

**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

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES
REGARDING JOINT BOARD RECOMMENDED DECISION
ON SUPPORTED SERVICES**

I. Introduction

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these reply comments on the Recommended Decision of the Federal-State Joint Board on Universal Service (“Joint Board”) regarding the definition of services supported by universal service (“Recommended Decision.”)² As shown here, the reasoning of the parties who oppose inclusion of equal access on the list of supported services is fatally flawed.

Few of the comments address issues other than equal access. There is some discussion of broadband and advanced services; all agree they should not be put on the list at this time. NASUCA had recommended further consideration of other services;

¹ NASUCA is an association of 41 consumer advocates in 39 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

² FCC 02J-1 (rel. July 10, 2002). See Notice of Proposed Rulemaking, FCC 03-13 (rel. February 25, 2003) (“NPRM”), 68 Fed. Reg. 12020 (March 13, 2003).

reply will be made here to those few commenters who addressed those services.³

In the Recommended Decision the Joint Board proposed generally that the Commission not modify the list of services supported by the federal universal service support mechanisms. Recommended Decision, ¶ 2. The Joint Board was unable to reach a recommended decision on one issue: whether equal access should be included in the list of supported services. Most of the comments focus on this issue.

II. Equal access to interexchange carriers should be added to the list of supported services.

Understandably, wireless carriers supported keeping equal access off the list, because wireless carriers do not currently provide equal access.⁴ No party argued that equal access was technically infeasible. Thus the wireless providers' focus is on the consequences -- for universal service purposes -- of the fact that wireless carriers have *chosen* not to offer equal access.

³ These reply comments respond to comments filed by AT&T Corp. ("AT&T"), Cellular Telecommunications & Internet Association ("CTIA"), Centennial Communications Corp. ("Centennial"), Dobson Communications Corporation ("Dobson"), Florida Public Service Commission ("FlaPSC"), Fred Williamson and Associates ("FW&A"), GVNW Consulting, Inc. ("GVNW"), MCI, Montana Universal Service Task Force ("MUST"), National Telecommunications Cooperative Association ("NTCA"), Nebraska Rural Independent Companies ("Nebraska Companies"), New York Department of Public Service ("NYDPS"), Nextel Communications Inc. and Nextel Partners, Inc. ("Nextel"), Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"), Rural Cellular Association and Alliance of Rural CMRS Carriers ("RCA/ARC"), SBC Communications Inc. ("SBC"), Sprint Corporation ("Sprint"), United States Cellular Corporation ("USCC"), United States Conference of Catholic Bishops, et al. ("USCCB"), United States Telecom Association ("USTA"), Valor Telecommunications Enterprises, LLC ("Valor"), Verizon, Verizon Wireless and Western Wireless Corporation ("Western Wireless"). Other comments were filed but do not require response here.

⁴ This group includes CTIA, Centennial, Dobson, Nextel, RCA/ARC, Sprint, USCC, Verizon Wireless and Western Wireless. MCI and SBC generically recommend against adding services to the list, but do not specifically mention equal access.

Other parties opposed to inclusion of equal access include regulators -- FlaPSC and NYDPS⁵ -- and Verizon⁶ and USTA.⁷ Those who support adding equal access to the list include NASUCA and numerous rural local carriers and their representatives.⁸

As expected, the principal argument against including equal access on the list of supported services is that this would “require” wireless carriers to provide equal access, contrary to section 332(c)(8) of the Act. See, e.g., CTIA at 3, Dobson at 15-16, USCC at 2.

The federal universal service support mechanism is intended to support the services found by the Commission to qualify under 47 U.S.C. 254(c). If a carrier chooses not to offer one or more of those services, that is the carrier’s business decision. For example, the Commission has decided that access to emergency services should be on the list of supported services; a carrier that decides -- for whatever reason -- not to offer access to emergency service has no claim to universal service support.

The same principle applies to equal access: Putting equal access on the list of supported services and thereby making the provision of equal access a condition of receiving federal universal service funding is not “requiring” wireless carriers to provide equal access. Neither would putting flat rate calling on the list require wireless carriers to

⁵ FlaPSC and NYDPS do not present any argument not presented by one or more of the wireless carriers.

⁶ Verizon also includes little substantive argument.

⁷ As discussed below, USTA’s proposal is that, in the name of regulatory parity, the equal access requirement should be *removed* from the incumbent carriers that currently have it.

