

Tenth Circuit.

After reviewing the initial comments, NASUCA continues to believe that the Joint Board's recommendations are an important first step in ensuring that the real rates that real consumers pay are the real test of the statutory mandate that "consumers in all regions of the nation...have access to telecommunications and information services ... that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."⁵ NASUCA also maintains the belief, however, that the Joint Board Recommendations did not go far enough in several areas and should be strengthened.

In particular, NASUCA continues to believe that the remand from the Tenth Circuit should focus on the support mechanism for non-rural carriers which was before the Court of Appeals. The nature of that support mechanism should depend on the conditions and characteristics of the non-rural companies, including their sheer size and the fact that they serve mostly urban areas.

This is particularly true because of the Joint Board's correct assessment that the statutory requirement that the universal service fund ("USF") be "sufficient" also means that the fund should not be more than sufficient. Providing support to areas that do not -- for whatever reason -- require support is contrary to Congressional intent.

In this respect, NASUCA opposes the proposals of non-rural ILECs that would unreasonably and unnecessarily expand the amount of federal high-cost support received by those companies. The Commission should also reject other commenters' proposals that would base a radical -- and unnecessary -- restructuring of the inter- and intrastate

⁵ 47 U.S.C 254(b)(3).

systems on the remand issues.

II. SBC’s positions on implicit support, affordability and “self-supporting” rates are incorrect on the facts and on the law. SBC’s proposals must be rejected.

There are three main interdependent themes contained in the comments of SBC Communications Inc. (“SBC”), each of which is factually incorrect and contrary to the law.

The first theme is that implicit intrastate universal service support mechanisms are contrary to the Act.⁶ This is incorrect: As more fully discussed below, the Act says that *interstate* universal service support mechanisms “should” be explicit, but there is no such directive for *intrastate* mechanisms.

The second theme is that “affordability” should be the key to universal service support, so that rates in high-cost areas should rise to the level represented by a set percentage of the median family income in those areas.⁷ This outcome would be the opposite of that envisioned in the Act, which sought to “preserve and advance” universal service. In addition, “affordability” was not one of the remand issues from the Tenth Circuit; setting affordability as the rate floor, in fact, ignores the key issue on remand, reasonable rate and service comparability between urban and rural areas.

SBC’s third issue is an allegation that that all residential rates are priced below costs. Here again, SBC is a proponent of rate increases, in order that residential rates be

⁶ In this, SBC is joined by, among others, Qwest Communications International Inc. (“Qwest”) (at 9-10).

⁷ SBC does not, in fact, propose a specific percentage, but suggests 3%, without any basis for that particular figure. SBC at 15.

“self-supporting.”⁸ The size of, and possible upcoming decreases in, the high-cost fund for non-rural companies both show that, for most companies in almost all states, service is indeed “self-supporting.”⁹ Simply put, **nowhere** on an intrastate level has SBC shown that its residential rates are below costs; the same is mostly true of the other non-rural carriers. Where companies have offered cost studies to support their subsidy claims, the studies are inaccurate and tend to violate 47 U.S.C. 254(k). It is more than time for SBC (and other carriers) to provide support for their claims or abandon them. They should be required to submit cost studies here to substantiate their positions.¹⁰

Returning to the first theme, throughout its comments, SBC insists that intrastate universal service support mechanisms must be explicit. SBC at 2, 4-5, 6, 7, etc. SBC’s position is incorrect as a matter of law.

Although 47 U.S.C. §254(e) does require that the FCC should create a specific *interstate* system that provides explicit support to qualified carriers, §254(f), which addresses *intrastate* universal service support mechanisms, **contains no requirement that intrastate mechanisms be explicit.**

(e) UNIVERSAL SERVICE SUPPORT. -- After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance and upgrading of facilities and services for which the support is intended. *Any such support should be explicit and sufficient to achieve the purposes of this section.*

⁸ As discussed below, SBC is arguing for rate increases on the federal level while agreeing to rate freezes and decreases on the intrastate level.

⁹ See Entry (January 7, 2003), DA 03-24, Attachment A.

¹⁰ On the interstate side, the cost studies submitted by NASUCA in the Subscriber Line Charge (“SLC”) docket showed clearly that for most residential customers, the SLC recovers far more than the interstate portion of the non-rural carriers’ costs.

(f) STATE AUTHORITY. -- A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state only to the extent that such regulations adopt additional *specific, predictable and sufficient* mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(Emphasis added).¹¹ The FCC has recognized this distinction. See Seventh Report and Order, ¶ 32.

The 1996 Act permits a state to adopt its own universal service mechanisms, whether explicit or implicit. Except for the prohibition against subsidies flowing from non-competitive services to competitive services (47 U.S.C. 254(k)), the Act does not prohibit or eliminate support or subsidies at the state level.

