federal universal service support in a manner that is inconsistent with § 254(e). The Commission requires all rural carriers receiving federal universal service support to “file annual certifications with the Commission to ensure that carriers use universal service support ‘only for the provision maintenance and upgrading of facilities and services for which the support is intended’ consistent with section 254(e).”<sup>18</sup> “Absent the filing of such certification, carriers will not receive federal universal service support.”<sup>19</sup> And to the extent that ACSF or any other LEC has a legitimate challenge to another LEC’s certification, the Commission has expressly determined that those challenges should be brought before the states, not before the Commission.<sup>20</sup> Accordingly, to the extent that ACSF challenges any specific state certification, those concerns are not a valid basis for a declaratory ruling from this Commission – especially not a declaratory ruling that would dramatically reduce competitive carriers’ ability to compete for local customers throughout the United States.<sup>21</sup>

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<sup>18</sup> See *Fourteenth R&O* ¶ 187.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.* ¶ 190 (“challenges to the propriety of the certifications . . . should be brought at the *state level*” (emphasis added)).

<sup>21</sup> ACSF does complain that the Alaska Commission has abdicated its certification duties. Petition at 18-20. Those claims do not appear to be supported by the record. The RCA requires carriers to file a detailed “Data Response and Affidavit” demonstrating that the carrier will use federal universal service support in a manner consistent with § 254(e) of the Act. See Order Opening Docket and Requiring Filings, RCA No. U-01-90 (Order No. 1) (July 13, 2001). Those data requests require carriers to identify all sources of federal and state funds they receive, and to

It is not surprising, therefore, that the Fifth Circuit, in upholding the Commission's *First R&O*, also rejected the argument advanced by ACSF. The Court confirmed that § 254(e) does not conflict with federal universal service support portability, but in fact *compels* the Commission to make federal universal service support fully portable.<sup>22</sup> Thus, according to the Fifth Circuit, the relief sought by the Petition would not remedy any purported conflict between the Commission's rules and § 254(e), but would actually *create* a conflict between those provisions.

**B. The Commission's Universal Service Support Portability Rules Are Consistent With The Goal of Competitive Neutrality And The Public Interest.**

ACSF's further assertion that its proposed rule change is necessary for competitive neutrality and the public interest is equally baseless, and contradicts express findings of the Commission which have been upheld by the Fifth Circuit.

Indeed, portability in these circumstances is necessary for competitive neutrality. In adopting the universal service methodology challenged by ACSF, the Commission stated that it was "not persuaded by [arguments] . . . that assert that providing support to CLECs based on the incumbents' embedded costs gives preferential treatment to competitors and is thus contrary to the Act and the principle of competitive neutrality."<sup>23</sup> To the contrary, the Commission has explained repeatedly that "federal universal service high-cost support should be available and

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specifically identify how those funds are being used. *See id.* Thus, ACSF has failed to identify any obvious abuses, but even if it had, that would not warrant the sweeping *national* rule changes sought by ACSF's Petition.

<sup>22</sup> *See Alenco v. FCC*, 201 F.3d 608, 622 (2000) ("portability . . . is dictated by 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") (internal quotations and citations omitted).

<sup>23</sup> *First R&O* ¶ 289; *see also Ninth R&O* ¶ 89 ("[t]o ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support that the incumbent would have received for that line"); *id.* ¶ 311 ("We conclude that paying the support to a competitive eligible telecommunications carrier that wins the customer or adds a new subscriber would aid the entry of competition in rural study areas").

portable to all eligible telecommunications carriers” and that “[u]nequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor’s ability to provide service at rates competitive to those of the incumbent.”<sup>24</sup>

Similarly, the Fifth Circuit, in upholding the Commission’s *First R&O*, expressly rejected ACSF’s argument, explaining that the Commission’s determination that universal service support should be fully portable “is not only consistent with predictability, but also is *dictated by principles of competitive neutrality*.”<sup>25</sup> Indeed, that Court rejected claims similar to those raised by ACSF, noting that “[w]hat petitioners [really] seek is not merely predictable funding mechanisms, but predictable market outcomes;” “they wish protection from competition, the very antitheses of the Act.”<sup>26</sup>

ACSF provides no legitimate basis for reversing these prior Commission and federal court findings. On the contrary, ACSF offers only a single, flawed argument in support of its position. ACSF compares its *embedded* loop costs (\$33) to a portion of GCI’s *forward-looking* loop costs (GCI purchases UNE loops from ACSF at the forward-looking rate of \$19 per line per month as determined by the RCA). Based on this comparison, ACSF asserts that after accounting for portable universal service support (about \$9), ACSF’s effective monthly per line loop costs are \$24 compared to GCI’s effective monthly per line costs of \$10.<sup>27</sup> ACSF thus asserts that the fully portable universal service support mechanism is not competitively neutral because the current mechanism provides CLECs, like GCI, with a substantial cost advantage.

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<sup>24</sup> *Ninth R&O* ¶ 90.

<sup>25</sup> *Alenco*, 201 F.3d at 622 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> Petition at 11.

