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

OPPOSITION OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its opposition to the petitions filed by TracFone Wireless, Inc. ("TracFone") seeking designation as an eligible telecommunications carrier ("ETC") in the states of Florida and Virginia.[1]

I. INTRODUCTION AND SUMMARY

On July 21, 2004, TracFone filed two petitions seeking designation as an eligible telecommunications carrier ("ETC") throughout the states of Florida and Virginia.[2] Previously, TracFone filed a separate petition[3] asking the Commission to forbear from applying the requirement in Section 214(e)(1)(A) of the Communications Act of 1934, as amended, ("Act"),

[1] *See Parties Are Invited to Comment on TracFone Wireless' Petitions For Designation As An Eligible Telecommunications Carriers in the States of Florida and Virginia*, CC Docket No. 96-45, *Public Notice*, DA 04-2345 (rel. July 28, 2004).

[2] TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of Florida, CC Docket No. 96-45 (dated July 21, 2004) ("TracFone Florida Petition"); TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45 (dated July 21, 2004) ("TracFone Virginia Petition").

[3] TracFone Wireless, Inc. Petition for Forbearance, CC Docket No. 96-45 (dated June 8, 2004) ("TracFone Forbearance Petition").

which mandates that a common carrier designated as an ETC offer services supported by the federal universal service support mechanism either "using its own facilities or a combination of its own facilities and resale of another carrier's services."[4] On August 16, 2004, nearly a month after filing its original petitions and a week before the deadline for parties to submit comments, TracFone filed amendments to its ETC requests for the states of Florida and Virginia.[5] In these amendments, TracFone claims to "narrow" the scope of its ETC petitions by stating that, if designated as an ETC, it plans to use universal service support to provide services solely to Lifeline customers.[6] According to TracFone, it is not seeking access to universal service funds to provide service to high-cost areas.[7]

As an initial matter, the Commission must deny TracFone's ETC designation petitions because TracFone has failed to meet the statutory test for forbearance as set forth in Section 10 of the Act.[8] Forbearance from applying this statutory requirement is the only means by which a pure reseller such as TracFone can become eligible to receive universal service support. As the record overwhelmingly demonstrates, grant of forbearance would establish bad precedent that would encourage inefficient and artificial competition, place undue pressure on the size of the

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[4] 47 U.S.C. § 214(e)(1)(A).

[5] *See* Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Florida, CC Docket No. 96-45 (dated Aug. 16, 2004) ("FL Amendment"); Amendment to Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45 (dated Aug. 16, 2004) ("VA Amendment").

[6] FL Amendment at 1-2; VA Amendment at 1-2.

[7] FL Amendment at 1-2; VA Amendment at 1-2.

[8] 47 U.S.C. § 160.

universal service fund, and adversely affect consumers.[9] In addition, a grant of forbearance would conflict with a number of statutory and public policy objectives such as facilities-based competition. Because TracFone has failed to satisfy the initial threshold for forbearance, the Commission must necessarily deny the petitions for ETC designation.

Even if the Commission were to grant the forbearance relief requested by TracFone, the Commission should nevertheless deny the instant requests for ETC designation. TracFone has failed to demonstrate that the public interest would be served by granting it ETC status. Moreover, its most recent proposal to use universal service funds to serve only Lifeline customers does nothing to cure the petitions' obvious deficiencies.[10]

II. DESIGNATION OF TRACFONE AS AN ETC WILL NOT SERVE THE PUBLIC INTEREST.

TracFone has failed to carry the burden of demonstrating that granting it ETC status will serve the public interest as mandated by Section 214(e) of the Act.[11] A grant of TracFone's

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[9] *See, e.g.*, Comments of Frontier Communications of New York, Inc., CC Docket No. 96-45 (filed July 26, 2004); Opposition of BellSouth Corporation, CC Docket No. 96-45 (filed July 26, 2004); Dobson Cellular Systems, Inc. Opposition to TracFone Petition for Forbearance, CC Docket No. 96-45 (filed July 26, 2004); Comments of the New York State Telecommunications Association, Inc., CC Docket No. 96-45 (filed July 26, 2004); Comments of TCA, Inc. – Telcom Consulting Associates, CC Docket No. 96-45 (filed July 26, 2004); Consolidated Comments of TDS Telecommunications Corp. on TracFone Wireless Petitions for Forbearance and ETC Designation, CC Docket No. 96-45 (filed July 26, 2004); Comments of Verizon, CC Docket No. 96-45 (filed July 26, 2004); Opposition of Virgin Mobile USA, LLC, CC Docket No. 96-45 (filed July 26, 2004).