The Commission should ignore SBC's position. There is nothing in the Act that requires intrastate universal service support to be explicit, and there is nothing in the Act that allows the Commission to enforce such a requirement on the states.

With regard to SBC's second argument, "affordability" is but one of the concepts in § 254, yet SBC would make it the paramount rule. SBC at 15. Equally importantly, the primary purpose of SBC's affordability benchmark is to allow "residential local telephone prices to rise to levels that are ... affordable." *Id.* at 16. The goal of "preserving and advancing universal service" will not be furthered by raising residential rates. The Joint Board noted that it "does not suggest ... that it is appropriate that any rates be

¹¹ See *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Seventh Report and Order and Thirteenth Order on Reconsideration (May 28, 1999) ["Seventh Report and Order"], ¶ 44.

increased....”¹² Indeed, any universal service proposal, such as SBC’s, that has as its purpose the raising of local rates, should be rejected out of hand.

The Commission has determined that current rates are affordable.¹³ Yet with this as with the “reasonably comparable” issue, the Commission has not done a granular analysis on a comparable service basis. SBC’s plan to increase rural rates would exacerbate the urban-rural reasonably comparable comparison. In addition, raising rural rates would reduce the effectiveness of the Lifeline and Link-up low-income support mechanisms.

The third SBC theme is that residential rates are priced below costs and must rise to levels that are “self-supporting.” SBC at 2, 5, 7, 11, 13, etc. The implication of SBC’s blanket assessment is that all residential rates everywhere for all services of all ILECs are below cost. Indeed, SBC complains that in its states, rates have not increased. *Id.* at 13. This is at best hypocritical of SBC, because, for example, in 1994 Ameritech Ohio (now an SBC affiliate) agreed to a plan that decreased residential basic service costs by 18%, even in the most rural parts of the Ameritech Ohio service territory.¹⁴ Indeed, in late 2002 Ameritech Ohio applied for, and recently received, alternative regulation under a plan that caps residential basic service rates at their current level for as long as the plan is in effect.¹⁵

¹² Recommended Decision, ¶ 53.

¹³ Seventh Report and Order, ¶ 30.

¹⁴ *In the Matter of the Application of the Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, PUCO Case No. 93-487-TP-ALT, Opinion and Order (November 23, 1994) at 18; 1994 Ohio PUC LEXIS 956, 157 PUR4th 595.

¹⁵ *In the Matter of the Application of Ameritech for Approval of an Alternative Form of Regulation*, PUCO Case No. 02-3069-TP-ALT, Finding and Order (January 6, 2003) at 7; available at [http://dis.puc.state.oh.us/dis.nsf/0/E922F47735F812AB85256C780078F351?OpenDocument&target="MainBody"](http://dis.puc.state.oh.us/dis.nsf/0/E922F47735F812AB85256C780078F351?OpenDocument&target=).

III. Sprint's proposal to set a price floor should be rejected, as should its position on local calling areas.

Sprint proposes that the Commission “should develop and then adopt a specific range, above and below the national rate benchmark, which becomes the safe harbor.” Sprint at 5. Presumably, this means that, where rates would otherwise be above the upper limit, universal service support will kick in and allow rates to be brought back down to the upper limit. Sprint is less clear about what would happen to rates currently below the lower limit, although the implication is that rates below the lower limit would be raised -- or would be required to be raised -- at least to the lower limit. *Id.* at 5-6.¹⁶ Sprint does not reveal how adjusting these rates upward will impact the need for support or the size of the universal service fund, because only service where rates would be above the upper benchmark would apparently receive support under Sprint's plan.

Sprint also rejects the idea of using local calling areas as a factor, because “the argument suggests that everyone in the country should have an identical calling scope -- an end user in a small town should have the same local calling scope as an end user in New York City.” *Id.* at 7. The Act does not require that rural customers receive identical service at identical rates to that available in New York City; instead it directs that rural customers should have reasonably comparable service at reasonably comparable rates to those available in urban areas generally. In many instances, the outwardly lower rates in

¹⁶ Here Sprint's actions on the state level -- like SBC's -- conflict with its federal positions. The Sprint Ohio ILEC, United Telephone Company of Ohio, has also just signed on to a plan that requires basic local service rates to be capped for the term of the plan. *In the Matter of the Application of United Telephone Company of Ohio dba Sprint for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, PUCO Case No. 02-2117-TP-ALT, Finding and Order (October 3, 2002); available at [http://dis.puc.state.oh.us/dis.nsf/0/95C719F8EDF5F0E385256C1A00411C88?OpenDocument&target="Ma inBody"](http://dis.puc.state.oh.us/dis.nsf/0/95C719F8EDF5F0E385256C1A00411C88?OpenDocument&target=).

rural areas are accompanied by constricted local calling areas, making the amount rural customers have to pay to reach their community of interest far in excess of that paid by urban customers who typically have broad local calling areas.¹⁷

IV. Qwest's and SBC's search for more universal service funding should be rejected.

Qwest supports changing the federal universal service support mechanism so that support would be received by “between 47 and 49 states, depending on the variables chosen, while keeping the federal price tag reasonable.” Qwest at 10. The current high-cost fund for non-rural carriers totals \$233 million, distributed among eight states.¹⁸ As described in Qwest's April 2002 comments, Qwest's proposal would result in a high-cost fund for the non-rural carriers of substantially more than \$2 billion, distributed among 48 states.¹⁹ Qwest's proposal would involve a ten-fold increase in the federal non-rural universal service fund. That is not a reasonable price tag, especially because Qwest has not shown that non-rural carriers in almost all the states need federal universal service support to keep their rural rates reasonably comparable to urban rates.

