

**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)	
)	
Request for Clarification of Clerical Changes)	
To 47 C.F.R. § 54.307 and for Direction to USAC)	

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

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August 31, 2005

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	BACKGROUND	6
III.	THE COMMISSION COULD NOT LAWFULLY ELIMINATE SECTION 54.307(a)(4)'s SUPPORT SUBTRACTION LANGUAGE WITHOUT NOTICE AND COMMENT OR EXPLANATION.....	8
	A. The Commission Failed to Provide for Notice and Comment on the Rule Change as Required by the Administrative Procedures Act.	8
	B. The Commission Could Not Lawfully Delete the Last Sentence of Section 54.307(a)(4) Without Reasoned Explanation.	9
	C. The ILECs' Post-Hoc Rationalizations Cannot Justify the Commission's Lack of Reasoned Decision-Making, and are not Based on the Commission's Actions in the <i>Ninth Report and Order</i>	11
IV.	GCI SEEKS CLARIFICATION OF THE COMMISSION'S EXISTING RULES, NOT A SUBSTANTIVE RULE CHANGE	15
V.	CLARIFYING THE RULE AS GCI REQUESTS WOULD BE IN THE PUBLIC INTEREST.....	15
	A. ILECs and CETCs Do Not Receive the Appropriate Price Signals in the Absence of the Last Sentence of Section 54.307(a)(4).	15
	B. The Purpose of Universal Service Support is to Keep Rates Affordable and Reasonably Comparable, not to Fund ILEC Networks.....	17
	C. Funding All ILEC Lines – Even Lines Captured by a CETC – is Not Necessary to Ensure Carrier of Last Resort Obligations.	19
	D. Administrative Complexity Is No Reason to Delete the Last Sentence of Section 54.307(a)(4) from the Commission's Rules.....	21
VI.	CONCLUSION.....	23

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I. INTRODUCTION AND SUMMARY

On June 29, 2005, GCI submitted a letter to the Chief of the Wireline Competition Bureau (the “Bureau”) of the Federal Communications Commission (the “Commission”) that asked the Commission or the Bureau direct USAC to withdraw certain informal policy guidance that USAC provided to Matanuska Telephone Authority (“MTA”).¹ Specifically, GCI asked the Commission to instruct USAC that the Commission has *not* modified certain provisions of the Fourth Order on Reconsideration in CC Docket No. 96-45² mandating that when a competitive eligible telecommunications carrier (“CETC”) captures an incumbent local exchange carrier (“ILEC”) subscriber and serves that subscriber using the CETC’s own facilities – as opposed to unbundled network elements (“UNEs”) – the ILEC no longer receives the universal service support attributable to that customer. The *Fourth Order on Reconsideration* established that

¹ See Letter from John T. Nakahata, counsel for General Communication, Inc., to Thomas Navin, Federal Communications Commission, CC Docket No. 96-45 (filed June 29, 2005).

² *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997) (“*Fourth Order on Reconsideration*”).

support would be fully portable – including ILECs losing support – when a CETC served an end user customer, regardless of whether the CETC served that customer using UNEs or wholly over its own facilities, and treated both those modes of CETC entry comparably and consistently. GCI also asked that the Commission revise the correcting amendment to Rule 54.307 that was published in the Federal Register on June 22, 2004³ so as to reinstate the last sentence of Section 54.307(a)(4), which was erroneously deleted as a result of clerical changes made in either the Ninth Report and Order in CC Docket No. 96-45⁴ or in the *June 22, 2004 Federal Register Notice*. Alternately, GCI asked the Commission to rescind the *June 22, 2004 Federal Register Notice* because it lacked legal authority to issue that notice without following the rulemaking procedures set forth in 5 U.S.C. § 553. These requested actions are required for the Commission to restore consistency in the implementation of universal service distribution rules as between ILECs and CETCs, regardless of the mode of CETC competition.

