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	)	

REPLY COMMENTS OF THE
MONTANA PUBLIC SERVICE COMMISSION

Introduction and Summary

In its Notice of Proposed Rulemaking (NPRM) of June 8, 2004 the FCC seeks comments on the Recommended Decision of the Federal-State Joint Board (Joint Board).[1] The Montana Public Service Commission (MPSC) limits these reply comments to issues in the NPRM on which other parties filed initial comments. Our reply comments are confined to the eligible telecommunications carrier (ETC) designation process, the scope of support and the basis of support.

In summary, the MPSC agrees with the Joint Board's recommendation encouraging state commissions to conduct a more stringent public interest analysis of ETC designation petitions in all areas. This recommendation is especially important in the case of rural and high cost areas. The MPSC is disheartened by the Joint Board's recommendation to limit funding to primary lines. The Joint Board's primary line recommendation is an inappropriate means to address the hemorrhaging of the universal service fund. We also view this recommendation as inconsistent with Congress' intent in the Universal Service provisions of the 1996 Act as it would discourage network investment in rural areas.

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[1] The NPRM is the FCC's response to the Federal-State Joint Board on Universal Service Recommended Decision regarding the process for designating eligible telecommunications carriers (ETCs) and the FCC's rules regarding high-cost universal service support [FCC 04J-1, CC No. 96-45, Released February 27, 2004].

Topics and Comments

ETC Designation Process

The MPSC agrees with the Joint Board's recommendation that the FCC (the Commission) adopt permissive federal guidelines that encourage state commissions to consider additional minimum qualifications in their evaluations of whether ETC designations are in the public interest. We encourage the Commission to adopt this Joint Board recommendation. The Commission's endorsement will serve to achieve consistency between the 5th Circuit Court of Appeal's (TOPUC) decision, the Commission's recent Virginia Cellular decision and practices of individual state commissions.[2]

The MPSC also agrees with those states that comment that the Commission's guidelines should be permissive and not mandatory (e.g., the initial comments filed by the California PUC, and the New York DPS). This would be most consistent with each state commission's right to establish specific technical service quality standards (see the Federal State Joint-Board's July 10, 2002 Recommended Decision in CC Docket No. 96-45, at paragraph 63).[3] The Joint-Board's suggested permissive guidelines are relevant standards that the Commission should encourage state commissions to consider in their public interest evaluations. If the Commission would otherwise adopt mandatory standards, we recommend that the FCC not foreclose state commission's from adopting additional state standards above the Federal baseline standards.

In initial comments, OPASTCO et. al., recommend three additional guidelines that, at a "minimum," ought to be considered when determining whether a CETC designation for a rural service area is in the public interest (see OPASTCO et al.,

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[2] The 5th Circuit Court of Appeals vacated a Commission rule prohibiting the states from imposing additional eligibility criteria for ETC status. The Court stated: "Therefore, we reverse that portion of the Order prohibiting states from imposing any additional requirements when designating carriers as eligible for federal universal service support." *Texas PUC v. FCC*, 183 F.3d 393 (5th Cir.1999).

[3] See id.

comments pages vi-vii).[4] We agree with these comments and would only add that the same considerations may be valid for CETC designation petitions in areas served by non-rural companies. Commissions need the flexibility, that only permissive guidelines permit, to consider such additional criteria. There may be, for example, service quality and consumer protection rules unique to each state with which new carriers should comply.

Scope of Support

The MPSC's concerns with the Joint Board's recommended primary line restriction are numerous and include inconsistencies with the Telecommunications Act of 1996 and administrative implementation problems.

A primary line restriction is contrary to Section 254(b)(3) of the Act. Under 24(b)(3) consumers in rural and high cost areas should, as matter of law, have access to reasonably comparable services at rates that are reasonably comparable to those that are assessed of consumers in urban areas.[5] Consumers in urban areas have access to services via second and additional lines that will not be available on a comparable basis in rural and high-cost areas. A primary line restriction will limit access to voice, data, fixed and mobile telecommunications services by consumers in rural and high cost areas. In turn, it will be very difficult to attract telecommuters to an area that not only has no DSL but that

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[4] See OPASTCO, RICA and RTG Inc.'s Comments of August 6, 2004 (CC Docket No. 96-45). The three additional guidelines include: 1) the impact of the designation on the USF. For instance regulators may also consider the overall level of per-line support provided to a specific ETC designated service area; 2) whether or not such a designation would create the potential for rural creamskimming by allowing the applicant to serve only the low-cost, high revenue customers in a rural telephone company's service area and 3) regulators may choose to impose consumer protection requirements as a precondition for designation as a CETC, provided that for wireless carriers such regulations do not violate Section 332(c)(3) of the Act.

[5] The section actually reads as follows: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and are available at rates that are reasonably comparable to rates charged for similar services in urban areas."

has high rates for fax and data lines. These higher costs could severely affect small business investment in rural areas and would be very likely to restrict rural economic development.

