

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

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Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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Petition for Rulemaking to Define "Captured" ) RM No. 10522  
and "New" Subscriber Lines for Purposes of )  
Receiving Universal Service Support Pursuant to )  
47 C.F.R. § 54.307, *et seq.* )  
 )

**REPLY COMMENTS OF AT&T CORP.  
IN OPPOSITION TO THE PETITION OF NTCA**

Pursuant to the Commission's *Order*,<sup>1</sup> AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to NTCA's Petition seeking to cut off federal universal service support to a substantial number of competitive eligible telecommunications carriers ("CETCs").<sup>2</sup>

NTCA correctly observes that the size of the federal high-cost universal service support fund is increasing at alarming rates – the size of the payments to CETCs has ballooned from \$4.6 million to \$76.4 million between the first quarter of 2001 and the third quarter of 2002 **alone**.<sup>3</sup> Although the Commission should take steps to ensure that the size

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Order, *Petition for Rulemaking to Define "Captured" and "New" Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307, et seq.*, RM No. 10522, DA 02-2214 (released September 9, 2002) ("*Order*").

<sup>2</sup> NTCA Petition For Expedited Rulemaking, *Petition for Rulemaking to Define "Captured" and "New" Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307, et seq.*, RM No. 10522 (filed July 26, 2002) ("*Petition*").

<sup>3</sup> See NTCA at 3; see also WUTC at 2.

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of the fund is not growing unnecessarily: the interim solution offered by NTCA – to almost entirely cut off federal high-cost support to numerous CETCs – must be rejected. As demonstrated by numerous commenters, NTCA’s proposal is overbroad, violates the Communications Act (“Act”), and contravenes well-established Commission policy, which has been upheld by federal courts.<sup>5</sup>

**I. THE COMMENTS CONFIRM THAT NTCA’S PROPOSED RULES ARE OVERBROAD, VIOLATE SECTION 254(e) OF THE ACT, AND CONTRAVENE BASIC PRINCIPLES OF COMPETITIVE NEUTRALITY.**

NTCA’s proposed **rule** changes are overbroad. NTCA defends its proposed ruled changes primarily on the ground that rural entry by wireless carriers (not wireline carriers) is causing the amount of federal high-cost universal service support payments to CETCs to grow exponentially. NTCA complains that high-cost payments to wireless carriers results in duplicative support payments: and that denying federal high-cost universal service to wireless CETCs would be competitively neutral because wireless CETCs have offsetting competitive advantages over ILECs.<sup>7</sup> Even if these allegations were **true**, however, they do not justify NTCA’s far reaching proposal to substantially curtail federal high-cost universal service support to *all* CETCs, including wireline CETCs. On the contrary, to the extent that the federal high-cost universal service support mechanism is broken with respect to wireless carriers, the Commission should address those issues in a future CMRS

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<sup>4</sup> *Accord* Verizon at 1

<sup>5</sup> *See, e.g.*, ARC at 6-12; CTIA at 3-5; CUSC at 4-12; RICA at 4-5; RTG at 2-4; SBI at 4-5; Sprint at 2-5; WUTC at 4-8.

<sup>6</sup> NTCA at 2 (noting that Commissioner Abemathy has indicated that the Commission is planning a rulemaking to focus on **the** question of whether commercial mobile radio service (CMRS) providers should receive universal service support based on ILEC’s costs).

<sup>7</sup> NTCA at 9-10.

proceeding. To implement new anticompetitive restrictions against all CETCs in this proceeding plainly would be overbroad and, as demonstrated below, flatly unlawful.

The Fifth Circuit Court of Appeals, in upholding the Commission’s current federal universal service support mechanism, expressly held that the Commission’s current policy of ensuring maximum portability of universal service support is *compelled* by the Act and basic principles of competitive neutrality: “portability . . . is dictated by principles of competitive neutrality and the statutory command that universal service be spent ‘only for the provision maintenance, and upgrading of facilities and services for which the [universal service] support is intended.’” As demonstrated by the commenters, NTCA’s proposed rules would severely curtail the portability of universal service, and therefore violate the Act and the core statutory goal **of** competitive neutrality.’