The few parties that filed comments in opposition to GCI's letter attempt to characterize the disappearance of Rule 54.307(a)(4)'s last sentence as the result of deliberate and reasoned decision making by the Commission. But these post-hoc rationalizations misstate the actions actually taken by the Commission in the *Ninth Report and Order*, and simply don't make sense in the larger context of the Commission's universal service orders or the even within the framework of Section 54.307 itself. Perhaps most bizarrely, the ILECs' interpretation of Section 54.307 would reduce an ILEC's support when a CETC using UNEs captures a line, treating these two facilities-based modes of CETC entry wholly *differently* and *inconsistently* without any rational basis for doing so. The ILECs do not even attempt to explain why universal service

³ *Federal-State Joint Board on Universal Service*, 69 Fed. Reg. 34601 (June 22, 2004) ("*June 22, 2004 Federal Register Notice*").

⁴ *Federal-State Joint Board on Universal Service*, Ninth Report and Order, 14 FCC Rcd 20432 (1999) ("*Ninth Report and Order*").

support would be reduced in the former circumstances (in which service to the customer continues to make use of elements of the ILEC network) but not in the latter (in which the CETC serves the customer entirely with its own facilities). As further set forth below, the most rational explanation is that the Commission inadvertently omitted the last sentence of Section 54.307(a) from its rules. The Commission should now reaffirm that it has never changed its consistent requirement that ILECs lose support when an ILEC no longer serves the end user customer, regardless of whether the customer is served in part using UNEs or wholly over the CETC's own facilities.⁵

Indeed, as the Commission surely knows, a deliberate effort by the agency to amend its rules through the actions preceding the disappearance of Rule 54.307(a)(4)'s final sentence – *i.e.*, without notice and comment, without a Commission order adopting changed rules, and without a reasoned explanation for the change in rules – would obviously have violated the Administrative Procedures Act (“APA”). First, it is black letter law that the APA requires notice and comment when an administrative agency proposes to change its regulations. Here, however, the *June 22, 2004 Federal Register Notice* was the first time that GCI and other potential commenters had notice of the change. Thus, to the extent that the Commission deliberately sought to change Rule 54.307 in the *June 22, 2004 Federal Register Notice* – as the ILECs claim – the agency failed to provide the requisite notice and opportunity for comment.

⁵ There are some instances in which a CETC, even upon full implementation of the *Triennial Review Remand Order (“TRRO”)* can still use a combination of all network elements to serve an end user, such as when the ILEC loop architecture precludes a CETC from gaining access to an unbundled loop without purchasing unbundled switching. GCI is not implying that such scenarios are treated differently than any other use of UNEs. These, however, will not be a significant number of lines except where the CETC and the ILEC have agreed to allow local switching to be used more broadly than as specified under the *TRRO*.

Second, the Commission – like all federal agencies – lacks authority to revoke a rule without reasoned analysis. Rule 54.307(a)(4), including its final sentence, was properly adopted in the *Fourth Order on Reconsideration* through notice-and-comment rulemaking. Changing or revoking the rule would require the same process. As in all rulemaking proceedings, the Commission would need to “examine the relevant data and articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’”⁶ Here, the ILECs do not seriously contend that the Commission has ever found *any* facts relevant to the revision or revocation of the regulatory language in question, let alone articulated a “rational connection” between such facts and a rule change. It is therefore clear that the last sentence of Rule 54.307(a)(4) remains good law.

Finally, it bears emphasis that the requirements of paragraph 84 of the *Fourth Order on Reconsideration* constituted sound public policy when the Commission adopted them in 1997, and they continue to represent sound public policy today. Allowing an ILEC to recover universal service support *when it no longer provides the underlying service* distorts competitive market signals, both when the CETC serves its customer using UNEs and when the CETC serves its customer using its own facilities. Indeed, the argument against double payment is strongest when the ILEC is wholly ousted from providing any universal service to an end user customer. It also violates the principle of competitive neutrality and the requirement that universal service support be used for the “provisioning, maintenance, and upgrading of facilities and services for which support is intended”⁷: without Rule 54.307(a)(4), while CETCs receive high cost support only when they *actually provide* service to customers, ILECs would receive support for sitting

⁶ *Motor Vehicle Manufacturer Association of U.S., Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).

