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May 10, 2005

VIA OVERNIGHT MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Attn: Tom Navin, Chief, Wireline Competition Bureau

**Re: Logan Telephone Cooperative, Inc.
CC Docket Nos. 96-45 & 00-256
Request for Review of an Administrator Decision**

Dear Ms. Dortch:

A Request for Review of an Administrator Decision ("Request for Review") was filed on behalf of Logan Telephone Cooperative, Inc. on May 2, 2005. The Wireline Competition Bureau is requested to review a decision by the Universal Service Administrative Company ("USAC") which has significantly reduced the Company's Safety Net Additive support.

The above Request for Review was made by means of a facsimile copy. Enclosed is the original as a supplement to the May 2, 2005 filing.

Please contact the undersigned at JSI with any questions concerning this filing.

Sincerely,

John Kuykendall
Director - Regulatory Affairs

on behalf of Logan Telephone Cooperative, Inc.

Enclosure

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

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In the Matter of)
)
Request for Review by) CC Docket No. 96-45
Logan Telephone Cooperative, Inc.) CC Docket No. 00-256
Of Decision of Universal Service)
Administrator)

To: Chief, Wireline Competition Bureau

REQUEST FOR REVIEW OF AN ADMINISTRATOR DECISION

Pursuant to Sections 54.719 and 54.722 of the Commission's Rules,¹ Logan Telephone Cooperative, Inc (the "Company") hereby requests the Federal Communications Commission ("FCC" or "Commission") to review a decision by the High Cost & Low Income Division of the Universal Service Administrative Company ("USAC") regarding recalculation of the Company's Safety Net Additive ("SNA") support. As demonstrated herein, the Company has been significantly adversely affected by USAC's decision to recalculate the SNA support that the Company receives.

USAC's decision to recalculate the Company's SNA support was based on a recently announced interpretation by the FCC's Wireline Competition Bureau ("Bureau") of Section 36.605 of the Commission's Rules (the "SNA Rule").² This recalculation has resulted not only in reduced monthly support that is appreciably less than the amount the Company received previous to its decision but also requires the Company to pay back SNA support that would not have been advanced to the Company if USAC had obtained the Bureau's interpretation of the rule from the outset.

If USAC's decision is allowed to stand, the Company will be denied the predictability and incentives that the SNA Rule was designed to provide the Company in order for to make investments in its network infrastructure to better serve its communities. Further, because USAC failed to provide any notice of the possibility that the Company's SNA support would be recalculated, it appears that the Company's due process rights have been violated. Accordingly, the Company respectfully requests that the Commission conduct a thorough review of this matter and overturn USAC's decision to recalculate the Company's SNA support.

¹ See 47 C.F.R. §§ 54.719 & 54.722.

² See 47 C.F.R. § 36.605.

I. Background

The Company is a rural telephone company that is a recipient of SNA support. The Company has been receiving SNA since January 2003. SNA is an additional universal service support provided to rural carriers that have made significant investment in rural infrastructure during the period in which the support level would otherwise exceed the indexed cap on the high-cost support loop fund.³ All universal service support, including SNA, is administered by a not-for-profit corporation, USAC, under the direction of the FCC. Section 36.605 of the Commission's Rules, the SNA Rule, specifies how SNA support is to be calculated for rural telephone companies.⁴

The Company received a letter from the High Cost & Low Income Division of USAC dated March 2, 2005, informing the Company that a "clarification" by the FCC of the SNA Rule required USAC to recalculate the Company's SNA support both on a prospective and a retroactive basis.⁵ On a prospective basis, the Company's monthly SNA support has been reduced from \$7,393.00 to \$2,072.00, a difference of \$5,321.00. Regarding the retroactive adjustment, the USAC Letter indicates that the Company owes USAC \$133,025.00 ("the prior period adjustment").⁶ This prior period adjustment has been deducted from the total amount of support provided to the Company in the NECA settlement process.⁷

³ See *Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, 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 (2001) ("MAG Order") at paras. 78, 80.