[10] The filing of an amended ETC application after the pleading cycle has already closed (as in the case of TracFone's New York Petition) or just before the close of a pleading cycle (as in the case of TracFone's Florida and Virginia ETC Petitions) arguably justifies the adoption of a new pleading cycle by the Commission to ensure that interested parties are afforded the opportunity to provide comment on the amendments in a timely manner.

[11] 47 U.S.C. § 214(e)(2) and (6).

requests would not only conflict with a number of existing statutory and Commission objectives but also completely undermine recent actions designed to ensure that the universal service fund remains "specific, predictable, and sufficient."[12] To protect competition, maintain the sustainability of the universal service fund, promote facilities-based competition, avoid "double recovery," and protect consumers, the Commission should deny the ETC petitions.

A. Increased Competition Alone Is Not Sufficient To Grant the Petitions.

To support its requests, TracFone relies heavily on the argument that approving its ETC applications will promote competition by creating an alternative for consumers.[13] Increased competition, though relevant, is not a *per se* demonstration that an ETC designation will serve the public interest. The Commission has already found that competition simply for competition's sake is not enough. Indeed, the Commission has expressly concluded that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test" of Section 214(e).[14] Rather, other factors must be considered and weighed, including the impact of multiple designations on the universal service fund and the impact of such designations on consumers.[15]

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[12] 47 U.S.C. § 254(b)(5).

[13] *See* TracFone Florida Petition at 10-11; TracFone Virginia Petition at 10-12.

[14] *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 1563, 1565, ¶ 4 (2004) ("*Virginia Cellular Order*"); *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 6422, 6424, ¶ 4 (2004) ("*Highland Cellular Order*").

[15] *Virginia Cellular Order*, 19 FCC Rcd at 1565, ¶ 4; *Highland Cellular Order,* 19 FCC Rcd at 6423-24, ¶ 4.

TracFone's claim that its designation as an ETC will lead to significantly increased competition ignores the robust competition already occurring in Florida and Virginia among wireless carriers. According to TracFone, it has been providing service throughout Florida for the last seven years and currently resells the services of Alltel, AT&T Wireless, Cingular Wireless, U.S. Cellular, and Verizon Wireless.[16] Similarly, operating in Virginia for the past seven years, TracFone purchases its underlying services from Alltel, Cingular Wireless, U.S. Cellular, Verizon Wireless, and Virginia Cellular.[17] Thus, TracFone is already competing with these five or six carriers in Florida and Virginia and has been doing so for some time. The only difference that a grant of ETC status would make is that TracFone would have access to another revenue stream, while continuing to provide the same level and quality of service. TracFone's claims of increased competition, therefore, are illusory.

B. Allowing Pure Resellers To Obtain Universal Service Support Would Threaten the Viability of the Universal Service Fund and Harm Consumers.

Grant of TracFone's ETC requests would establish bad precedent and poor public policy by jeopardizing the long-term sustainability of the universal service fund and placing undue burdens on consumers. TracFone claims that granting it ETC status will have a minimal or *de mininis* impact on the size of the universal service fund.[18] This argument is fatally flawed as it assumes that TracFone will be the only CMRS reseller to potentially receive universal service support. This view is extremely shortsighted. Nothing in TracFone's request distinguishes its circumstances from those of any other reseller. If the Commission were to grant the instant

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[16] TracFone Florida Petition at 1-2, 4-5.

[17] TracFone Virginia Petition at 4.

[18] TracFone Florida Petition at 12; TracFone Virginia Petition at 12.

forbearance request, there would inevitably be a deluge of similar pleas made by other pure resellers (CMRS and wireline) as these carriers rush to seek federal support. The Commission has already expressed "increasing[ ] concern[ ] about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs."[19] Grant of the instant requests would be a giant step backward in the Commission's on-going efforts to reform the universal service system and ensure the long-term viability of the universal service fund.

Granting TracFone ETC status would create an incentive for pure resellers to seek ETC designation in order to obtain a new stream of revenue. The result would be artificial competition that cannot be sustained. Allowing TracFone and potentially other pure resellers to enter already competitive markets through ETC funding is economically inefficient and could be counterproductive to competition. The receipt of universal service support by TracFone and other pure resellers would give these resellers a clear competitive cost advantage over their competitors, especially facilities-based competitors, which face network operation and maintenance expenses. If facilities-based carriers are unable to effectively compete for customers due to an excessive number of competitors or multiple ETC resellers with lower cost structures operating in a particular market, facilities-based businesses will fail. TracFone cannot offer service if the underlying facilities are no longer available. To ensure that competition remains efficient and viable, the Commission should not designate TracFone as an ETC.