⁷ 47 U.S.C. § 254(e).

idle. Moreover, high cost support for ILEC customers lost to CETCs is not necessary to enable ILECs to provide universal service to that customer, or to maintain their Carrier of Last Resort (“COLR”) status under state law. COLR typically provides ILECs benefits, rather than imposing burdens, and ILECs also have other means of recovering costs, such as line extension tariffs. Nor does supporting infrastructure in rural, insular, and high-cost areas require the competitive advantage that the ILECs seek – it is well established, both by the Act itself and judicial precedent, that the purpose of universal service is to support *customers*, not legacy networks.

Section 1.2 of the Commission’s rules states that the Commission “may ... on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”⁸ GCI seeks a declaratory ruling pursuant to Section 1.2 that explains the proper interpretation of Section 54.307. As this Commission has recognized,⁹ in a program that distributes over \$3 billion in high cost support annually, there needs to be a clear and transparent understanding of what the rules actually are, and clear and transparent processes need to be utilized when those rules are actually changed. The Commission should act here to make clear those rules, and to maintain the consistent and comparable treatment of portable support payments, both when the CETC uses UNEs and when the CETC serves its customer wholly over its own facilities.

⁸ 47 C.F.R. § 1.2.

⁹ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-Up; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 2005 FCC LEXIS 3337 (rel. Jun 14, 2005).

II. BACKGROUND

In the *Fourth Order on Reconsideration*, the Commission made the sensible determination – in response to a petition for reconsideration filed by GCI – that when an incumbent LEC loses a customer to a CETC the ILEC should also “lose some or all of the per-line level of support that is associated with serving that customer.”¹⁰ The Commission further found that when a CETC serves a former ILEC subscriber using only the CETC’s own, non-UNE facilities, “the incumbent LEC will lose [all of] the support it previously received that was attributable to that customer.”¹¹ To implement this policy, the Commission added language to Rule 54.307(a)(4) expressly stating that the “amount of universal service support provided to such incumbent local exchange carrier shall be reduced by an amount equal to the amount provided to such competitive eligible telecommunications carrier.” As for a CETC serving a former subscriber using UNE facilities, the ILEC is to lose universal service support up to the UNE rate charged by the ILEC, keeping any support in excess of the UNE rate or rates.

When the Commission adopted its *Ninth Report and Order* in CC Docket No. 96-45 in November 1999, it redrafted Section 54.307(a). When it did so, the sentence added to Rule 54.307(a)(4) by the *Fourth Order on Reconsideration* simply disappeared.¹² The *Ninth Report and Order*, however, addressed universal service support *only* for non-rural ILECs, and even then, did not revisit portability. More specifically, the *Ninth Report and Order* adopted the High Cost Model support mechanism for non-rural ILECs, but did not address issues related to High Cost Loop Support or Local Switching Support for rural ILECs. Moreover, paragraphs 90-92 of the *Ninth Report and Order* generally reaffirmed the Commission’s approach to portability in

¹⁰ *Fourth Order on Reconsideration*, 13 FCC Rcd at 5367 (¶ 84).

¹¹ *Id.* at 5368, (¶ 84).

¹² *See id.*, 14 FCC Rcd at 20503-05 (Appendix C).

addressing hold-harmless funding for non-rural ILECs. In short, the *Ninth Report and Order* did not reconsider the portability portion of the *Fourth Order on Reconsideration* – and, indeed, could not have done so because the issue was never properly noticed.

When the Commission published the *Ninth Report and Order* in the Federal Register, it added an ellipsis in the place of Section 54.307(a)(4) – an indication that the section was *preserved* in the redrafting process, albeit elsewhere in the C.F.R. At that time, then, the public was certainly entitled to assume that the Commission intended to preserve the entire section, including the sentence added pursuant to paragraph 84 of the *Fourth Order on Reconsideration*. Last summer, however, the Commission issued its *June 22, 2004 Federal Register Notice* “correcting” the 1999 Federal Register notice to delete the ellipsis.¹³ That action was presented as a clerical correction rather than a substantive change.

In short, at no time since the adoption of the *Fourth Order on Reconsideration* has the Commission provided for notice and comment on the language at issue here, or made any findings supporting a substantive amendment to Rule 54.307. Accordingly, there is no basis for the ILECs’ view that the Commission has repudiated paragraph 84 of the *Fourth Order on Reconsideration*. To the contrary, the provision added by that paragraph remains good law, despite the fact that the Commission and USAC have consistently failed to enforce it.¹⁴ GCI believes that USAC is legally obligated to implement paragraph 84 of the *Fourth Order on*

¹³ See *June 22, 2004 Federal Register Notice*.