⁴ See 47 C.F.R. § 36.605.

⁵ See Letter from Karen Majcher, Director, High Cost Support Mechanism, USAC, to Kimberly Miles, Logan Telephone Cooperative, Inc., dated March 2, 2005 ("USAC Letter") at 1 (Attachment 1).

⁶ *Id.* at 2. In the USAC Letter, the actual total amount of SNA support received to date is subtracted from an estimated total SNA support that would have been received if USAC had used the FCC's interpretation of the SNA Rule in making the Company's SNA calculations. This results in a significant balance of funds being owed to USAC.

⁷ See the Company's March 30, 2005 Statement from NECA (Attachment 2) showing the deduction of the "prior period adjustment" from the total amount due to the Company. The amount specified on the NECA settlement is \$138,346.00 which contains both the "prior period adjustment" of \$133,025.00 and an additional amount of \$5,321.00 which is the difference between the revised monthly support and the January 2005 monthly support.

II. Grant of Request for Review is Justified

1. Statement of the Party's Interest in the Matter Presented for Review

SNA support is designed to provide rural carriers with "appropriate incentives" and "predictability" to invest in the network infrastructure serving their communities.⁸ In harmony with this goal, the Company has relied upon receiving the full SNA support that USAC had indicated it would receive when it made its original calculations and has continued to invest in its network infrastructure in order to better serve the communities located within its authorized service area.

In making its decisions regarding future investment in its infrastructure, the Company had no knowledge that the SNA support would be reduced or subject to a possible "take back." The first notice provided to the Company indicating that its SNA would be recalculated was the USAC Letter received in March 2005, in which it informed the Company that effective immediately, the monthly SNA support would be reduced by \$5,321.00 and that the Company would have to immediately pay back all of the "prior period adjustment" received to date which amounted to \$133,025.00.

Because of USAC's failure to provide any notice that the SNA support may be recalculated and the drastic steps that it has taken when it discovered that its interpretation of FCC rules were not in accord with the Bureau's, the Company has been negatively impacted financially and its ability to invest in network infrastructure to better serve its communities has been curtailed.

2. Statement of Relevant, Material Facts

The person whose signature appears below is an authorized officer of the Company and hereby declares that the information contained herein as it pertains to the Company is true and accurate to the best of my knowledge, information and belief.

In the USAC Letter dated March 2, 2005, USAC informed the Company that because the Bureau had "clarified that SNA support should be based on the amount calculated for the first qualifying year," USAC is "required" to recalculate SNA support for companies that filed subsequent SNA qualification letters after their initial qualification letter.⁹ On its web page, USAC attached a copy of the letter in which the FCC made this clarification (the "Bureau Letter").¹⁰

⁸ MAG Order at paras. 80 & 81.

⁹ See USAC Letter, Attachment 1.

¹⁰ See USAC web page (www.universalservice.org) containing copy of letter dated January 14, 2005, from Jeffrey J. Carlisle, Chief of the Commission's Wireline Competition Bureau to Irene Flannery of USAC, Attachment 3.

The Bureau Letter cited a memorandum dated November 24, 2003, in which USAC sought assistance from the FCC's Telecommunications Access Policy Division of the Bureau regarding the application of the SNA Rule in the context of carriers that meet the SNA eligibility criteria in more than one period (the "Memorandum").¹¹ In the Memorandum, USAC specifically asked the FCC's guidance as to "whether carriers who meet the SNA eligibility criteria in more than one period may be eligible to receive additional support, and if so, how much and over what period of time."¹² To be eligible for SNA, a rural carrier must realize growth in Telecommunications Plant in Service ("TPIS") per loop of at least 14 percent more than the study area's TPIS per loop investment at the end of the prior period.¹³ In the Memorandum, USAC provided an example of a rural telephone company that met the 14 percent TPIS trigger in two subsequent years and posed three alternative methods for calculating SNA support, the first one being a scenario in which SNA support should be based on the amount calculated for the first qualifying year.¹⁴