In addition, designating pure resellers as ETCs would place significant pressure on the size of the fund. To accommodate an expanding base of ETCs and ensure adequate support to each of these carriers to carry out their obligations to provide affordable service to the public, the

[19] *Virginia Cellular Order*, 19 FCC Rcd at 1577, ¶ 31; *Highland Cellular Order*, 19 FCC Rcd at 6433, ¶ 25.

universal service fund would necessarily have to increase. There are two ways to finance a larger universal service fund: (1) by expanding the pool of providers subject to universal service contributions; or (2) by raising the level of carrier contributions. Although the Commission is considering whether to reduce or expand the pool of providers required to contribute to the universal service fund in a number of separate proceedings,[20] it is unclear when the Commission will reach a decision. In the absence of expanding the base of contributing providers, consumers would bear the ultimate burden of financing an expanded universal service fund through higher end-user assessments. To ensure that consumers are not unduly burdened, the Commission should not approve TracFone's ETC applications.

C. Granting TracFone ETC Status Would Undermine the Act's and the Commission's Goal To Promote Facilities-Based Competition.

Designating TracFone as an ETC also would conflict with the Act's and the Commission's objective to increase facilities-based competition. Expanding the pool of eligible ETC candidates to include pure resellers eliminates an incentive for competitors to invest in their own facilities, contrary to the Act. Section 214(e)(1)(A) illustrates Congress's unequivocal intention to exclude pure resellers from universal service support. In addition to this express exclusion, the Act also requires a carrier that receives universal service support to "use that

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[20] *See, e.g.*, *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4905-08, ¶¶ 63-66 (2004); *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45, *et al.*, *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd 3752 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 92-33, 95-20, 98-10, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3046-56, ¶¶ 65-83 (2002).

support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[21] High-cost support is intended to promote network maintenance and build-out in high-cost areas to ensure that all consumers in the nation have access to affordable telecommunications service at reasonably comparable rates. Grant of TracFone's requests would nullify this incentive and send the wrong signals to potential market entrants.

The growth of facilities-based competition remains a clear objective of the Commission. Less than a month ago, the Commission reiterated its commitment to "advance the cause of facilities-based competition" when it replaced the "pick-and-choose" rule with an "all-or-nothing" rule in order to better enable carriers to obtain mutually beneficial concessions when negotiating interconnection agreements.[22] In the "pick-and-choose" proceeding, Chairman Michael K. Powell noted that "[o]ne of the Commission's most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress' goal of reducing regulation and promoting facilities-based competition."[23] Commissioner Kathleen Q. Abernathy echoed this sentiment when she acknowledged that the Commission was appropriately "mov[ing] toward adopting new rules under which competitors will be increasingly required to rely on their own facilities and to differentiate their services."[24] Further, in announcing the Commission's plans to establish interim local competition rules, Chairman Powell acknowledged the importance of facilities-based competition. He stated: "Facilities-

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[21] 47 U.S.C. § 254(e).

[22] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Second Report and Order*, FCC 04-164, ¶ 1 (rel. July 13, 2004).

[23] *Id.*, Statement of Chairman Michael K. Powell.

[24] *Id.*, Statement of Commissioner Kathleen Q. Abernathy.

based competition brings the innovation and value that consumers demand. The [ ] [interim] rules will also encourage increased investment in infrastructure that will continue to drive down prices for advanced services."[25] As these recent announcements demonstrate, the Commission remains committed to promoting facilities-based competition as envisioned by Congress, approval of TracFone's ETC applications would be completely antithetical to this objective.

D. Granting TracFone ETC Status Would Create an Unequal Playing Field As It Would Excuse Pure Resellers from Obligations Imposed on Other ETCs.

Grant of TracFone's ETC petitions would conflict with the principle of competitive neutrality by relieving pure resellers from obligations recently imposed upon other carriers seeking ETC status. The Commission recently granted two CMRS carriers ETC status based, in part, upon their specific commitments to provide service to requesting customers outside of their coverage areas by modifying equipment, deploying additional antenna or equipment, and constructing additional cell sites, cell extenders, or repeaters.[26] TracFone, however, has expressed no intention to construct or deploy its own facilities. Imposing certain obligations on one class of ETCs, while excusing another class of carriers is not competitively neutral and would give pure resellers such as TracFone a competitive advantage.

