

**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)	
)	

**REPLY COMMENTS OF AT&T
IN OPPOSITION TO PETITION OF ACSF**

Pursuant to the Commission's *Notice*,¹ AT&T Corp. ("AT&T") submits these reply comments in opposition to ACS of Fairbanks, Inc.'s ("ACSF's") Petition² seeking to cease the disbursement of 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

As demonstrated by the commenters, ACSF's Petition effectively seeks a repeal of the Commission's universal service support portability mechanism, which makes the amount of federal universal service support associated with a particular line available to the carrier that is actually paying for and serving customers with that line.³ In particular, the Petition proposes to replace these existing clear and unambiguous rules with the following rule: If a line is paid for and served by an incumbent LEC, then the incumbent LEC is paid the amount of federal

¹ 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").

² See *ACS of Fairbanks, Inc. Petition for Declaratory Ruling and Other Relief*, CC Docket No. 96-45, at 1 (filed July 24, 2002) ("Petition").

³ See GCI at 6-9; AT&T at 3-4.

universal service support for that line; if a line is paid for and served by a competitive LEC, then the *incumbent* LEC is still paid the amount of federal universal service support for that line.⁴ This proposed rule change must be rejected on multiple grounds.⁵

As a threshold matter, the comments confirm that ACSF's use of a petition for a "declaratory ruling" to propose a rule change must be rejected out of hand on procedural grounds.⁶ The Commission's rules clearly state that a declaratory ruling is appropriate only "where necessary to terminate a controversy or remove uncertainty."⁷ Furthermore, the Commission has emphasized that where "there is no uncertainty to be removed or controversy to be terminated . . . a declaratory ruling is . . . unwarranted,"⁸ and a Petition seeking a declaratory ruling "in stark contravention of a clear, comprehensive rule"⁹ must be denied. As noted, ACSF's Petition does not seek to remove any legitimate ambiguity in the Commission's existing rules, but seeks instead to repeal and replace clear and unambiguous universal service support portability rules.¹⁰ Accordingly, ACSF's Petition must summarily be rejected.

Even if ACSF's Petition could be considered on the merits, the comments confirm that the Petition still must be denied. According to ACSF and its few supporters, the rule change proposed in the Petition is necessary to (1) terminate a conflict between the Commission's

⁴ See Petition at 1; ATA at 2-3; NTCA at 2; OPASTCO at 2. There is no question that under ACSF's proposal, a CTEC's subsidy would be paid to the incumbent LEC, because under the Commission's existing rules, the amount of universal service support that otherwise would have been paid to the CETC would be given to the incumbent LEC. See 47 C.F.R. § 54.307.

⁵ See GCI at 1-21; AT&T at 1-12.

⁶ See GCI at 6-9; AT&T at 10-11.

⁷ 47 C.F.R. § 1.2.

⁸ *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).

⁹ 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).

¹⁰ See GCI at 6-9; AT&T at 10-11.

universal service portability rules and § 254(e) of the Act; (2) ensure competitively neutrality; and (3) serve the public interest. But as demonstrated by GCI and AT&T, 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.¹¹

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

GCI and AT&T conclusively demonstrated that, contrary to ACSF’s claims (which are parroted by the few commenters that support ACSF’s Petition),¹² there is no conflict between the Commission’s existing federal universal service support 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.”¹³ The Commission has expressly held that universal service support should be fully portable to *all* CETCs, and that such portability does *not* preclude CETCs’ from complying with Section 254(e).¹⁴ And, contrary to ACSF’s and its few supporters’ claims,¹⁵ 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 that of other carriers. Here, the CETC obviously would “use the support” for the provision of the facilities and services

¹¹ See GCI at 2-6, 9-21; AT&T at 3-10.

¹² See Petition at 11; ATA at 1-2; NTCA at 5; OPASTCO at 2.

¹³ 47 U.S.C. § 254(e); *see also* 47 C.F.R. 54.314.

¹⁴ See Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 289 (1997) (“*First R&O*”) (“[w]hile the CLEC may have costs different from the ILEC, the CLEC must also comply with Section 254(e)”).

¹⁵ See Petition at 11; ATA at 1-2; NTCA at 5; OPASTCO at 2.

for which it is intended, which in this case is local service provided over an unbundled loop obtained from the incumbent LEC – *i.e.*, the subsidy is to be applied against the CETC’s loop costs, which is the rate for the unbundled loop. Thus, ACSF has identified no conceivable violation of Section 254(e).

The Fifth Circuit also has expressly 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.¹⁶ 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.

Moreover, 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).¹⁷ 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).”¹⁸ “Absent the filing of such certification, carriers will not receive federal universal service support.”¹⁹

¹⁶ See *Alenco v. FCC*, 201 F.3d 608, 622 (5th Cir. 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).

¹⁷ See GCI at 8-9; AT&T at 6-7.

¹⁸ See Fourteenth Report and Order, *Federal-State Joint Board on Universal Service, et al.*, 16 FCC Rcd. 11233, ¶ 187 (“*Fourteenth R&O*”).