These cost disparities are more illusory than real, however, because they are based on an apples-to-oranges cost comparison. ACSF's analysis is predicated on a comparison of its *embedded* costs to GCI's *forward-looking* costs. As explained by the Fifth Circuit, the only relevant comparison is between both carriers' *forward-looking* costs.<sup>28</sup> The Court explained that "[i]t is the current anticipated costs [forward-looking costs], rather than historical cost, that is relevant to business decisions to enter markets and price products. . . . The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by the new production decision. This factor may be particularly significant in industries such as telecommunications which depend heavily on technological innovation, and in which firm's accounting, or sunk, costs may have little relation to current pricing decisions."<sup>29</sup> ACSF concedes, as it must, that the RCA has determined that ACSF's forward-looking monthly per line loop costs are \$19, *i.e.*, equivalent to the UNE rate GCI pays for the same loops.<sup>30</sup> Thus, a proper cost comparison shows that ACSF's and GCI's forward-looking per line loop costs are roughly equivalent, thereby foreclosing ACSF's claim that the Commission's current federal universal service support portability mechanism disadvantages incumbent LECs.<sup>31</sup>

In fact, a grant of ACSF's Petition would bestow incumbent LECs with a substantial competitive advantage over new local telephone entrants. As noted, the relevant forward-looking loop costs for both ACSF and UNE-based local entrants in Alaska are both \$19. A grant

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<sup>28</sup> *Alenco*, 201 F.3d at 622.

<sup>29</sup> *Id.*

<sup>30</sup> See Petition at 3 (explaining that the RCA adopted a forward-looking UNE-loop rate of \$19.19 for ACSF).

<sup>31</sup> Even if new entrants' costs were lower than the incumbent LECs' costs, that is not a sufficient reason to deny new entrants federal universal service support. As the Commission has explained, "[i]f the CLEC can serve the customer's line at a much lower cost than the incumbent, this may indicate a less than efficient ILEC. The presence of a more efficient competitor will require that ILEC to increase its efficiency or lose customers." *First R&O* ¶ 289.

of ACSF's Petition deprive UNE-based local entrants of universal service support, but would provide ACSF and other rural incumbent LECs with substantial universal service support. ACSF and other incumbent LECs could, therefore, afford to provide local telephone service in rural areas at much lower rates than could new UNE-based entrants. Thus, there can be no debate that the relief sought by ACSF would violate the goal of competitive neutrality, and, by deterring local entry, would contravene the public interest.<sup>32</sup>

## **II. A DECLARATORY RULING IS NOT AN APPROPRIATE MECHANISM FOR CHANGING COMMISSION RULES.**

A declaratory ruling is appropriate only where necessary to “terminat[e] a controversy or remov[e] uncertainty.”<sup>33</sup> As explained by the Commission, where “there is no uncertainty to be removed or controversy to be terminated . . . a declaratory ruling is . . . unwarranted,”<sup>34</sup> and a Petition seeking a declaratory ruling “in stark contravention of a clear, comprehensive rule”<sup>35</sup> must be denied. As demonstrated above, the existing universal service support mechanism challenged by ACSF is clear and certain. Accordingly, ACSF's Petition must be denied because it is nothing more than an “impermissible attack” on “Commission decisions that were adopted in proceedings in which the right to review has expired.”<sup>36</sup>

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<sup>32</sup> ACSF's additional claim (at 27-30) that basing universal service support on ILECs' forward-looking costs itself contravenes the public interest by deterring incumbent LEC investment has also been effectively rejected by this Commission. See *First R&O* ¶ 293 (“We conclude that a forward-looking economic cost methodology . . . should be able to predict rural carriers' forward-looking economic cost with sufficient accuracy that carriers servicing rural areas could continue to make infrastructure improvements and charge affordable rates”).

<sup>33</sup> 47 C.F.R. § 1.2.

<sup>34</sup> *In Re Application of Abundant Life, Inc.; For A Construction Permit for a New FM Station at Hattiesburg, Mississippi*, 17 FCC Rcd. 4006, ¶ 7 (2002).

<sup>35</sup> See Order, *Petition to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, 66 F.C.C.2d 1021, ¶ 9 (1977).

<sup>36</sup> Memorandum Opinion and Order, *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio*, FCC 99-160, ¶ 11 (released July 7, 1999).

The Commission and federal courts both have determined that the Commission's universal service portability rules are fully compatible – and in fact compelled by – § 254 of the Act. Moreover, the Commission has implemented specific safeguards that ensure such compatibility. Thus, ACSF's Petition must be denied, because ACSF has failed to establish the existence of a legitimate “controversy” or any “uncertainty” regarding the Commission's existing rules.

The Commission's determination that it should not substantially alter clear rules in declaratory ruling proceedings is appropriate. Rule changes – particularly rule changes that would vastly distort competition in local markets – should be made only after all interested parties are on notice that the Commission is considering such changes, and after those parties have had a sufficient opportunity to comment on those proposed rule changes. To the extent that ACSF believes that a rule change is appropriate – and as demonstrated above, the rule changes ACSF seeks would be inappropriate and flatly unlawful – ACSF should petition the Commission to open a rulemaking proceeding in a manner consistent to the Commission's procedural rules.

## CONCLUSION

For the foregoing reasons, the Commission should deny ACSF's Petition for Declaratory Ruling and Other Relief.

Respectfully Submitted,

/s/ Judy Sello

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September 3, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of September, 2002, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 3, 2002  
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

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