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

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

**COMPETITIVE UNIVERSAL SERVICE COALITION
REPLY COMMENTS
ON THE JOINT BOARD RECOMMENDED DECISION
ON THE TENTH CIRCUIT REMAND**

The Competitive Universal Service Coalition (“CUSC”) hereby submits its reply comments on the Joint Board’s *Recommended Decision* regarding issues from the *Ninth Report and Order* that were remanded to the Commission by the U.S. Court of Appeals for the Tenth Circuit. 1/

INTRODUCTION AND SUMMARY

This proceeding is *not* merely about whether the high-cost fund for non-rural carriers should be larger or smaller. Rather, the real core issue is how to restructure the universal service high-cost support system in a manner that is consistent with emerging competition. The Commission must make serious changes

1/ *Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 20716 (Jt. Bd. 2002) (“*Recommended Decision*”). See also *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) (“*Ninth Report and Order*”), remanded, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, DA 02-3476 (Wireline Comp. Bur., released Dec. 18, 2002) (granting all parties extension of time to file reply comments).

to the system, such as working with the states to eliminate implicit subsidies, which are a barrier to competition.

The Commission should also refuse to adopt proposals like the rate comparability certification requirement proposed in the *Recommended Decision*. While facially neutral, such proposals could stifle the development of innovative service packages and have a seriously harmful effect on competitive entrants, to the ultimate detriment of consumers in rural areas. The Commission should also decline to adopt the *Recommended Decision*'s vague proposal regarding *ad hoc* state commission showings for supplemental support, and should reject suggestions to abandon the fundamental principle of portability.

I. THE COMMISSION SHOULD WORK WITH THE STATES TO BEGIN ELIMINATING IMPLICIT SUBSIDIES

Implicit subsidies such as statewide rate averaging constitute a barrier to entry and are inconsistent with competition, as CUSC, the Wyoming PSC, and several ILECs pointed out in their initial comments. ^{2/} In rural areas, implicit subsidies make it difficult or impossible for prospective new entrants to compete effectively with ILECs, because those subsidies artificially reduce ILECs' rates, but are unavailable to prospective entrants. The Commission itself has recognized that "efforts to sustain implicit support in a competitive environment could encourage business decisions contrary to the purpose of high-cost support" and would deprive prospective competitors of "opportunities to serve lower-revenue residential

^{2/} CUSC Comments at 10-12; Wyoming PSC Comments at 3, 8; SBC Comments at 1-7, 22-25; Qwest Comments at 7.

customers in high-cost rural areas where incumbent LECs are charging artificially low rates because of implicit support flows.” ^{3/}

Therefore, implicit subsidies violate the principle of competitive neutrality, and reviewing courts have repeatedly held them to be unlawful. ^{4/} The use of implicit subsidies is also “contrary to the statutory requirement that universal service support be ‘explicit,’ as well as ‘specific, predictable and sufficient.’ ” ^{5/} Thus, while implicit subsidies may be appealing in the short term, they ultimately thwart local competition and harm consumers, as the Wyoming PSC cogently explains:

As long as states continue to average their rates, they will limit the rate impact on their customers. As long as states continue to use value of service pricing, customers will not have to face affordability issues and there is no need to implement a state universal service program. As long as states continue to keep access rates high and business rates high, subsidized residential rates in urban and rural areas can be left lower. However, each of these actions ignores economic realities in the telecommunications industry and thus inhibits, rather than promotes, the development of local competition. It destroys the incentive for a state, especially a rural state like Wyoming, to move rates to cost to foster a competitive environment. ^{6/}

Rather than adopting the approach proposed in the *Recommended Decision*, which condones the continued use of statewide averaging and other forms

^{3/} *Ninth Report and Order*, 14 FCC Red at 20441-42, ¶ 16.

^{4/} CUSC Comments at 11 n.22, citing *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 406 (5th Cir. 1999); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000); *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 318 (5th Cir. 2001).

^{5/} SBC Comments at 4-5.

^{6/} Wyoming PSC Comments at 8 (emphasis added).

of implicit subsidies, the Commission should explore alternative approaches that would give the states positive inducements to phase out and ultimately eliminate such implicit subsidies. For example, without necessarily endorsing the particulars of either proposal, CUSC recommends further consideration of the alternative approaches offered by SBC and Qwest, each of which points the way toward ending states' reliance on anti-competitive implicit subsidies. In particular, CUSC commends the transparency of the SBC proposal to rely on a neutral geographic definition like *counties* as the basic geographic building block for which support is to be calculated, ^{7/} rather than using wire centers or other ILEC-centric geographic units that may be familiar to ILECs and their traditional regulators, but not to competitive carriers.