¹⁴ See, e.g., Comments of General Communication, Inc., CC Docket No. 96-45 at 38-39 (filed May 5, 2003); see also Comments of General Communication, Inc., CC Docket No. 96-45 at 29-30 (filed August 6, 2004) (describing how the Commission has not enforced paragraph 84 of the *Fourth Order on Reconsideration* to date, resulting in duplicate support for the ILEC and the CETC when a CETC captures a subscriber from the ILEC and serves the subscriber using the CETC’s own facilities).

Reconsideration as written, effectuating portability of support for any ILEC subscriber lost to a CETC, regardless of the CETC's use of its own facilities or UNEs to serve that subscriber.¹⁵

III. THE COMMISSION COULD NOT LAWFULLY ELIMINATE SECTION 54.307(a)(4)'S SUPPORT SUBTRACTION LANGUAGE WITHOUT NOTICE AND COMMENT OR EXPLANATION.

A. The Commission Failed to Provide for Notice and Comment on the Rule Change as Required by the Administrative Procedures Act.

It is black letter law that the APA requires notice and comment when an administrative agency proposes to change its regulations. According to Section 553(b) of the APA, “[g]eneral notice of proposed rule making shall be published in the Federal Register,” and the “notice shall include ... either the terms or the substance of the proposed rule or a description of the subjects and issues involved.”¹⁶ Of course, not every nuance of a proposed rule change needs a separate notice. More specifically, the D.C. Circuit has indicated that an agency does not have to publish a separate notice of proposed rulemaking when a particular action is a “logical outgrowth” of previously proposed rule changes.¹⁷

In determining whether a final rule is the logical outgrowth of the proposed rule, the key is whether the purposes of notice and comment have been adequately served. This means that a final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice

¹⁵ As discussed further below, GCI recognizes that USAC is not presently ready to implement Rule 54.307(a)(4) and, notwithstanding the fact that this rule was adopted nearly eight years ago, certain administrative steps must be taken to implement that provision. During any interim transition implementation period, the Commission should ensure that UNE entry and full-facilities CETC entry continue to be treated comparably and consistently.

¹⁶ 5 U.S.C. § 553(b).

¹⁷ *See, e.g., Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

and comment would not provide commenting parties with “their first occasion to offer new and different criticisms which the Agency might find convincing.”¹⁸

Here, contrary to the assertions of ITTA, the Commission never provided proper notice and opportunity for comment in connection a substantive change to Section 54.307(a)(4).¹⁹ As further discussed below, the *Seventh Report and Order and FNPRM* only noticed changes to the hold-harmless support mechanisms for non-rural carriers. Likewise, the *Ninth Report and Order* concerned only support for non-rural carriers, and did not address issues relating to High Cost Loop Support and Local Switching Support for rural ILECs. The deletion of the last sentence of Section 54.307(a)(4) could not have been a “logical outgrowth” of those proceedings because GCI had neither reason nor opportunity to comment on the rule’s mysterious metamorphosis prior to the *June 22, 2004 Public Notice* summarily deleting the language implementing paragraph 84 of the *Fourth Order on Reconsideration*. In short, the Commission was obliged to issue a separate notice of proposed rulemaking if it intended to place the substance of Rule 54.307(a)(4) at issue, and it did not do so.

B. The Commission Could Not Lawfully Delete the Last Sentence of Section 54.307(a)(4) Without Reasoned Explanation.

The Commission – like any administrative agency – cannot revoke a rule without reasoned analysis. According to *Motor Vehicle Manufacturer Association of U.S., Inc. v. State Farm Mutual Insurance Co.*, “an agency changing its course by rescinding a rule is obligated to

¹⁸ *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)), *cert. denied*, 444 U.S. 1096 (1980).

