

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

In the Matter of)	
)	
Elimination of Rate-of-Return Regulation of Incumbent Local Exchange Carriers)	RM-10822
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	

**OPPOSITION TO PETITION FOR RULEMAKING
TO ELIMINATE RATE-OF-RETURN REGULATION
OF INCUMBENT LOCAL EXCHANGE CARRIERS**

Valor Telecommunications of Texas, L.P. (“Valor”) submits the following Opposition in response to Western Wireless Corporation’s (“Western Wireless”) *Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers* filed on October 30, 2003 (“*Petition*”).¹

Valor was formed for the purchase of approximately 550,000 mostly rural access lines from GTE (now Verizon) in Arkansas, Texas, New Mexico, and Oklahoma. Upon completion of the acquisition, Valor opted into the Commission’s CALLS Plan, and operates as a price cap carrier in each state. In 2002, Valor acquired Kerrville Communications, Inc., whose wholly owned subsidiary Kerrville Telephone Company (“Kerrville”) serves rural customers in Texas. Kerrville was a rate-of-return carrier, and those exchanges are still operated on a rate-of-return basis under a waiver of the FCC’s “all-or-nothing rule.”² All of Valor’s properties are eligible

¹ Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers, Western Wireless, RM-10822, CC Docket No. 96-45 (Oct. 30, 2003) (“*Petition*”).

² *Valor Telecommunications, LLC Petition for Waiver of Section 61.41 of the Commission’s Rules*, Memorandum Opinion and Order, 17 FCC Rcd 25544 (2002).

for universal service high-cost support under the Commission's embedded cost-based mechanism. Valor's operations would be materially affected by Western Wireless' self-serving Petition.

Many of the issues raised in Western Wireless' *Petition* will be squarely addressed in multiple ongoing proceedings, obviating any need for the instant duplicative Petition. Further, in submitting its *Petition*, Western Wireless fails to provide any evidence that a forward-looking cost-based methodology can provide predictable and sufficient universal service support to all rural carriers. Recent FCC precedent and Western Wireless' own proffered evidence rebut the contention that rate-of-return regulation is no longer an effective mechanism for regulating small and mid-sized carriers.

I. WESTERN WIRELESS' PETITION IS PREMATURE GIVEN THE PENDING STATUS OF SEVERAL INTERRELATED COMMISSION REVIEWS

There are multiple pending proceedings, as Western Wireless notes, that will have a significant impact on the range of issues addressed by Western Wireless' Petition.³ To initiate an additional proceeding at this time that would consider the elimination of rate-of-return regulation, and the forced transition of rural high-cost support to a forward-looking cost model, without the benefit of the outcome of these proceedings, would be premature.

Specifically, in the *Intercarrier Compensation* proceeding, the FCC is conducting a comprehensive review of its intercarrier compensation rules and access charge regime.⁴ In the pending *MAG* proceeding, the Commission is considering incremental incentive-based reforms for rate-of-return carriers. The Commission is also about to begin a global review of its high-

³ *Petition* at 6-7.

⁴ *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

cost universal service program.⁵ In each of these individual proceedings, the Commission and the industry has invested considerable resources and time to incrementally address rate-of-return regulation, access charge reform, and universal service high-cost support reform. Underlying each of these initiatives is the Commission’s stated desire to “proceed more cautiously in reforming universal service and access charges for the smaller, rate-of-return carriers, in recognition of the differences between these carriers and the larger carriers.”⁶ The Commission must then reject Western Wireless’ call for premature and hasty action, and continue forward with its structured examination of these vital programs.

II. WESTERN WIRELESS PROPOSES A UNIVERSAL SERVICE MECHANISM THAT WOULD BE NEITHER SUFFICIENT NOR PREDICTABLE.

Section 254 of the Telecommunications Act of 1996 requires the Commission to establish a specific and predictable mechanism that will provide sufficient support to telecommunications carriers and will thereby advance universal service. Western Wireless seeks the forced imposition of an imprecise forward-looking cost mechanism on rural carriers without clear evidence of its impact on rural carriers’ support, even though the Commission has repeatedly acknowledged that the current forward-looking high-cost mechanism for non-rural carriers will not work for rural carriers. Accordingly, Western Wireless’ desired relief would violate the Act.