⁸ This includes FW&A, GVNW, MUST, NTCA, OPASTCO and Valor.

provide flat rate calling.⁹ In both instances, the carrier that chooses to seek federal universal service funding must choose to provide the services that are on the list. None of the opponents of adding equal access effectively counter this key principle. See, e.g., USCC at 2-3. USCC states, “Carriers would have to modify or eliminate their existing pricing structures and service offerings or cease being an ETC” (*id.* at 6), as if that concept were foreign to a universal service support system based on a list of services that the Commission is permitted to change.

Centennial makes the specious argument that, because Congress did not explicitly include equal access as a supported service, Congress could not have intended to include it. Centennial at 4. Yet Congress did not explicitly include *any* specific service in the statute; establishing -- and expanding -- the list of services was left to be established by the Joint Board and the Commission. 47 U.S.C. 254(c)(1).

If not being eligible for ETC status -- hence not receiving federal universal service funding -- makes “mobile wireless ... a poor stepchild to ... landline service” (Nextel at i) it is indeed wondrous that wireless service has flourished without that support.¹⁰ Western Wireless notes Commissioner Adelstein’s point that universal service policy should not promote uneconomic competition, but also should not be used as an artificial barrier to economically efficient competition. Western Wireless at 2. The wireless carriers simply fail to show that competition in rural areas would be harmed if

⁹ CTIA touts the wireless industry’s “one rate” plans. CTIA at 8. These plans have developed without federal universal service assistance; surely they will continue even if the Commission puts flat rate service on the list.

¹⁰ As noted in paragraphs 81 and 84 of the Recommended Decision, the number of wireless lines grew from 48.7 million in 1997 to 135 million in 2002, even though wireless carriers received virtually no universal service support until 2002.

carriers that do not provide equal access do not receive universal service support. The fact is that wireless carriers have entered rural areas based on business plans that do not include receipt of such support.¹¹ Thus universal service support is not a barrier to economically efficient competition.¹²

According to the wireless carriers, not providing them with universal service support will stifle new entry in rural areas. Nextel states, “it would be counterintuitive for the Commission to place its thumb on the scale to keep wireless services out of rural America....” Nextel at 8; see also CTIA at 2. One could equally view giving universal service funding to wireless carriers that do not provide equal access as placing a thumb on the scale. Dobson says (at iii) that “[t]he ability of CMRS carriers to obtain ETC status in rural or high-cost areas results in the introduction of new or newly-competitive services in such areas.” See also *id.* at 5. Yet neither Dobson nor any other carrier identifies a single service in any specific rural or high cost area that was introduced because of universal service support, or a single carrier that entered a specific area because of that support. Sprint describes (at 9) the current good health of the wireless industry, achieved with minimal recourse to universal service funding.

CTIA asserts that wireless carriers bring to rural areas services comparable to those provided in urban areas, citing a Commission report discussing conditions in

¹¹ Wireless carriers received no universal service support in 1997 and only \$15 million at the beginning of 2002. Recommended Decision, ¶84. Wireless carriers have sought eligible telecommunications carrier status after market entry and have begun to draw from the universal service fund. Based on the latest report from USAC, wireless support now amounts to over \$125 million on an annual basis. *Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2003*, Universal Service Administrative Company (January 31, 2003), Appendix HC01.

¹² Western Wireless’ attached economic analysis by two professors of economics suffers from two grave flaws: it is not in affidavit form but, more importantly, its general high-level theoretization makes it merely speculative.

October 2001. CTIA at 8-9. Yet in October 2001 the wireless ETCs' take from the universal service fund was minimal, as the wireless carriers themselves admit.

Prospectively, Western Wireless states (at 9) that "imposing an equal access requirement upon CMRS carriers will force them out of many markets and effectively preclude them from offering combined local/long distance plans as part of supported universal service offerings." This argument is baseless for a number of reasons.

The "requirement" to offer equal access is only effective if the CMRS carrier wants to receive universal service funds. There is nothing to prevent the carrier from continuing to offer the combined local/long distance plans, as it did before receiving universal service support.

Further, elimination of future universal service support to wireless carriers that refuse to offer equal access should not result in a roll back of service in rural areas. Section 254(e) of the Act requires that any universal service funds received be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." If wireless carriers have actually used universal service funds to construct more towers and improve service in rural and high-cost areas, those investments and operations will not disappear simply because of a change in universal service status. Operational harm would only occur if a wireless carrier was improperly using universal service funds to generally subsidize its entire operation.