¹⁹ See Comments of Independent Telephone and Telecommunications Alliance; National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; United States Telecom Association; and Western Telecommunications Alliance, CC Docket No. 96-45 at 9-10 (filed Aug. 17, 2005) (“*ITTA comments*”).

supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”²⁰ Indeed, “the direction in which an agency chooses to move [its rules] does not alter the standard of judicial review established by law.”²¹ Interpreting the *State Farm* decision, the D.C. Circuit Court of Appeals has held that when the action involves a change to agency rules, “the court should be satisfied both that the agency was aware it was changing its views and has articulated permissible reasons for that change, and also that the new position is consistent with the law.”²² Moreover, the court “will demand that the [agency] consider reasonably obvious alternative[s] . . . and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.”²³

The Commission’s *June 22, 2004 Public Notice* plainly cannot satisfy the requirements of *State Farm* – as interpreted by the D.C. Circuit – as a vehicle for substantively changing Rule 54.307(a)(4). Substantive change would have to be supported by reasoned analysis, and the Commission made no pretense of such analysis in the *June 22, 2004 Public Notice*. That notice purported only to make a “correction” (nearly *five years* later) to the Commission’s December 1, 1999 Federal Register Notice, which adopted the *Ninth Report and Order*. And as discussed above, however, the Commission has never taken any action to rescind paragraph 84 of the *Fourth Order on Reconsideration*’s determination that when a CETC captures an ILEC subscriber and serves that subscriber using the CETC’s self-provided facilities or UNEs, the ILEC should no longer receive the universal service support attributable to that customer. The Commission never “examine[d]” any “relevant data,” never “found” any relevant “facts,” and

²⁰ *State Farm*, 436 U.S. at 42.

²¹ *Id.*

²² *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984), quoting *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982).

²³ *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

certainly never “articulate[d]” any “satisfactory explanation for its action,” if its action was intended to actually change the rule.²⁴ It certainly never undertook any examination of the disparate treatment that resulted from the edit, the irreconcilable outcome that an ILEC would lose support if it lost the customer to a UNE-competitor, but not to a self-provided facilities competitor. Such inconsistency is squarely counter to paragraph 84. In short, the Commission cannot substantively amend or rescind a rule by issuing a “Public Notice” purporting to amend a clerical error, and containing no reasoned analysis.

C. The ILECs’ Post-Hoc Rationalizations Cannot Justify the Commission’s Lack of Reasoned Decision-Making, and are not Based on the Commission’s Actions in the *Ninth Report and Order*.

Both ITTA²⁵ and MTA²⁶ attempt to justify the Commission’s apparent clerical error – which led to the deletion of the last sentence of Section 54.307(a)(4) – as the product of reasoned decision-making by the Commission. But ITTA’s and MTA’s attempts to characterize the disappearance of the critical language in Section 54.307(a)(4) as the “logical outgrowth” of the Commission’s treatment of universal service policies for non-rural carriers are wholly unsupported by the orders themselves.

According to ITTA and MTA, when the Commission asked for comment on the narrow issue of “*hold-harmless*” funding for non-rural ILECs in the *Seventh Report and Order* and *FNPRM*,²⁷ the Commission somehow placed interested parties on that it proposed to revisit the

²⁴ *State Farm*, 463 U.S. at 43 (internal quotation marks omitted); *see also AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (requiring that “conclusions reached [by an agency] have a rational connection to the facts found.”).

²⁵ *See ITTA comments* at 3-8.

²⁶ *See Comments of Matanuska Telephone Association*, CC Docket No. 96-45 at 2-4 (filed August 17, 2005) (“*MTA comments*”).

²⁷ *Federal-State Joint Board on Universal Service*, *Seventh Report and Order* and *Thirteenth Order on Reconsideration* in CC Docket No. 96-45, *Fourth Report and Order* in CC Docket

far broader matter of *portability rules for all ILECs*, both rural and non-rural. Subsequently, in the *Ninth Report and Order*, ITTA and MTA assert that the Commission addressed the portability issue *for all LECs* by synchronizing the reporting of line count information for both ILECs and CETCs. According to ITTA and MTA, this minor change eliminated any need for the last sentence of Section 54.307(a)(4), which addresses the fundamental issue of which carrier should receive support when customers migrate off ILEC networks and onto CETC networks.

