

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

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Petition for Declaratory Ruling and Other Relief of ACS of Fairbanks, Inc.)	DA 02-1853
)	

**REPLY COMMENTS OF THE
COMPETITIVE UNIVERSAL SERVICE COALITION
IN OPPOSITION TO THE ACS PETITION**

**COMPETITIVE UNIVERSAL SERVICE
COALITION**

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The Competitive Universal Service Coalition (“CUSC”) hereby submits reply comments in opposition to the Petition for Declaratory Ruling and Other Relief (“Petition”) filed by ACS of Fairbanks, Inc. (“ACS”). 1/

INTRODUCTION AND SUMMARY

The Commission should reject the Petition because the ruling it proposes would (1) violate the Communications Act of 1934, as amended (the “Act”), in that the courts have held “portability . . . is dictated by the principles of competitive neutrality” and Section 254(e); 2/ (2) destroy the Rural Task Force consensus plan, which, as adopted by the Commission, was to have established regulatory stability over a five-year period from 2002 through 2007; (3) disserve the public interest by eliminating or severely restricting competition in the provision of

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 Aug. 1, 2002).

2/ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).

supported universal service; and (4) flout Commission procedures and the Administrative Procedure Act by changing rules through a declaratory ruling.

The target of ACS's petition is its direct competitor, General Communication, Inc. ("GCI"), but the ruling it proposes would affect every competitive eligible telecommunications carrier ("ETC") in the country. ACS seeks nothing less than the elimination of universal service funding portability. Instead of providing funding to competitive ETCs based on the per-line support received by the incumbent local exchange carriers ("ILECs"), as the established rules clearly provide, ACS proposes that competitive ETCs receive funding based on some undefined measure of their own costs – a measure likely to put competitive ETCs at a severe disadvantage. ^{3/}

But ACS fails to justify its attempt to have the Commission abandon its bedrock commitment to the principle of portability for all universal service funding. Instead, ACS seeks to manipulate the regulatory process out of its desire to wound its competitors. Universal service portability is rooted in the dual commitment to competition and universal service enshrined in the Telecommunications Act of 1996 ("1996 Act"), and has been recognized by the courts as being indispensable to implementing the Act's provisions aimed at opening local

^{3/} Petition at iii, 34-37. ACS makes it clear that the ruling it seeks would not be limited to HCLS funding or to competitive ETCs that use unbundled network elements; rather, it asks the Commission to "ensure that [competitive ETCs] provide cost support for receipt of any universal service support mechanisms." *Id.* at 36.

telephone markets to competition and ensuring the ubiquity of basic telecommunications services.

I. PORTABILITY OF UNIVERSAL SERVICE FUNDING IS REQUIRED BY THE 1996 ACT AND THE FCC'S ESTABLISHED PRINCIPLES.

Rural ILECs have brought numerous challenges to the Commission's established portability principle, both before the Commission and before the courts, and each time they have been correctly rebuffed. Indeed, the courts have held that portability is not only permitted, but is compelled, by provisions of the 1996 Act. The U.S. Court of Appeals for the Fifth Circuit held that "portability is not only consistent with [the statutory requirement of] predictability, but also is *dictated* by the principles of competitive neutrality and . . . 47 U.S.C. § 254(e)." ^{4/} Portability is also compelled by the Act's requirement that all markets be opened to competitive entry, and the long-standing Commission recognition that a regulatory system that grants ILECs significantly more per-line support than competitive ETCs would constitute an unlawful barrier to entry. ^{5/} Accordingly, the ruling that ACS seeks is precluded by the Act.

^{4/} *Alenco Communications, Inc. v. FCC*, 201 F.3d at 622 (emphasis added). *See also id.* at 616 ("[T]he [universal service] program must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, *this [portability] principle is made necessary not only by the economic realities of competitive markets but also by statute.*") (emphasis added); *id.* at 622 ("What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act.").