Over a year after USAC posed its questions to the Bureau, the Bureau responded in its Bureau Letter dated January 14, 2005. The Bureau found that USAC's first scenario was the correct application of the SNA Rule under the example that USAC presented and stated its conclusion that "unless the Commission changes section 36.605 of its rules, SNA support shall be based on the amount the carrier receives its first qualifying year."¹⁵ The Bureau Letter made no reference to USAC's recalculating SNA support received by carriers that met the 14 percent trigger in two subsequent years nor did it give any directive that its "clarification" was to be applied retroactively. In the USAC Letter dated March 2, 2005, however, USAC announced that the clarification "required" USAC to recalculate SNA support for companies that filed subsequent SNA qualification letters after their initial qualification letter on both a prospective and retroactive basis.¹⁶ The USAC Letter then provided the revised monthly support and the prior period adjustment amounts explained in Section I above.

3. Question Presented for Review

Was USAC justified in recalculating the Company's SNA support on a prospective and retroactive basis or do concerns for fulfillment of Commission objectives and due process rights direct USAC to do otherwise?

¹¹ See *Id.* at 1 *citing* the Memorandum at 1. The Company has not seen a copy of the Memorandum nor could it find a copy on the FCC's Electronic Comment Filing System.

¹² Bureau Letter at 1.

¹³ *Id.* *citing* 47 C.F.R. § 36.605(c)(2).

¹⁴ Bureau Letter at 1.

¹⁵ *Id.*

¹⁶ See USAC Letter at 1.

4. **Statement of Relief sought and relevant statutory or regulatory provision pursuant to which relief is sought**

The Company requests that the Commission determine whether USAC was justified in significantly reducing the Company's SNA support. According to USAC, the Bureau's recent interpretation of the SNA Rule required it to recalculate the Company's SNA support both on a prospective and retroactive basis. The Company, however, is not aware of any such directive and requests the Commission to conduct a thorough review of this matter to ensure that its objectives for SNA support are being met and that due process concerns are not violated.

Given that the Commission established SNA support solely to provide rural carriers with "appropriate incentives" and "predictability" to invest in the network infrastructure serving their communities;¹⁷ it would appear that significantly reducing promised support to rural carriers would be entirely contradictory to the very existence of SNA. USAC distributes all universal service support, including SNA, under the direction of the FCC.¹⁸ According to the Bureau Letter, in November 2003, USAC sought guidance from the Bureau regarding how the SNA Rule should be applied in situations where carriers have met the SNA eligibility criteria in more than one period and believed that there were at least three different ways for SNA support to be calculated in these situations.¹⁹ In response to USAC's request, the Bureau was silent for over a year. During this period, USAC evidently chose a method which the Bureau later deemed not to be correct. Nevertheless, the method USAC chose appears to have been one USAC considered to be consistent with the SNA Rule, and it continued to use this method until the Bureau responded with its interpretation. The Company has then relied on this method of calculation to plan and execute investments into its network infrastructure to better serve the rural communities that it serves.

To allow USAC to suddenly determine that the SNA support that the Company has relied upon for both past and future investments must be totally recalculated without a full review of its actions would destroy the "predictability" that SNA support was designed to achieve. Accordingly, the Company urges the Commission to make a thorough review of USAC's actions, including a finding as to whether USAC's initial method for advancing the SNA support is in violation of the SNA Rule, and if so, whether other alternatives exist that are more in line with the Commission's stated purposes for SNA than recalculating all of the Company's SNA support.

Additionally, the fact that the Company was not provided with any indication that the SNA support may be recalculated or even that there was any question regarding

¹⁷ See MAG Order at paras. 80 & 81.

¹⁸ See *Semiannual Report of FCC Inspector General*, 2002 FCC Lexis 2823, Memorandum (2002) at 2.

¹⁹ See Bureau Letter at 1.