The ILEC's imaginative arguments are utterly baseless. In the first instance, the ILECs get their facts wrong. The Commission, in the *Ninth Report and Order*, did not synchronize mandatory line count reporting by rural ILECs and CETCs serving those areas, but only did so for non-rural LECs in order to implement its new federal high cost mechanisms for non-rural carriers. The Commission did not synchronize the reporting of rural ILEC and CETC lines until nearly two years later in the *Rural Task Force Order*.²⁸ The ILECs' tale is therefore pure fiction, wholly unsupported by the actions taken in the actual orders: the deletion of Rule 54.307(a)(4) in the *Ninth Report and Order* could not have been contemporaneously justified by an action (synchronizing rural ILEC and CETC line reports) that the Commission did not take at that time. Indeed, in the only section in the *Ninth Report and Order* in which the Commission discussed high cost loop support for *rural* carriers, the Commission expressly discussed and acted "[c]onsistent with our commitment not to consider significant changes in rural carriers' support until after the Rural Task Force and the Joint Board have made their

No. 96-262 and Further Notice of Proposed Rulemaking, 14 FCC Rcd 8078 (1999) ("*Seventh Report and Order and FNPRM*").

²⁸ *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*, 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, 11298-99 (¶¶ 132-135) (2001).

recommendations.”²⁹ Accordingly, it cannot now be plausibly argued that the *Ninth Report and Order* made a significant change to the Commission’s method for calculating rural carrier support in areas served by an ETC, when the Commission was disclaiming its intent to make any change to rural carrier support.³⁰

Moreover, it stretches the imagination to believe that the Commission would have, in the *Ninth Report and Order*, altered the portability rules for full-facilities-based CETC entry into rural study areas without simultaneously considering whether the revisions it was making necessitated changes with respect to the rules governing UNE-based entry into rural study areas. ITTA and MTA would have the Commission believe that it acted in the *Ninth Report and Order* without considering whether it was creating different rules and results for facilities-based entry than for UNE-based entry, effectively treating the ILEC *more* favorably when it was wholly ousted from serving the customer than when the ILEC at least provided a UNE loop. It is extremely unlikely that the Commission would have taken such a significant step without any public explanation, especially to reconcile its actions with Section 254(e)’s direction that universal service support be used for the “provisioning, maintenance, and upgrading of facilities and services for which the support is intended”.³¹

Furthermore, as briefly set forth above, ITTA and MTA would have the Commission believe that it took such action despite the fact that the *Seventh Report and Order and FNPRM* did not address the Commission’s portability rules, and in particular, how these rules apply to rural ILECs, and thus could not have provided the requisite notice. To the contrary, the express

²⁹ *Id.* In that portion of the Order, the Commission stated it would continue to calculate high cost support for rural carriers “as if all carriers continued to participate in the fund.”

³⁰ When the Commission adopted the *Rural Task Force Order*, it modified only 54.307(a)(1), and not (a)(4).

³¹ 47 U.S.C. § 254(e).

purpose of the *Seventh Report and Order and FNPRM* was to “establish a methodology for determining non-rural carriers’ support amounts, based on forward-looking costs estimated using a single, national model, and a national cost benchmark.”³² And with regard to portability, the language in the *Seventh Report and Order and FNPRM* only concerned the portability of “hold harmless” support, not universal service support generally. To be more specific, the Commission inquired into “whether the competitor should receive the [non-rural] incumbent’s hold-harmless support, or whether the competitor should receive the amount of support determined on a forward-looking basis” “in the event a competitor wins a customer from an incumbent receiving hold-harmless support.”³³

This language makes patently clear that the *Seventh Report and Order and FNPRM* did not seek comment on the Commission’s general portability rules embodied in Section 54.307(a)(4), and thus there is no basis for finding that the *Ninth Report and Order* did so without any express discussion. In fact, it is noteworthy that *none* of the groups asserting that the Commission sought comment on its portability rules generally actually filed comments discussing the portability of support in response to the *Seventh Report and Order and FNPRM*. In short, contrary to the assertions of MTA and ITTA, the public was *not* on notice that the Commission sought to revise its more general portability rules, and therefore had no opportunity to comment on that issue.

³² *Seventh Report and Order and FNPRM*, 14 FCC Rcd. at 8080 (¶ 3).

³³ *Id.* at 8135-8136 (¶ 122).