^{5/} *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the*

II. ABANDONING PORTABILITY WOULD DESTROY THE RURAL TASK FORCE COMPROMISE.

In 1997, the Commission and the Federal-State Joint Board on Universal Service convened a Rural Task Force (“RTF”) consisting of representatives of ILECs, prospective wireline and wireless competitive entrants, consumers, and state regulators. Over a multi-year process, the RTF participants worked out a compromise that gave all parties some, but not all, of what they sought. The plan included a number of features sought by rural ILECs, including retaining support based on their embedded costs, with a major one-time increase in the amount of support. The plan also included retaining per-line funding portability as a central component of the rules governing funding for carriers serving rural areas. Most critically, to ensure a stable regulatory environment, the RTF recommended, and the Commission ruled, that these rules would remain in effect for a five-year period, from January 2002 through January 2007. The Commission adopted the RTF’s consensus recommendations in May 2001 with only minimal changes. ^{6/}

The basic tenets of the RTF compromise must not be unraveled even before the first year is complete. The ACS Petition, as part of the rural ILECs’ relentless effort to protect their existing monopolies by restricting support to competitive ETCs and precluding entry, constitutes a frontal assault on the

Communications Act of 1934, 15 FCC Rcd 16227 (2000) (“*Kansas USF Declaratory Ruling*”).

^{6/} *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244 (2001) (“*RTF Order*”), *recon.*, 17 FCC Rcd 11472 (2002).

portability principle at the core of the RTF compromise. This proposal would fundamentally alter the competitive landscape, and would unfairly – and prematurely – unravel the RTF compromise that rural ILEC representatives helped craft and signed on to support. The Commission should reject ACS’s proposal.

III. RESTRICTING PORTABILITY WOULD BE ANTI-COMPETITIVE AND WOULD DISSERVE THE PUBLIC INTEREST.

A. ACS’s Proposal To Eliminate Portability Would Restrict Competition and Harm Consumers.

Portability is a necessary prerequisite to competition in the provision of universal service in high-cost areas. As the Commission has consistently recognized, consumers in rural areas unequivocally benefit from the introduction of competition. ^{7/} Competition “benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies,” including “not only . . . the deployment of new facilities and technologies,” but also “incentive[s] to the incumbent rural telephone companies to improve their existing network to remain competitive, resulting in improved service to [] consumers.” ^{8/}

^{7/} *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, ¶¶ 11-15 (2001); *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming*, 16 FCC Rcd 48, 55, ¶ 16 (Com. Car. Bur. 2000) (“*Wyoming ETC Order*”).

^{8/} *Wyoming ETC Order*, 16 FCC Rcd at 55, ¶ 17.

Moreover, “competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.” 9/

The only way to avoid obstacles to competition and ensure competitive neutrality is to provide an identical per-line universal service subsidy to incumbent and competitive carriers. 10/ As long as both the incumbent and the new entrant receive the same amount per customer, then the marketplace incentives facing both carriers are the same as if neither carrier received a subsidy, which means that the subsidy system avoids skewing the competitive marketplace in favor of either carrier. By contrast, if the ILEC receives a subsidy that is significantly greater than that available to the competitive entrant, then the ILEC could be substantially less efficient and more costly than the entrant and still garner more revenue (especially given that ILEC support is not decreased when they lose customers to competitive carriers). This would make competitive entry difficult or impossible.

ACS improperly compares apples with oranges when it contrasts its embedded loop costs with the forward-looking costs GCI pays for unbundled network elements. 11/ CUSC submits that if an apples-to-apples comparison of

9/ *Id.* at 57, ¶ 22. See also *Petition of RCC Minnesota, Inc., d/b/a Cellular One for Designation as an Eligible Telecommunications Carrier*, Docket No. UT-023033, Order Granting Petition, ¶¶ 59-60 (WUTC Aug. 14, 2002).

10/ See *Kansas USF Declaratory Ruling*; GCI Opposition at 11-17.

11/ Petition at 8-11. See AT&T Opposition at 8; GCI Opposition at 14-16. Of course, it would not be competitively neutral to allow ILECs to receive support based on their historical, embedded costs, while requiring competitive ETCs to receive support based on their incremental, forward-looking costs of providing the same service.

ILECs' and competitive ETCs' embedded costs were conducted, it is just as likely that competitive ETCs' embedded costs would be *higher* than those of the rural incumbents. This is particularly true when examined on a per-line basis, since competitive ETCs that have recently entered a market typically will have relatively few customers over whom to spread costs. Also, CLECs and wireless carriers face a higher cost of capital than ILECs, and must incur significant start-up costs (of marketing, customer acquisition, construction of new facilities such as cellular towers) to enter new local markets.