USAC's interpretation of the SNA Rule raises serious questions regarding whether constitutional due process rights have been violated. The U.S. Court of Appeals for the D.C. Circuit has found that "[due] process requires that parties receive fair notice before being deprived of property" and that where an interpretation of a regulation is not sufficiently clear to warn a party about what is expected of it, due process rights have been violated.²⁰ The court found that in these situations, "[s]uch confusion does not inspire confidence in the clarity of the regulatory scheme."²¹ The Company fully trusted USAC's method of calculating SNA support in making investments in its network infrastructure to better serve the communities in its service area. The only "notice" that the Company received regarding recalculation of its support was the USAC Letter informing the Company that effective immediately all its support on a prospective and retroactive basis would be recalculated according to the Bureau's recent interpretation. The Company had no reason to believe that USAC, which is under FCC oversight, was calculating its SNA support in a manner inconsistent with FCC directives. It was totally unaware of the Memorandum raising issues regarding interpretation of the Rule (and still has been unable to locate a copy of the document). Accordingly, not only did the Company not have adequate notice that its SNA support would be reduced, it had no reason to even expect that the agency would take such action.

Further, USAC failed to make the required showing that it had the requisite justification or "rational purpose" when it applied the Bureau's interpretation retroactively and then required the Company to pay back support that had previously been advanced. The Supreme Court has ruled that "(t)he retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."²² Expounding upon this precedent, the Court declared that the due process standard requires a "showing that the retroactive application of the [regulation] is itself justified by a rational . . . purpose."²³ USAC seeks to justify its actions by stating that it was "required" to recalculate the Company's SNA support because of the Bureau's recent interpretation. The Bureau Letter, however, gives no directive as to whether its interpretation should be applied retroactively or prospectively nor does it give any directive regarding recalculation of existing SNA support. USAC provides no evidence that it even sought the advice of the Bureau before applying its interpretation retroactively.

²⁰ *Trinity Broad. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (quoting *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (*GE*)) and citing other cases with similar precedent). In *GE*, the court held that the EPA could not fine *GE* for its failure to comply with the agency's interpretation because the regulation was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed *GE* of the agency's perspective." *GE*, 53 F.3d at 1330.

²¹ *GE*, 53 F.3d at 1332.

²² *Bowen v. Georgetown Hospital*, 488 U.S. 204 (1988) ("*Bowen*") citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

²³ *Bowen* citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)).

III. Conclusion

SNA support has been designed specifically to provide rural carriers, like the Company, with the predictability they require to make investments in their network infrastructure to better serve their communities. Rural carriers, like the Company, have made use of this FCC-created mechanism and invested in network infrastructure based on USAC's calculations of the amount of SNA support they should receive. Accordingly, any decisions by the FCC or USAC that might affect the predictability of the amount that these carriers are receiving should be made with the utmost care and seriously evaluate whether any alternatives exist before making any reductions in the amount of support.

As demonstrated herein, however, when USAC finally received a response to its inquiry regarding its interpretation of the SNA Rule and discovered that its interpretation was not in line with the Bureau's interpretation, it took the most drastic action possible – reducing the entire amount of the Company's SNA support. This decision apparently was taken by USAC on its own initiative and with little or no consideration to less drastic alternatives that might be more in line with the Commission's stated objectives. Further, USAC totally disregarded constitutional due process rights by immediately reducing the total amount of support on a prospective and retroactive basis, providing the Company with no prior notice of even the possibility that the Company's SNA support might be recalculated. For these reasons, the Company urges the Commission to review and overturn USAC's decision to recalculate the Company's SNA support.

Based on the foregoing, the Company respectfully requests that while this matter is being reviewed by the Commission, the SNA support that was taken from the Company when USAC retroactively applied the Bureau's interpretation be immediately refunded to the Company. The Company believes that at very least, USAC's actions constituted a change in the rules and should not be applied retroactively.

Respectfully Submitted,



Greg Hale, General Manager
Logan Telephone Cooperative, Inc.

May 2, 2005