The Commission’s current universal service support rules state that “[a] competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier *captures* the subscriber lines of an [ILEC] . . . or serves *new* subscriber lines in the [ILEC’s] . . . service area.” Since 1997 – when these rules were first adopted by the Commission – regulators and federal courts have interpreted the rules to mean what they say, *i.e.* that a CLEC that captures a line previously served by an ILEC,” **or** wins a new subscriber line in the ILEC’s

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<sup>8</sup> *Alenco v. FCC*, 201 F.3d 608,622 (5<sup>th</sup> Cir. 2000) (quoting 47 U.S.C. § 254(e)); *see also* ARC at 6-11; CUSC at 4-9; SBI at 4-5; WUTC at 4-8.

<sup>9</sup> *See, e.g.*, ARC at 6-11; CUSC at 4-9; SBI at 4-5; WUTC at 4-8.

<sup>10</sup> 47 C.F.R. § 54.307(a) (emphasis added).

<sup>11</sup> 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

service area is entitled to the same amount of funding to which the ILEC would be entitled for serving that line.”

But NTCA now claims that the terms “capture” and ‘hew” as they appear in the Commission’s **rules** are “not clear,” and that the Commission should issue new rules redefining these **terms**.<sup>13</sup> According to NTCA, the term “captured line” should be redefined to mean only lines that were formerly served by the ILEC and where the ILEC no longer provides any supported services to the end-user customer, and the term “new” should be redefined to mean only lines to customers that have not previously received only service from the ILEC.<sup>14</sup> Any CETC line that does not satisfy these much narrower

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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 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>12</sup> *See, e.g.*, Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 287 (1997) (“*First R&O*”) (“A competitive carrier that has been designated as an eligible telecommunications carrier shall receive universal service support to the extent that it captures subscriber lines formerly served by an ILEC receiving support or new customer lines in that ILEC’s study area”); 47 C.F.R. § 307(a)(1) (“A competitive eligible telecommunications carrier serving loops in the service area of a non-rural incumbent local exchange carrier shall receive support for each line it serves in a particular wire center based on the support the incumbent LEC would receive for each such line.”); *Alenco v. FCC*, 201 F.3d 608, 621-622 (5<sup>th</sup> Cir. 2000) (explaining that “[t]he methodology governing subsidy disbursement is plainly stated,” and noting that the Commission’s rules “provide[] that the universal service subsidy be portable so that it moves with the customer, rather than stay with the [ILEC], . . . whenever a customer makes the decision to switch local service providers”).

<sup>13</sup> *See* NTCA at 4.

<sup>14</sup> *See id.*

definitions should, in NTCA’s view, be cut off from receiving federal high-cost universal service support on a prospective basis.”

The comments confirm that these new “definitions” would severely curtail portability of federal high-cost support.<sup>16</sup> For example, a CETC that captures one of two lines to a single customer would not be eligible to receive federal high-cost universal service support if the ILEC continues to serve the other line (but if the ILEC served both lines its would be eligible for support for both lines).<sup>17</sup> Similarly, a wireless carrier that provides a new line to a customer would not be eligible for support if that customer continues to purchase wireline service from the ILEC (but if the ILEC served both the wireline and the new wireless line, the ILEC would be eligible for support for both lines).<sup>18</sup> The comments provide numerous additional examples of situations where the NTCA’s proposed rules would cut CETCs off from receiving federal high-cost universal service support.” On this record, there is no question that a grant of NTCA’s Petition would substantially reduce portability of high-cost support to CETCs and, therefore, as the Fifth Circuit has confirmed would violate section 254(e) of the Act and the principle of competitive neutrality.”

Neither NTCA nor any of its supporters even attempt to reconcile NTCA’s proposed rules with 254(e) of the Act, as construed by the Commission and the courts.

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<sup>15</sup> See *id.*

<sup>16</sup> See, e.g., ARC at 7; CUSC at 6-7; RTG at 2-3; SBI at 5; WUTC at 5-6.