IV. GCI SEEKS CLARIFICATION OF THE COMMISSION'S EXISTING RULES, NOT A SUBSTANTIVE RULE CHANGE

GCI is seeking clarification of an existing rule, not a rule change.³⁴ Thus, GCI's request for clarification of the proper interpretation of the rule is timely. According to Section 1.2 of the Commission's rules, "[t]he Commission may . . . on motion or its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." In this proceeding, GCI asks the Commission to remove uncertainty surrounding the implementation of Rule 54.307(a)(4), which GCI believes remains in effect because the Commission has done nothing to rescind it. Pursuant to the Commission's rules, there is no time limit on motions for a declaratory ruling, despite USTA's assertion to the contrary.³⁵ Moreover, to the extent that the Commission agrees with GCI that its *June 22, 2004 Federal Register Notice* was issued in error, the Commission has the authority to correct that error, inasmuch as the correction was not issued in accordance with notice and comment rulemaking procedures. Once the Commission clarified its rules and corrected its clerical errors, it would then be up to the Commission and USAC to implement those rules.

V. CLARIFYING THE RULE AS GCI REQUESTS WOULD BE IN THE PUBLIC INTEREST.

A. ILECs and CETCs Do Not Receive the Appropriate Price Signals in the Absence of the Last Sentence of Section 54.307(a)(4).

Under the Commission's implementation (or, more accurately, lack thereof) of its existing rules, the ILEC always recovers the cost of its entire network, and does not lose support, even when the ILEC no longer serves the end user customer, regardless of whether the CETC serves that customer wholly using its own facilities or UNEs. With respect to end users that a

³⁴ See *ITTA comments* at 10-11; Comments of the United States Telecom Association, CC Docket No. 96-45 at 2 (filed Aug. 17, 2005) ("*USTA comments*"); *MTA comments* at 5-7.

³⁵ *USTA comments* at 2.

CETC serves using UNEs, the Commission has yet to implement rule 54.307(a)(2), and thus both the ILEC and the CLEC receive high cost support. In the absence of implementing 54.307(a)(4), the same is true when a CETC wins a customer from the ILEC. This result (the languishing implementation), while unlawful, is consistent, and is in stark contrast to the CETC, which must actually win a customer's business in order to obtain universal service support.

The current lack of implementation of the ILEC's loss of support for customers they do not serve distorts the correct price signals that would occur in markets without high cost support. In an unsubsidized market, an ILEC loses all of the revenue associated with service to a customer when it loses that customer to a competitor. By contrast, in an area receiving high cost support, when the Commission and USAC have not implemented Section 54.307(a) and (4), although the ILEC loses the end user revenue associated with that customer, it *retains* the high cost support associated with the facilities that were formerly used to serve that customer, because its high cost support does not decline when it loses the line. Thus, the rural ILEC is partially insulated from the forces of competition.

An even odder anomaly is created if the Commission finally implements rule 54.307(a)(2), but takes the view that 54.307(a)(4) no longer exists. In that circumstance, because the Commission will have retained support subtraction as it applies to UNEs, but eliminated it with respect to circumstances in which the CETC serves an end user entirely over its own facilities, the ILEC will potentially lose universal service support *only* when a CETC uses UNEs, and not in any other circumstance. Under such rules, support would be truly portable, *i.e.*, it would "move[] with the customer, rather than stay[ing] with the incumbent LEC, whenever a customer makes the decision to switch local service providers,"³⁶ only when the CETC used

³⁶ *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000) ("*Alenco*").

UNEs, and not when the CETC uses entirely its own facilities. This anomaly is illogical, and wholly unexplained by *any* FCC decision. There is no imaginable reason why UNE-based entry and full-facilities-based entry should be treated differently, particularly in this manner, where the ILEC retains support when it provides no facilities but loses support when it provides some facilities. This irrational lack of consistency further underscores that the deletion of subtraction of support for full-facilities-based competition was not a deliberate policy choice in the *Ninth Report and Order*, but was instead a clerical error.³⁷

B. The Purpose of Universal Service Support is to Keep Rates Affordable and Reasonably Comparable, not to Fund ILEC Networks.