CUSC also agrees with AT&T that the Commission should begin the process of harmonizing the support mechanisms for so-called rural and non-rural carriers, as contemplated in the *RTF Order*. ^{8/} CUSC strongly agrees with USTA and NRTA/OPASTCO that the existing framework for rural ILECs and competitors, as adopted in the *RTF Order*, must remain in place for its full five-year term. ^{9/} However, the Commission should begin laying the groundwork for moving rural

^{7/} SBC Comments at 5, 15-16.

^{8/} AT&T Comments at 20, citing *Federal-State Joint Board on Universal Service, et al.*, Fourteenth Report and Order, 16 FCC Rcd 11244 (2001) ("*RTF Order*"). See generally AT&T Comments at 18-21.

^{9/} USTA Comments at 3; NRTA/OPASTCO Comments at 2, 4-6.

carriers toward a forward-looking support system that is compatible with emerging competition, at the end of that term.

II. THE COMMISSION SHOULD NOT ADOPT A RATE COMPARABILITY CERTIFICATION REQUIREMENT

The Commission should decline to adopt the *Recommended Decision*'s proposal to require state commissions to certify that eligible telecommunications carriers ("ETCs") operating in the rural portions of non-rural service areas provide service at rates that satisfy a national "comparability" standard. ^{10/} As demonstrated in CUSC's initial comments, this proposal ignores the diversity of carriers that may be designated as ETCs (including CMRS carriers that are exempt from state rate and entry regulation), and violates the principle of competitive neutrality. ^{11/} Moreover, such a requirement could harm consumers by giving state commissions an "inducement" to restrict ETCs' ability to offer innovative, bundled service packages that differ from the standard, ILEC-centric "basic service rate template." In addition, it would be unnecessary and counter-productive to apply such a certification requirement to competitive ETCs. ^{12/}

None of the other commenting parties addressed the impact of the proposed rate comparability certification requirement on ETCs other than

^{10/} *Recommended Decision*, ¶¶ 50-56.

^{11/} CUSC Comments at 2-10.

^{12/} *Id.*

ILECs. ^{13/} NASUCA’s misguided argument for an expanded version of the certification requirement, in which funding would be denied to carriers in states that cannot issue the requisite certification, fails to consider how such a requirement would harm competitive ETCs and consumers. ^{14/} The Commission should reject both the basic certification proposal described in the *Recommended Decision* and the expanded version proposed by NASUCA because they are anti-competitive and ultimately would be harmful to consumers by depriving them of competitive alternatives.

Moreover, such proposals would be difficult or impossible to implement. CUSC concurs with the concerns expressed by a number of parties about the feasibility of establishing a meaningful “basic service rate template” – a prerequisite for implementing the rate comparability certification proposal – given the wide differences between ratemaking methodologies in use in different states and the different definitions of local calling areas in various geographic areas. ^{15/} It would be extremely difficult to develop a meaningful, “apples to apples” ^{16/} template even when only ILEC offerings are considered; and when competitive ETCs are taken

^{13/} Indeed, only two parties even acknowledged the *existence* of competitive ETCs. *See* Wyoming PSC Comments at 4 n.2; RICA Comments, *passim*. We address RICA’s anti-competitive proposals in Section III below.

^{14/} Compare NASUCA Comments at 14 *with* CUSC Comments at 3-6.

^{15/} *See, e.g.*, Sprint Comments at 7-8; *cf.* NASUCA Comments at 8, 16-17 (arguing that local calling area differences be taken into account in comparability certification, but providing no explanation for how such a comparison would be implemented); Missouri Public Counsel Comments at 2 (same).

^{16/} RICA Comments at 3.

into account, developing a meaningful standard template becomes impossible. 17/ CUSC also agrees with the Texas and Wisconsin commissions' concerns that such certification requirements could impose unwarranted administrative burdens on state commissions. 18/

CUSC's initial comments also demonstrated that the closely related proposal to give state commissions an opportunity to make an *ad hoc* showing to justify additional federal support would make it virtually impossible for ILECs or prospective competitors to determine the amount of available support, thus violating both the principles of "predictability" and competitive neutrality. 19/ Most of the other commenting parties concurred in opposing this proposal. 20/ Most significantly, as the Wyoming PSC points out, "nothing in the proposal incents states to establish cost-based rates or competitive rates. In fact, the proposal seems to go in the opposite direction." 21/ Thus, the Commission should not adopt this inchoate proposal from the *Recommended Decision*, and should not devote

17/ CUSC Comments at 6-8.