It might well be that in some cases, competitive ETCs may utilize technologies that incur lower *forward-looking* costs per customer than those used by ILECs to serve the same customer base. But even in cases where this is true, the solution is not to give a higher subsidy to the ILEC and a lower subsidy to the competitive ETC. As discussed above, such unequal support amounts would unfairly skew the competitive marketplace in favor of the ILECs, enable ILECs to garner more revenue than competitive ETCs even if their operations are more costly, and destroy any incentives for ILECs to operate efficiently. Rather, if ILECs' cost structures are really as inefficient as their representatives apparently think they are, then the universal service system should not be manipulated to protect them from the inevitable competitive consequences of their inefficiencies. Portable universal service support makes head-to-head competition possible, and strongly serves the public interest, particularly the interests of consumers in rural areas.

B. The Commission Should Reject ACS's Proposal to Require Competitive Entrants to File Cost Showings.

ACS asks that competitive ETCs be required to make a cost showing to justify the universal service support they receive, but the Commission five years ago correctly rejected such an approach as unreasonably “burdensome.” ^{12/}

Determining competitive ETCs' embedded costs would require the kind of arduous, intrusive proceedings the FCC long ago deemed inappropriate for competitive carriers. ^{13/} In addition, basing support on each carrier's individual costs would require the FCC and USAC to undertake a much greater administrative effort than required, with the burden multiplying with each new ETC designated to serve a rural market. In any event, the provisions of Parts 32, 36, 64, and 69 of the FCC's rules (under which ILEC embedded costs are measured, allocated, separated, and categorized), rely on ILEC network designs and historical regulated accounting systems that do not lend themselves to new entrants (especially wireless carriers). Finally, prospective entrants need to know exactly how much support will be available in order to make reasoned business decisions about entry, and such

^{12/} Petition at 33-37; *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8933, 8945, ¶¶ 288, 313 (1997) (“*First Report and Order*”), *subsequent history omitted*.

^{13/} *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980); *see also generally Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

reasoned decisions would be impossible if prospective entrants had to undergo a rate case prior to knowing how much support they could expect to receive. 14/

ACS is also wrong and uninformed in alleging that GCI and other competitive ETCs do not use the support they receive for the intended purposes, as required by Section 254(e) of the Act. To the contrary, ACS itself makes it clear that (even without considering the additional costs that GCI substantiates) the loop costs GCI incurs exceed the amount of universal service support it receives, which means that every dollar of that support is necessarily used for the intended purposes. 15/

In sum, restricting or eliminating portability as ACS proposes would impose a barrier to competitive entry, and would disserve the public interest.

14/ This is also consistent with the statutory directive that the Commission's universal service program be "specific and predictable." *See* 47 U.S.C. § 254(b)(5).

15/ Petition at 11 (Figure 1). Moreover, there is no basis for ACS's contention that extensive fact-finding or other burdensome regulatory procedures are needed to verify competitive ETCs' certifications that they are in compliance with Section 254(e) of the Act. *Id.* at 17-19. ACS's suspicions are totally unfounded. CUSC takes strong exception to the suggestion that competitive ETCs receiving portable support generically cannot be trusted. The Commission should reject this unfounded and offensive allegation.

IV. THE COMMISSION CANNOT CHANGE ITS RULES IN A DECLARATORY RULING PROCEEDING.

ACS seeks a ruling that would effectively change the Commission's established rule, in place since 1997, that competitive ETCs will receive "per-line support [calculated] by dividing the ILEC's universal service support payment by the number of loops served by that ILEC." 16/ But the time has long passed for ACS to seek reconsideration of that 1997 rule; and the Commission cannot modify the rule at this point on the basis of a declaratory ruling petition. 17/ The declaratory ruling sought by ACS is procedurally improper because the rule is entirely clear and there is no uncertainty to be removed or controversy to be terminated. 18/

16/ *First Report and Order*, 12 FCC Rcd at 8945, ¶ 313. *See also id.* at 8933, ¶ 288; 47 C.F.R. § 54.307. NTCA, for one, recognizes that ACS's petition would require the Commission to "revise its rules." NTCA Comments at 3, 4-6.

17/ 47 U.S.C. § 405; 5 U.S.C. § 553.

18/ 47 C.F.R. § 1.2. *See* GCI Opposition at 6-9; AT&T Opposition at 10-11 (citing *Abundant Life, Inc.*, 17 FCC Rcd 4006 (2002); *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, 14 FCC Rcd 12752 (1999); *Petition to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, 66 FCC 2d 1021 (1977)).

CONCLUSION

For the foregoing reasons, the Commission should reject the ACS
Petition.

Respectfully submitted,

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