In the *First Report and Order*, the Commission recognized that the forward-looking cost mechanisms available at that time could not “predict the costs of serving rural areas with

⁵ *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, ¶¶ 97-107 (2003) (“*Remand Order*”); *see also*, *Federal-State Joint Board on Universal Service*, Recommended Decision, 16 FCC Rcd 6153, ¶¶ 13, 21 (2000).

⁶ *Id.*, at ¶ 99.

sufficient accuracy.”⁷ In part, the FCC deferred action on rural carriers “because [they] generally have higher operating and equipment costs, which are attributable to lower subscriber density, small exchanges, and a lack of economies of scale.”⁸ Moreover, the Commission at that time asked the Joint Board to study the “appropriateness of proxy cost models for rural carriers.”⁹ In 2001 (based on the recommendations of both the Rural Task Force and the Joint Board), the Commission again rejected the adoption of a forward-looking model for rural support, reaffirming the use of carriers’ embedded costs to provide universal service support to rural carriers for a five-year period. In doing so, the Commission explicitly ruled that “the modified embedded cost mechanism will provide sufficient support for purposes of section 254 of the Act.”¹⁰

Western Wireless now contends that a shift to forward-looking costs is long overdue, but the Commission has recognized that “when we adopted the forward-looking methodology for non-rural carriers, we noted that our decision did not necessarily mean that we would adopt a similar approach for rural carriers.”¹¹ The Commission has repeatedly held the use of a forward-

⁷ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, ¶ 293 (1997). The Rural Task Force, three years later, agreed. *See Rural Task Force, White Paper 4* at 8 (Sept. 2000) (finding that “the result of errors or radical changes in the amount of explicit support developed from a model which is imprecise at the company level could cause an individual Rural Carrier to either gain a substantial windfall or have a serious deficiency in “sufficient” support”).

⁸ *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, ¶ 5 (2001).

⁹ *Id.*, at ¶ 16.

¹⁰ *Id.*, at ¶ 26.

¹¹ *Id.*, at ¶ 29. In addition, the Commission is under no obligation to base access charges or universal service high-cost support on forward-looking costs. The Act only requires a specific cost methodology for the pricing unbundled network elements. *See Texas Office of Public*

looking mechanism “is not feasible at this time” for all carriers,¹² yet Western Wireless’ Petition contains no proposal to modify or improve upon the application of the non-rural forward-looking model to rural carriers.

The Chair of the Rural Task Force warned the Commission not to tinker with the rural high-cost support methodology until the conclusion of the five-year period or else “investment in rural areas would be stifled ... by ILECs who would be unsure of their investment recovery.”¹³ Throughout its Petition, Western Wireless attempts to undermine that regulatory certainty by calling into question, three years in advance of the time period set by the Commission, the appropriateness of rate of return regulation and embedded-cost based universal service support. Western Wireless thus attempts to cast doubt as to the future of universal service support and chill investment opportunities for the carriers it targets, at the same time its own universal service funding is under scrutiny in the wireless ETC review. Moreover, it is obvious from the tone of the Petition that Western Wireless seeks to perpetuate and advance discredited stereotypes about the rural wireline industry as a means to advance its own interests as a wireless ETC serving rural areas. The Commission cannot entertain this transparent anticompetitive request.

Utility Counsel v. FCC, 265 F.3d 313 (5th Cir. 2001) (“The 1996 Act does not compel the FCC to conduct forward-looking cost-studies because the cost-study requirements of §§251(c)(1) and 252(d)(1) do not apply to the interstate access services at issue in this petition.”).

¹² *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, ¶ 129 (2001) (“*MAG Order*”).