Finally, the wireless carriers have failed to present any concrete data to support their allegations. None of the wireless carriers identifies any rural market which it would leave were it not for receiving support, or identifies any market which it has entered because of the support.

The wireless carriers assert that putting equal access on the list would violate the Commission policy of competitive neutrality. See, e.g., Dobson at 5. Of course, the rural carriers argue that keeping equal access *off* the list violates competitive neutrality. See, e.g., NTCA at 6. On balance, it must be recalled that competitive neutrality was a Commission-established, not a Congressionally-ordered, factor,¹³ and cannot override the other factors. In any event, it is technologically and economically feasible for all carriers to provide equal access, and it is competitively neutral to require the provision of equal access by all eligible telecommunications carriers.

Western Wireless states (at 7) that “[u]nder the current, competitively neutral rules, a consumer can choose between an ETC that offers equal access and an ETC that offers packaged local and long distance service.” Yet most customers where wireline equal access is available can also take a package of local and long distance service from a wireline carrier.

In fact, Western Wireless’ argument can be used to justify taking virtually all services off the list. In Western Wireless’ view (at 8), “[T]he Commission would better advance the interests of consumers by reducing the regulatory obligations of ILECs, rather than increasing the regulation of CMRS carriers and other competitive entrants.” In this, Western Wireless has an ally in USTA, whose main argument is that the equal access requirement should be lifted from the ILECs because it is anti-competitive. USTA at 6. The obvious losers in such a scenario would be the millions of consumers who have come to depend on equal access as a fundamental means of exercising choice in the long distance market.

¹³ Report and Order, 12 FCC Rcd 8776, 8803, ¶ 52.

The wireless carriers speak generally about the increased cost of adopting equal access (e.g., RCA at 5) but only USCC (at 9) actually cites some specific dollar costs. Yet in the end the cost of adopting equal access is a non-issue: If the cost to USCC of providing all of the services on the list outweighs the benefit to USCC of receiving federal universal service support, then USCC should not seek to be an ETC.

Nextel also asserts that adding equal access could inflate the USF requirements (Nextel at 2), but does not explain how. Imposing an equal access condition on receipt of universal service funds cannot simultaneously be both a bar to CMRS participation (as most wireless carriers recite) and a drain on the fund (as Nextel claims). This is especially true if, as Sprint says (at 8), wireless carriers would not adopt equal access even if universal service funding were available.

None of the arguments put forward by the wireless carriers outweigh the public interest benefits that would accrue from adding equal access to the list of services included in the definition of universal service. Equal access meets all four of the statutory criteria for supported services, and the requirement to provide equal access would be competitively neutral. The Commission should add equal access to the list of supported services.

III. Unlimited local usage should be added to the list.

NASUCA's support for including unlimited local usage on the list of supported services is challenged only by Dobson (at 12) and AT&T (at 8). Dobson says "the number of minutes to be offered to consumers should be determined by the market and not by regulatory fiat." Dobson at 12. The same argument could be made -- just as

implausibly -- for removing touch-tone capability or 911 access from the list. AT&T says that the degree of local service to be supported should be a state-by-state analysis. This state-by-state view is unnecessary because, across the country, where market forces have been allowed to operate -- that is, where residential customers have a choice between flat rate service and some form of measured service -- the customers have overwhelmingly subscribed to the service that allows unlimited local usage. Flat rate service clearly qualifies as a supportable service under 47 U.S.C. 254(c)(1)(B).

Failure to support a carrier that does not offer all of the services is not anti-competitive; rather, it is consistent with the universal service principles contained in 47 U.S.C. 254. Otherwise, carriers could pick and choose which of the supported services they want to offer. That would not be in the public interest.

IV. Commenters' arguments do not negate the need for further study of some of the services.

NASUCA had proposed that soft dial tone/warm line service and expanding rural local calling areas should be studied further. Only two commenters even addressed these issues.

- Soft dial tone/ warm line service (*id.*, ¶ 27)

Dobson asserts that “wireless carriers are *already* required to transmit calls from non-initialized handsets to Public Service Answering Points.” Dobson at 10, citing 47 C.F.R. § 20.18(b) (emphasis in original). If so, then it appears that wireless carriers already provide the feature that is key to warm line service.