In addition, TracFone's ability to serve as a carrier of last resort is impossible in the absence of its own facilities. Section 214(e)(4) allows an ETC to relinquish its ETC status in an

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[25] *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules,* FCC News Release (rel. June 14, 2004).

[26] *Virginia Cellular Order*, 19 FCC Rcd at 1570-71, ¶¶ 15-16; *Highland Cellular Order*, 19 FCC Rcd at 6429-30, ¶¶ 16-17.

area served by multiple ETCs upon advance notice to the appropriate commission.[27] A condition of authority to relinquish ETC status is the ability of the remaining ETC to serve all of the customers served by the relinquishing carrier. This eligibility requirement is critical because, given the tenuous state of the telecommunications marketplace, it is possible that more and more carriers may find themselves unable to continue providing service in some areas due to financial constraints. TracFone's ability to serve its customers is entirely contingent on the viability of the underlying facilities-based carriers that serve TracFone. Thus, in the absence of any of its own facilities, TracFone is simply not in a position to assume the responsibility to serve as a carrier of last resort. There is no justification for allowing pure resellers to enjoy the benefits of universal service support, while leaving the underlying carriers with all of the obligations and risks associated with maintaining a network, including carrier of last resort obligations. Accordingly, the Commission should find that grant of the ETC requests will not serve the public interest.

E. Allowing Pure Resellers To Receive Universal Service Funding Could Lead To "Double Recovery."

If the Commission were to allow TracFone and other pure resellers to receive universal service funding, "double recovery" would inevitably result. In 1998, the Commission refused to allow pure resellers to become eligible to receive universal service support, concluding that in such cases the pure resellers would receive a "double recovery." As the Commission explained, universal service support is already incorporated into the reduced wholesale rates charged to

[27] 47 U.S.C. § 214(e)(4).

resellers. Allowing a reseller to benefit from these lower wholesale rates and to receive universal service support as an ETC would result in a "double recovery."[28]

Contrary to TracFone's prior assertions,[29] "double recovery" is equally applicable to CMRS carriers. Even though wireless carriers, unlike local exchange carriers, do not have a statutory obligation to provide, at reduced rates, those telecommunications services they offer to their retail subscribers,[30] there still exists a clear potential for "double recovery" in the wireless context. It cannot be automatically assumed or proven that the universal service support received by some of TracFone's current (or future) vendors is not somehow reflected in the wholesale rates charged to TracFone. TracFone has asserted that wireless rates are set solely by market forces, including the relative bargaining power of the buyer and seller.[31] A carrier's bargaining power is based upon a number of factors, including size, resources, existing business relationships, access to investment capital. Because universal service support enables ETCs to offer affordable service and deploy facilities in high-cost areas, it is reasonable to believe that this access to federal funding may play a role in a carrier's bargaining position when negotiating business deals with other carriers and establishing the rates for its wholesale services. The fact that a CMRS carrier designated as an ETC is not obligated by law to offer resold services at a

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[28] *Federal-State Joint Board*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501,11581, ¶ 168 (1998); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87, 173, ¶ 162 (1996) (recommending that the Commission reject a request to exercise its forbearance authority to permit pure resellers to become eligible for universal service support).

[29] TracFone Forbearance Petition at 8-10.

[30] *See* 47 U.S.C. § 251(c)(4).

[31] TracFone Forbearance Petition at 9.

discount that incorporates the universal service funding it receives does not automatically mean that "double recovery" is completely eliminated.

In deciding to exclude pure resellers from ETC eligibility, Congress and the Commission clearly wanted to ensure that this class of carriers did not receive a windfall. TracFone has failed to prove that a windfall is impossible in the context of CMRS resellers. In order to continue to ensure against "double recovery," the Commission should deny the ETC petitions.

F. TracFone's Recent Plan To Use Universal Service Funds To Provide Service To Lifeline Customers Does Not Cure the Petitions' Deficiencies and Raises Concerns of Compliance.