¹⁹ *Id.*

The only response that ACSF's supporters can muster is their assertions that the Regulatory Commission of Alaska ("RCA") erroneously certified GCI.²⁰ But to the extent that ACSF or any other LEC has a legitimate challenge to a CETC's certification, the Commission has expressly determined that those challenges should be brought before the states, not before the Commission.²¹ And, in any event, those Alaska-specific concerns are not a valid basis for a nationwide declaratory ruling from this Commission that would dramatically reduce competitive carriers' ability to compete for local customers.²²

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

The comments further confirm that ACSF's additional claims that the proposed rule changes are necessary for competitive neutrality and the public interest also are baseless. As explained by GCI (at 2-6, 9-12) and AT&T (at 7-10), the Commission has expressly rejected these arguments, stating that it is "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."²³ On the contrary, the Commission repeatedly explained that "federal universal service high-cost support should be available and portable to all eligible telecommunications carriers" and that "[u]nequal

²⁰ See Petition at 18-20, ATA at 3.

²¹ See *Fourteenth R&O* ¶ 190 ("challenges to the propriety of the certifications . . . should be brought at the *state level*").

²² The RCA certification process 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 specifically identify how those funds are being used. See *id.* ACSF and its supporters have identified no obvious abuses in this process. And even if they had, that would not warrant the sweeping *national* rule changes sought by ACSF's Petition.

²³ *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

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.”²⁴

As explained by GCI (at 9-17), full portability of universal service support is a necessary cornerstone of competitive neutrality and the public interest. If universal service support were available only to incumbent LECs, then incumbent LECs would enjoy a virtually insurmountable competitive advantage over CETCs. For example, if incumbent LECs were the only carriers eligible to receive a \$10 federal subsidy, then CETCs could compete against incumbent LECs only if CETCs were \$10 more efficient than the incumbent LEC. Such a system clearly is not competitively neutral or consistent with the public interest – indeed, it would erect entry barriers that foreclose local telephone competition in rural areas.

It is not surprising, therefore, that the Fifth Circuit, in upholding the Commission's portability requirements, determined that full portability of support is “*dictated by principles of competitive neutrality.*”²⁵ Moreover, in rejecting claims similar to those raised by ACSF, the court explained 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.”²⁶

In response to these fatal flaws in their analyses, ACSF and its supporters attempt a cost comparison that the Commission and the Fifth Circuit already have explicitly rejected. These commenters compare ACSF's *embedded* loop costs (\$33) to a portion of GCI's *forward-looking*

eligible telecommunications carrier that wins the customer or adds a new subscriber would aid the entry of competition in rural study areas”).

²⁴ Ninth Report & Order And Eighteenth Order On Reconsideration, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd. 20432, ¶ 90 (1999).

²⁵ *Alenco*, 201 F.3d at 622 (5th Cir. 2000).

²⁶ *Id.*

loop costs (GCI purchases UNE loops from ACSF at the forward-looking rate of \$19 per line per month as determined by the RCA).²⁷ Based on this comparison, these commenters claim 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 \$10,²⁸ and conclude 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.

The problem with this "analysis" is that it is based on an apples-to-oranges cost comparison – a comparison of ACSF's *embedded* costs to GCI's *forward-looking* costs. As explained by the Fifth Circuit: "It 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."²⁹ Thus, the only appropriate comparison of ACSF's and GCI's *forward-looking* costs.

ACSF concedes, as it must, that the RCA has determined that ACSF's forward-looking monthly per line loop costs are \$19, which is equivalent to the UNE rate GCI pays for the same loops.³⁰ A proper cost comparison, therefore, shows that ACSF's and GCI's per line loop costs are roughly equivalent, thereby foreclosing any claim that the Commission's current federal

²⁷ See Petition at 11; ATA at 2-3; NTCA at 3-4; OPASTCO at 2-3.

²⁸ See Petition at 11; ATA at 2-3; NTCA at 3-4; OPASTCO at 2-3.

²⁹ *Alenco*, 201 F.3d at 622 (5th Cir. 2000).

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

universal service support portability mechanism disadvantages ACSF or other incumbent LECs.³¹ On the contrary, it is ACSF's proposal that would distort competition by providing incumbent LECs with a virtually insurmountable competitive advantage over CETCs, because incumbent LECs would have the luxury of federal universal service subsidies, whereas CETCs would not.³²

Put simply, ACSF's Petition must be denied because it is procedurally deficient and, as the Commission and federal courts already have determined, because a grant of the Petition would contravene the public interest and the principle of competitive neutrality by bestowing an insurmountable competitive advantage on incumbent LECs, thereby precluding local telephone competition.

³¹ 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.

³² ACSF's additional claim (at 27-30) that basing universal service support on incumbent LECs' 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"). The Supreme Court also has expressly rejected ACSF's argument. *See Verizon v. FCC*, 122 S. Ct. 1646, 1675-76 (2002) ("[T]he claim that TELRIC is unreasonable as a matter of law because it . . . does not produce facilities-based competition founders on fact. [F]igures show[] that [new entrants] . . . have invested in new facilities to the tune of \$55 billion since the passage of the Act (through 2000). . . . The FCC's statistics indicate substantial . . . pure and partial facilities based competition. . . . It suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.").

CONCLUSION

For the foregoing reasons, and for the reasons stated in AT&T's initial opposition, the Commission should deny ACSF's Petition for Declaratory Ruling and Other Relief.

Respectfully Submitted,

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September 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2002, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. in Opposition to the Petition of ACSF to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 17, 2002
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/s/ Peter M. Andros
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