¹³ Letter from William R. Giles, Chair, Rural Task Force, to FCC, CC Docket No. 96-45 (filed Dec. 12, 2000).

III. RATE-OF-RETURN REGULATION CONTINUES TO BE AN EFFECTIVE MECHANISM FOR REGULATING MID-SIZED AND SMALL CARRIERS.

Despite Western Wireless' claims, rate-of-return regulation continues to be an effective method of regulation for small and mid-sized carriers. Ignoring the Commission's long-standing policies, Western Wireless asserts that rate-of-return regulation is inappropriate for carriers because it encourages inefficiency while impeding innovation.¹⁴ In support, Western Wireless cobbles together a selective history of rate-of-return regulation based primarily on decisions pertaining to large national carriers, yet Western Wireless ignores more relevant and recent FCC findings. In the *MAG Order*, the FCC again reaffirmed the validity of rate-of-return regulation: explicitly recognizing that "[r]ate-of-return regulation has worked well in extending service to rural America."¹⁵ In that proceeding, the Commission rejected commenters request to force a transition of rate-of-return carriers to price cap regulation.¹⁶

¹⁴ Western Wireless suggests that rate of return carriers avoid regulatory scrutiny and exaggerate the costs to provide service. *Petition* at 25-26. Yet in support of this view, Western Wireless strangely provides a list of cases in which regulators have entered into enforcement actions after investigating rate of return providers. Western Wireless' own evidence establishes the sufficiency of current regulatory checks. Further, Western Wireless acknowledges that rate of return carriers are subject to multiple levels of regulatory review and oversight, FCC, state PUCs, NECA, etc. In stark comparison, wireless providers, like Western Wireless, are immune from almost all regulation of their rates. Further, no audits are conducted and there is no ready mechanism available to ensure that wireless providers properly invest high-cost support funds received as CETCs.

¹⁵ *MAG Order* at ¶ 224.

¹⁶ Moreover, many carriers, including Valor, have received waivers of the Commission's "all-or-nothing" rule to allow different subsidiaries of the same company to operate under different (and more appropriate) regulatory schemes: rate-of-return or price caps. *See, e.g., Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., Reservation Telephone Cooperative and Citizens Telecommunications Company of North Dakota, Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission's Rules, Order, 18 FCC Rcd 838 (2003).*

Western Wireless further asserts that the majority of states have an “aversion” to rate-of-return regulation by specifically noting that all states, except six, have eliminated rate-of-return regulation for the Bell Operating Companies (“BOCs”).¹⁷ Western Wireless’ reliance on this one fact, however, is very misleading. The fact that BOCs in any state, let alone mid-sized and rural carriers, are still regulated under rate-of-return regulation demonstrates the continued viability and fitness of rate-of-return regulation. Western Wireless’ own statistics further establish that the vast majority of states continue to rely on rate-of-return regulation for mid-sized and small incumbent carriers.¹⁸

In sum, Western Wireless has failed to present any evidence to justify the reconsideration of the *MAG Order’s* clear acceptance of the continued use of rate-of-return regulation. Rate of return regulation remains a legitimate regulatory mechanism for mid-size and rural carriers.

¹⁷ *Petition* at 13.

¹⁸ National Regulatory Research Institute, Retail Regulation of Local Telecommunications Providers (as of April 2002), Jan. 2003, available at <http://www.nrri.ohio-state.edu/programs/markets/pdf/reg-regime-adoption-by-state-map.pdf>.

IV. CONCLUSION

The factual basis for Western Wireless' Petition is built upon inaccuracies as to the realities of rate-of-return regulation, and the inherent limitations of forward-looking cost models. Western Wireless has provided neither argument nor evidence to support the drastic steps suggested in its Petition. Embedded cost-based high-cost support for rural carriers remains the only available mechanism that ensures predictable and sufficient support, and rate-of return regulation remains a valid regulatory form for mid-sized and rural carriers. Accordingly, Valor urges the Commission to reject Western Wireless' Petition.

Respectfully submitted,

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