Recognizing the weaknesses in its prior arguments as pointed out by numerous commenters in the related proceeding for ETC designation in New York,[32] TracFone attempts to salvage its petitions by allegedly clarifying and narrowing the scope of its requests. Specifically, TracFone states that, if it is designated as an ETC, it will only utilize federal universal service funds to offer a Lifeline service to customers who are qualified to participate in the Lifeline

[32] *See, e.g.*, Comments of Frontier Communications of New York, Inc., CC Docket No. 96-45 (filed July 26, 2004); Opposition of BellSouth Corporation, CC Docket No. 96-45 (filed July 26, 2004); Dobson Cellular Systems, Inc. Opposition to TracFone Petition for Forbearance, CC Docket No. 96-45 (filed July 26, 2004); Comments of the New York State Telecommunications Association, Inc., CC Docket No. 96-45 (filed July 26, 2004); Comments of TCA, Inc. – Telcom Consulting Associates, CC Docket No. 96-45 (filed July 26, 2004); Consolidated Comments of TDS Telecommunications Corp. on TracFone Wireless Petitions for Forbearance and ETC Designation, CC Docket No. 96-45 (filed July 26, 2004); Comments of Verizon, CC Docket No. 96-45 (filed July 26, 2004); Opposition of Virgin Mobile USA, LLC, CC Docket No. 96-45 (filed July 26, 2004).

program.[33] According to TracFone, it is no longer seeking access to universal service funds to support service to high cost areas.[34]

As an initial matter, TracFone's commitment to provide Lifeline service to low-income consumers is not an extraordinary or unusual commitment, but rather a requirement. All carriers designated as ETCs must offer Lifeline and Link Up service to qualifying low-income consumers. Although TracFone goes into extensive detail about the proposed Lifeline per-minute plans it proposes to offer Lifeline customers,[35] it fails to explain how it will comply with the Commission's certification and recordkeeping requirements for low-income support as well as the requirements of the Universal Service Administrative Company. TracFone describes its pay-as-you-go service as one suited for "transient consumers"[36] and available to anyone "irrespective of age; irrespective of residency."[37] Consequently, it is unclear what methods TracFone intends to use to keep track of customers for recordkeeping purposes. For both Lifeline and Link Up, USAC requires that the "[t]he telephone service address must be the participant's primary residence."[38] However, TracFone has not indicated a method for identifying and tracking a customer's primary residence. This absence of appropriate recordkeeping creates a potential for abuse. The Commission has made significant progress to

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[33] FL Amendment at 2; VA Amendment at 2.

[34] FL Amendment at 2; VA Amendment at 2.

[35] TracFone Florida Petition at 14; TracFone Virginia Petition at 14; FL Amendment at 3; VA Amendment at 3.

[36] FL Amendment at 2; VA Amendment at 2.

[37] TracFone Florida Petition at 12; TracFone Virginia Petition at 12-13.

[38] *See* http://www.universalservice.org/li/components/lifeline.asp; http://www.universalservice.org/li/components/linkup.asp.

eliminate fraud and abuse in the various universal service programs.[39] In order to foreclose a potential new avenue for abuse, the Commission should deny the instant ETC petitions.

Another deficiency in TracFone's petitions is its failure to explain how it will comply with the requirement to offer Link Up service to low-income customers. The Link Up program helps low-income subscribers initiate telephone service by paying a portion of the installation charges. TracFone makes no mention of the Link Up program or any plans to participate in Link Up. An ETC's obligation to provide service to low-income customers is not limited to the Lifeline program. This deficiency only further demonstrates why the Commission should deny TracFone's ETC requests.

III. CONCLUSION

The Commission has demonstrated through its recent actions that it is firmly committed to ensure that all designations of ETCs satisfy the public interest as mandated by Section 214(e) of the Act. Because TracFone has failed to meet this standard on several fronts, the Commission should deny the instant ETC petitions. To do otherwise would establish bad precedent by creating inefficient and artificial competition, place undue pressure on the size of the universal service fund, impede facilities-based competition, allow double recovery, and harm consumers. In light of the foregoing, the Commission should deny TracFone's requests for ETC status in Florida and Virginia.

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[39] *See, e.g.*, *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 26912 (2003); *Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.; Schools and Libraries Universal Service Support Mechanism*, CC Docket Nos. 96-45, 97-21 & 02-6, *Order on Reconsideration and Fourth Report and Order*, FCC 04-181 (rel. July 30, 2004).

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August 23, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 23rd day of August 2004 served the following parties to this action with a copy of the foregoing **OPPOSITION** by electronic filing or placing a copy of the same in the U.S. Mail addressed to the parties listed below.

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