<sup>17</sup> See, e.g., CUSC at 6-7.

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., *id.* at 2-3, 6-7.

<sup>20</sup> *Alenco v. FCC*, 201 F.3d 608,622 (5<sup>th</sup> Cir. 2000).

Indeed, NTCA makes only a token effort to address the Fifth Circuit’s finding that the Commission’s existing portability rules are compelled by the principle of competitive neutrality. According to NTCA, the Commission’s current rules are not competitively neutral because “[l]oopholes in the rules now permit CETCs to receive support for every working loop they serve in the ILEC service area,”” which allows CETCs to “game” the system.” This claim is baseless.

Under the Commission’s current rules, CETCs and ILECs are eligible to receive support for the exact same lines, and the support is ultimately paid to the carrier that actually serves that line, thus allowing CETCs to compete for customers on equal terms with the ILEC. As explained by the Commission, “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 portability of support is necessary “[i]n order not to discourage competition in high cost areas.”<sup>23</sup> Indeed, “[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 [ILEC].”<sup>24</sup> Thus, contrary to NTCA’s assertions, the current federal high-cost universal service support rules intentionally allow CETCs equal access to the same support for which ILECs are eligible, and CETCs that take advantage of that funding are not “gaming” the system, or taking advantage of a “loophole” in the Commission’s rules.

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<sup>21</sup> *NTCA* at 8.

<sup>22</sup> *Id.*

<sup>23</sup> *First R&O* ¶ 287.

<sup>24</sup> *Ninth R&O* ¶ 90.

## II. THERE ARE NO “CHANGED CIRCUMSTANCES” TO JUSTIFY CURTAILING PORTABILITY OF HIGH-COST SUPPORT TO RURAL CETCS.

NTCA asserts (at 11-13) that “changed circumstances” justify repealing the existing portability rules. According to NTCA “[t]he 1997 assumptions underlying the [portability] rule[s] have . . . proven false over the course of the last five years.”<sup>25</sup> But NTCA discusses only one of the myriad justifications identified by the Commission for adopting its portability rules, *i.e.* that a CETC could not unfairly compete by “cherry picking” in high-cost service areas because CETCs are required to provide service and advertise “throughout the entire service area, consistent with 214(e).”<sup>26</sup> NTCA complains that the Commission has allowed state commissions to “redefine service areas and reduce CETC obligations to serve throughout the entire rural ILEC service area.”<sup>27</sup> But NTCA’s claims are flatly refuted by the same orders that NTCA cites in support of its argument:

[A]s the Commission concluded in Universal Service Order, the primary objective in retaining the rural telephone company’s study area as the designated service area of a competitive ETC is to ensure that competitors will not be able to target only the customers that are the least expensive to serve and thus undercut the incumbent carrier’s ability to provide service to high-cost customers. Rural telephone companies, however, now have the option of disaggregating and targeting high-cost support below the study area level so that support will be distributed in a manner that ensures that the per-line level of support is more closely associated with the cost of providing service. Therefore, any concern regarding “cream-skimming” of customers that may arise in designating a service area that does not encompass the entire

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<sup>25</sup> NTCA at 12. NTCA also makes vague claims that the current portability rules reduce ILECs’ incentives to invest in rural areas. NTCA at 14. In reality, the portability rules create competition, and thereby provide ILECs and CETCs with the same investment incentives as firms in naturally competitive markets.

<sup>26</sup> First R&O ¶ 48

<sup>27</sup> See NTCA at 12-13.

study area of the rural telephone company has been substantially **eliminated**.<sup>28</sup>

As noted by the commenters, the only real change in circumstances is that CETCs are finally making competitive inroads into rural markets, thereby providing rural customers with long-awaited choice for local telephone service **providers**.<sup>29</sup> It is *that* pro-competitive change in circumstances that NTCA and its supporters actually oppose. And that is why NTCA and its supporters are seeking a rule change that would create an entry barrier to further CETC entry in **rural** areas. As the Fifth Circuit noted in similar circumstances: “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.””