18/ Texas PUC Comments at 4; Wisconsin PSC Comments at 5.

19/ CUSC Comments at 13-14.

20/ See, e.g., California PUC Comments at 12-15 (characterizing it as "unworkable, vague, and ill-defined," *id.* at 15); New York PSC Comments at 2; AT&T Comments at 17-18 (calling the proposal "cumbersome" and "entirely unnecessary"); RICA Comments at 4 ("the proposal invites a standardless case-by-case approach that inevitably will produce arbitrary and inconsistent results, accompanied by substantial litigation costs"). See also Sprint Comments at 6-8 (noting problems with the proposal).

21/ Wyoming PSC Comments at 8. See also *id.* (the proposal "is substantially undefined and provides no comfort to high cost states such as Wyoming. . . . It is tantamount to an abandonment of the attempt to satisfy the universal service funding mandates of the Act.").

additional resources to developing such a proposal with greater specificity. Instead, the Commission should develop more substantive policies to address the Tenth Circuit's concerns about inducing states to eliminate barriers to competitors having fair and transparent access to explicit universal service funding, as discussed in Section I above.

III. THE COMMISSION SHOULD REJECT THE SUGGESTION TO ABANDON PORTABILITY

The Commission should unequivocally reject the anti-competitive proposals submitted by the so-called Rural Independent “Competitive” Alliance (“RICA”), which purports to represent the interests of CLECs affiliated with rural ILECs. RICA suggests that the Commission “decouple CLEC Universal Service Support from that of the incumbent.” 22/ This assault on the fundamental principle of funding portability has no place in this proceeding. First, the Commission cannot lawfully jettison portability; the courts have confirmed that portability is “dictated by principles of competitive neutrality” and by the requirements of the statute. 23/ Portability is also necessary to ensure that consumers in rural areas enjoy the full benefit of local competition that is neither impeded nor artificially promoted by a lopsided distribution of universal service support.

22/ RICA Comments at 5.

23/ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000); *see also Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, 15 FCC Rcd 16227 (2000); *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8701-02, ¶ 48 (1997).

In addition, the Commission should firmly reject RICA's real agenda – to extend the rural ILECs' embedded cost-based system into non-rural ILEC territories when rural ILECs' affiliates compete in those areas. 24/ To be sure, CUSC strongly supports competition in rural areas, including when ILEC affiliates enter into competition in neighboring ILECs' territories. But such competition must be fair and based on portable universal service funding. 25/ As a policy matter, the Commission should refuse RICA's invitation to extend the rural ILECs' embedded cost-based support system into non-rural ILEC areas. Rather, the Commission eventually should extend a system based on forward-looking cost into the rural ILEC areas after the expiration of the five-year term of the *RTF Order's* interim plan.

Finally, the Commission should avoid adopting proposals that, while not specifically intended to skew the competitive balance against competitive ETCs, would be wholly incompatible with competition and funding portability. For example, NASUCA proposes to deny high-cost funds to ILECs that are earning a rate of return exceeding 11.25%. 26/ Whatever the merits of this proposal in a monopoly environment, in the real-world competitive environment, the effect of this

24/ RICA Comments at 5 (“Rural CLECs are prepared to provide the same justification for Universal Service Support as rural ILECs, through either individual costs or use of a formula analogous to the Average Schedules.”).

25/ New entrants in rural portions of non-rural ILEC study areas have a difficult enough time competing against a non-rural ILEC receiving portable support. The competition would be well-nigh impossible if the new entrant (receiving forward-looking cost-based, portable non-rural ILEC support) must compete against a rural ILEC affiliate receiving much greater amounts of support based on the rural ILEC's embedded costs.

26/ NASUCA Comments at 9-10.

proposal would be to deny portable funds to competitive ETCs that compete with such well-heeled ILECs. The Commission should not adopt this illogical proposal.

CONCLUSION

For the reasons stated above and in CUSC's initial comments, CUSC respectfully urges the Commission to consider alternative policies that would diverge substantially from the *Recommended Decision*. If necessary, then the Commission should not hesitate to seek further comment, or even to refer the issues back to the Joint Board for further consideration.

Respectfully submitted

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January 17, 2003