The MPSC concurs with those initial commenters that oppose a primary line restriction and that find inadequate the Joint Board majority's suggested mitigation measures (see, for example, the Regulatory Commission of Alaska, Coalition of State Telecom Associations and Iowa Utilities Board's comments). The Joint Board is wrong to recommend that the harmful impacts of a primary line restriction may be corrected by mitigation measures (e.g., rebasing, lump sum and hold harmless measures). These mitigation measures are at best only temporary palliatives. Others cast the hold harmless proposal as the best of three undesirable mitigation measures.[6] We find all three of the mitigation measures (rebasing, lump sum and hold harmless measures) inadequate to mitigate the problems associated with a primary line restriction. These alleged fixes have associated additional problems ranging from being anticompetitive to impractical. There should be no primary line restriction and none of the three mitigation measures can actually fix the problems associated with the primary line restriction.

A primary line restriction is contrary to the goal of supporting network costs. If support is diminished for all lines, then network support is diminished. A reduction in network support will handicap the ability of carriers that serve rural and high cost areas to provide supported and advanced services. This will result, in part, because carriers that serve rural and high cost areas do not have the equivalent scale and scope economies of the larger carriers that serve more urbanized areas.

The Joint Board majority's endorsement of the primary line support mechanism is a move away from the Commission's prior agreement that universal service policies should not inadvertently create barriers to the provision of advanced telecommunications services.[7] Whereas the Commission has stated that the current universal service

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[6] See initial comments of Century Tel. Inc (p. 22) and MITS initial comments (p. 12).

[7] The Rural Task Force recommended that the "no barriers" policy incorporate the following general principles: (1) support should be provided for plant "that can, either as built or with the addition of plant elements, when available, provide access to advanced services (2) carriers should be encouraged by regulatory measures to remove

mechanism does not create such barriers,[8] the same cannot be said of the primary line restriction. In fact the reverse holds. Section 254(b)(2) of the Act requires that universal service policies ensure access to advanced services in all areas of the country. By reducing network support, the primary line mechanism will stymie the ability of carriers to provide a network that would otherwise serve as a platform for the provision of advanced technology.

There will also be administrative problems associated with implementation of any primary line proposal. If the Commission were to adopt rules that limit support to primary lines, then the Commission would have to establish mechanisms so that, for example, individuals residing at the same address could select the primary line carrier. If the Commission would approve of a primary line restriction, then the instrument (e.g., ballot, voucher) should make clear that the customer's primary carrier selection is the carrier that will receive federal funding not only to provide access to basic exchange service but that the selected carrier will likely be the consumer's main source of advanced services.

With a ballot process the Commission should expect a high percentage of non respondents; therefore, and as a default mechanism, non-respondents should have their ILEC designated as their primary line carrier. Based upon direct experience with other retail services, we expect that some carriers would engage in slamming in order to capture customers.

Basis of Support

We encourage the Commission to resolve the basis of support issue in favor of basing CETC support upon each carrier's own costs. We endorse those initial comments that would base a petitioner's universal service support upon the petitioner's own cost unless it exceeded the incumbent local exchange carrier's (ILEC's) support, in which

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infrastructure barriers relating to access to advanced services and (3) federal universal service support fund should be sized so that it presents no barriers to investment in plant needed to provide access to advanced services." [Rural Task Force Order, FCC 01-157, Released May 23, 2001; para.197 citing Rural Task Force Recommendation at 22-23.]

[8] Rural Task Force Order, FCC 01-157 (Released May 23, 2001), at para 199.

case the CETC's support should not exceed that which the ILEC receives. Had the Joint Board considered and recommended adoption of this basis of support proposal the Commission would not have to consider the insurmountable problems it now faces with respect to the primary line restriction proposal. Basing support upon a carrier's own costs would help address the size of the federal universal service fund issue.

In initial comments, OPASTCO, RICA and RTG Inc. proposed a tiered series of safe harbor ratios for determining a wireless CETC's per-line support as an alternative to a primary line restriction (see p. iv-vi). We agree that this OPASTCO proposal is an alternative to a primary line restriction. While we believe that basing support on a carrier's own cost is a better solution, the OPASTCO proposal has merit. If a CETC disagrees with the percentage of the ILEC's federal support (e.g., 20 percent with Tier II), the CETC, under the OPASTCO proposal, may always submit its own costs. When combined with the option (safety valve) that CETCs have to compute and provide their own costs, the safe harbor will provide an administratively efficient solution, until such time as the Commission requires that all ETC's support be based upon their own costs. We continue to hold that the best measure of a wireless carrier's cost is its own cost of service, whether that be embedded or forward looking economic costs (FLECs). Given that that wireless technology is relatively new, there should not be enormous differences between ECOS and FLEC estimates. ECOS, unlike forward looking economic costs is a preferable option in the case that costs might need auditing. We believe that the Commission should in this proceeding resolve the basis of support issue by basing a CETC's support on its own costs.

Respectfully submitted,

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September 22, 2004