Further, when carefully examined, Qwest's proposal that more states be eligible for federal funding is merely an attempt to induce more states to establish intrastate universal service mechanisms. Qwest at 12. But if these states do not currently need

¹⁷ See “The Rural Difference,” Rural Task Force White Paper 2 (January 2000) (“The Rural Difference”) at 42 (available at <http://www.wutc.wa.gov/rtf>).

¹⁸ *Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2003*, Universal Service Administrative Company (Nov. 1, 2002), App. HC12.

¹⁹ Declaration of Byron Watson (April 10, 2002) at 3.

federal universal service funding, they should not need to be induced to develop intrastate support mechanisms.²⁰

Equally absurd along these lines is SBC's assertion that the current USF is insufficient because there are states where SBC contributes to a state universal service fund but does not receive any state universal service support. SBC at 14. It is doubtful whether SBC's position is really that every primary contributor to a state USF should also be a recipient, and that this Commission must act cure that problem. SBC's argument is a *non sequitur*; SBC's and Qwest's proposals should be non-starters.

V. The 135% benchmark should be retained pending further study.

It does not appear that the record is clear on which benchmark should be used, or what the level of the benchmark should be. Until both questions are answered, the current 135% of national average costs appears to be a reasonable compromise.

Despite the best efforts of all parties, there does not appear to be a significant consensus on when rural rates are reasonably comparable to urban rates. Neither does there appear to be a consensus on how the equation is changed when rural rates and services are examined to see if they are reasonably comparable to urban rates and services. Those, after all, are the specific issues raised by the statute. Congress gave little indication of how the issues should be resolved. Until these issues are resolved to the satisfaction of the courts, however, any support mechanism must be recognized as being interim.

²⁰ Clearly, the ultimate goal of Qwest's approach is requiring states to get rid of implicit intrastate support mechanisms through increases in residential rates.

The Commission has chosen to use costs as a surrogate for rates. The Commission has also chosen to use national average costs as the benchmark. The record does not show these choices to be unreasonable.

Unfortunately, however, if the Commission attempts to select a specific benchmark level -- such as the current 135% of national average costs -- some party is likely to appeal. And unless the benchmark level is supported by more of the record than the current 135% enjoys, the appeal may well follow in the footsteps of *Qwest*.

As noted in NASUCA's initial comments, because the cost benchmark is being used in conjunction with a supplemental review of rates, the Joint Board's methodology appropriately acknowledges cost review as a part of the overall mechanism whose aim is to ensure reasonably comparable rates.

VI. The support mechanism for non-rural carriers must be based on the characteristics of non-rural carriers.

USTA and others point out forcefully that this phase of this proceeding is to determine a support mechanism for non-rural carriers, not rural carriers. USTA at 2; AT&T Corp. at 18; National Rural Telecom Association/Organization for the Promotion and Advancement of Small Telephone Companies at 1-2. They note that rural carriers as a group and individually are significantly different from non-rural carriers.²¹ If rural carriers as a group are different from non-rural carriers, then, of course, non-rural carriers as a group are different from rural carriers. And the support mechanisms for each group can be significantly different.

²¹ See "The Rural Difference," see also *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 16 FCC Rcd 11244 (2001) ("*Fourteenth Report and Order*"), ¶ 17.

As discussed in NASUCA's initial comments, for the most part the non-rural carriers have agreed to their current rates. For this reason among many others, federal policy should not direct rate increases for these companies. Their need to take from the USF is clearly less, generically and individually, than the need of rural carriers.

All of the distinctions between non-rural carriers and rural carriers support definitions of "sufficient" and "reasonably comparable" for the non-rural carriers that tend to limit, rather than expand, the level of federal universal service support provided to the non-rural carriers. Many of these carriers clearly have the resources -- on the intrastate level and the interstate level -- to ensure that their rural rates are reasonably comparable to their urban rates, without additional support from the federal universal service fund.

CONCLUSION

The Commission should reject the ILEC proposals discussed herein. The Commission should retain the 135% benchmark while seeking additional information on whether rural rates and services are reasonably comparable to urban rates and on what a "reasonably comparable" benchmark would be.

Respectfully submitted,

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