NYPSC states that the New York “experience indicates that a national solution, and the concomitant costs that would be incurred, would conflict with this [New York]

program and eliminate the flexibility required to meet local needs.” NYPSC at 5-6; see also AT&T at 8. This presumes that there might be a “local need” *not* to allow disconnected consumers access to emergency services. The characteristics of such a community are as hard to grasp as a community that might have a local need for rotary service. In any event, this seems ripe for additional study.

As previously stated, the Joint Board’s concerns focused on possible conflicts between a national standard and state efforts (Recommended Decision, ¶ 28) and on the lack of detail in the record on the cost of adding warm line service to the federal list. *Id.*, ¶ 29-30. These are issues that should be studied further.

- Expanding rural local calling areas

Dobson takes the position (at 10-11) that an expanded -- better stated as “adequate” -- local calling area should not be included on the list. Dobson’s opposition appears to be based on the fact that wireless carriers already offer very broad local calling areas -- often much broader than the minimum proposed by NASUCA. Dobson’s opposition is curious in that this is one area where most wireless carriers currently have a competitive advantage over wireline carriers.

As previously stated, the Commission has found that a supported service need not meet all four of the § 254(c)(1)(A) through (D) factors.¹⁴ Establishing adequate local calling areas meets at least three of the four, (B), (C) and (D) criteria, if not all four.¹⁵

¹⁴ Report and Order, 11 FCC Rcd 7920 (1996), ¶ 61.

¹⁵ NASUCA would define a minimum local calling area as including all contiguous exchanges and the county seat. Rural customers who live close to an urban area should have the urban area included as local calling.

The Joint Board recommended that toll and extended area service not be included on the list, but acknowledged that this was primarily due to the lack of record on the subject in this proceeding. Recommended Decision, ¶ 35. The Commission should seek further comment to create such a record.

V. Prepaid service should not be included on the list of supported services.

USCCB argues that prepaid service should be added to the list of supported services. USCCB at 13-20. This is incorrect, for at least two reasons. First, if prepaid service is added to the list, all ETCs will be required to offer prepaid service, including small rural ILECs with high local penetration or subscription rates.

More importantly, supporting prepaid service will not achieve the goal supported by USCCB, of assisting consumers who cannot obtain traditional wireless or wireline service. See *id.* at 14-16. This is because most prepaid providers offer only a limited yet higher-priced product that, in some states, has been found not to be in the public interest.¹⁶ USCCB acknowledges this (USCCB at 16) but says only that “increased competition in this service would help eliminate the problem of price gouging.” *Id.* at 17. This appears contrary to the experience in states that have encouraged competition among prepaid providers.

¹⁶ E.g., *In the Matter of the Application of NOW Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services in the State of Ohio*, PUCO Case No. 98-1466-TP-ACE, et al., Opinion and Order (November 2, 2000) at 58-59 (available at <http://dis.puc.state.oh.us/dis.nsf/0/AFFC644297814F4085256994005FE745?OpenDocument&Page=2>).

VI. Conclusion

Many of the commenters focus on issues that are being examined in other proceedings. For example, SBC discusses whether non-primary residential lines and multiple business lines should be “subsidized” by federal universal service support mechanisms. SBC at 1. These specific issues are being addressed in response to the ETC Public Notice.¹⁷ SBC also argues -- again -- that “[a]djusting the definition of universal service to include only essential services must be accompanied by broader reform at the state level to rationalize residential prices and to replace implicit forms of support with explicit universal services support.” *Id.* at 2 (emphasis in original). Once again, SBC overlooks the fact that the Act does not require *intrastate* universal service support to be explicit. Compare 47 U.S.C. 254(e) (federal universal service support “should be explicit”) to 47 U.S.C. 254(f) (requiring state support to be specific, predictable and sufficient). The Recommended Decision does not even touch on SBC’s argument.

The Recommended Decision did state that specific services should not be added to the supported list, and reflected the Joint Board’s split on equal access. For the reasons stated herein and in NASUCA’s initial comments, the Commission should, for the most part, adopt the Joint Board recommendations that certain services should not be added to the list of supported services. The Commission should adopt, however, NASUCA’s recommendation that warm line service and adequate local calling areas should be further studied for inclusion on the list. Pursuant to NASUCA’s recommendation, flat rate service and equal access should both be added to the list now.

¹⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-307 (rel. November 8, 2002); *id.*, Public Notice, FCC 03J-1 (rel. February 7, 2003).

Respectfully submitted,

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