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<sup>28</sup> See Order on Reconsideration, *Federal-State Joint Board on Universal Service*, CC Docket No. **94-65**, FCC **01-311**, ¶ **12** (October **19,2001**).

<sup>29</sup> See, e.g., ARC at **18-20**; CUSC at **14-18**; SBI at **1-4**; Sprint at **2-5**.

<sup>30</sup> *Alenco v. FCC*, **201 F.3d 608, 622** (5<sup>th</sup> Cir. 2000)

## CONCLUSION

For the foregoing reasons, the Commission should deny NTCA's Petition seeking to substantially curtail the Commission's universal service support portability rules.

Respectfully Submitted,

/s/ Judy Sello

Mark C. Rosenblum

Judy Sello

AT&T Corp.

Room 3A229

900 Route 202/206 North

Bedminster, New Jersey 07921

(908) 532-1846

David L. Lawson  
Christopher T. **Shenk**  
Sidley Austin Brown & Wood L.L.P.  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000

*Attorneys for AT&T Corp.*

October 7, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of October, **2002**, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. in Opposition to the Petition of NTCA to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service **list**.

Dated: October 7, **2002**  
Washington, D.C.

/s/ Christopher T. Shenk  
Christopher T. Shenk

## SERVICE LIST

Nancy W. Gibbs  
10714 S. Jordan Gateway, Suite 260  
South Jordan, UT 84095

L. Marie Guillory  
Daniel Mitchell  
National Telecommunications  
Cooperative Association  
4121 Wilson Blvd., 10<sup>th</sup> Floor  
Arlington, VA 22203

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Sheryl Todd  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 5-B540  
Washington, DC 20554

Thomas G. Fisher, Jr.  
Hogan & Fisher, P.L.C.  
3101 Ingersoll Avenue  
Des Moines, IO 50312

Robert R. Puckett, President  
**Louis** Manuta, Esq.  
New York State Telecommunications  
Association, Inc.  
100 State Street  
Suite 650  
Albany, NY 12207

Cammie Hughes  
Authorized Representative  
Texas Statewide Telephone  
Cooperative, Inc.  
3721 Executive Center Drive, Suite 200  
Austin, TX 78731

James Rowe  
Executive Director  
Alaska Telephone Association  
201 E. 56<sup>th</sup>, Suite 114  
Anchorage, AK 99518

John F. Jones  
Vice President  
Federal Government Relations  
CenturyTel, Inc.  
100 Century Park Drive  
Monroe, LA 71203

Karen Brinkmann  
Richard Cameron  
Tonya Rutherford  
Latham & Watkins  
Suite 1000  
555 Eleventh Street, N.W.  
Washington, DC 20004-1304

Ann H. Rakestraw  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201

Stuart Polikoff  
Director of Government Relations  
**OPASTCO**  
21 Dupont Circle N.W.  
Suite 700  
Washington, DC 20036

Jeffrey W. Smith  
Policy Analyst  
**OPASTCO**  
21 Dupont Circle N.W.  
Suite 700  
Washington, DC 20036

Michele C. Farquhar  
David L. Sieradzki  
Ronnie London  
Hogan & Hartson LLP  
555 13<sup>th</sup> Street, N.W.  
Washington, DC 20004

Jay C. Keithley  
Richard Juhnke  
Roger Sherman  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, DC 20004

Craig T. Smith  
6450 Sprint Parkway  
Overland Park, KS 66251

David Cosson  
Kraskin, Lesse & Cosson, LLP  
2120 L Street, N.W.  
Suite 520  
Washington, DC 20037

Caressa D. Bennet, General Counsel  
Kenneth C. Johnson, Regulatory Director  
Bennet & Bennet, PLLC  
1000 Vermont Avenue, N.W.  
10<sup>th</sup> Floor  
Washington, DC 20005

David A. LaFuria  
Steven M. Chernoff  
Lukas, Nace, Gutierrez & Sachs, Chartered  
1111 19<sup>th</sup> Street, N.W.  
Suite 1200  
Washington, DC 20036