Neither the Commission nor the Courts have ever embraced ILEC assertions that the ILECs must continue to receive support for all lines – including those they no longer serve – in order to ensure the availability of universal service. As the United States Court of Appeals for the Fifth Circuit noted, “the purpose of universal service is to benefit the customer, not the carrier.”³⁸ As the Fifth Circuit found in rejecting prior ILEC challenges to support portability, “what [ILECs] seek is not merely [a] predictable funding mechanism[], but predictable market outcomes.”³⁹ “[W]hat they wish is protection from competition, the very antithesis of the Act.”⁴⁰

The ILECs reinterpret the universal service goals of the Act, arguing that the purpose of Section 254 was to ensure cost recovery for network infrastructure used to serve rural, insular and high cost areas, rather than to ensure that the rates paid by consumers for universal service

³⁷ The ILECs assert that the last sentence of Section 54.307(a)(4) is not competitively neutral, because it will allegedly result in lower per-line high cost support amounts for the ILEC than the CETC. *See ITTA comments* at 7; *MTA comments* at 4. However, the ILECs fail to explain why the rules should be different depending on whether a carrier serves its customers using its own facilities or UNEs.

³⁸ *Alenco*, 201 F.3d at 621.

³⁹ *Id.* at 622.

⁴⁰ *Id.*

are affordable and reasonably comparable.⁴¹ USTA, for example, argues that “universal service support should be used to help recover the cost of networks, not lines or services.”⁴² In reality, USTA’s self-serving interpretation of the universal service principles contained in the Act as focused on “networks” (*i.e.*, companies) rather than consumers is in direct conflict with the plain language of the statute. Section 254(b)(3) states:

Access in rural and high cost areas. *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 that are available at *rates* that are reasonably comparable to *rates* charged for similar services in urban areas.⁴³

The consumer (rather than the competitor or “network”) focus of the Act was affirmed by the Fifth Circuit Court of Appeals in *Alenco*, wherein the court held that the Commission’s portability rules did not violate Section 254(e)’s command to provide sufficient universal service support. According to the court:

The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.⁴⁴

Rural ILECs and their representatives also cannot somehow transform Section 254(e)’s requirement that high cost support be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” into a cost recovery guarantee.

⁴¹ See Comments of ACS of Alaska, Inc., ACS of Fairbanks, Inc., ACS of the Northland, Inc. and ACS of Anchorage, Inc. at 4 (filed Aug. 17, 2005) (“*ACS comments*”); *ITTA comments* at 13; *MTA comments* at 5; *USTA comments* at 3.

⁴² *USTA comments* at 3.

⁴³ 47 U.S.C. § 254(b)(3) (emphasis added).

⁴⁴ *Alenco*, 201 F.3d at 620 (emphasis in original).

Indeed, as the Fifth Circuit pointed out in *Alenco*, “portability is not only consistent with predictability, but also *is dictated* by principles and competitive neutrality and the statutory *command* that universal service support be spent ‘only for the provision, maintenance, and upgrading of facilities and services for which the [universal service] support is intended.’⁴⁵ Thus, Section 254(e) supports and requires true and full portability, including ILEC loss of support when it loses the customer, not support of the ILEC network irrespective of whether the ILEC serves the customer. The Act does not give the Commission (or USAC) the discretion to choose not to implement ILEC loss of support for either full facilities or UNE-based entry by a CETC.

C. Funding All ILEC Lines – Even Lines Captured by a CETC – is Not Necessary to Ensure Carrier of Last Resort Obligations.

Several commenters argue that the Commission must not reinstate the last sentence of Section 54.307(a)(4) because doing so will undermine the ILECs’ ability to comply with their Carrier of Last Resort obligations under state law.⁴⁶ These arguments, however, at least implicitly overstate the “burden” placed on ILECs as Carriers of Last Resort.

As a threshold matter, COLR obligations are rarely the reason why a carrier builds out its network to reach new customers. An ILEC – and, in a competitive market, a competitive local exchange carrier (“CLEC”) – will build facilities to a new residential development because the revenue opportunity from serving the new units justifies the investment. In a market with facilities-based, last-mile competition, the ILEC has a market incentive to extend its network so that it can have the opportunity to serve these customers, rather than ceding that opportunity to a competitor. Build-out in those cases is not attributable to COLR requirements.

⁴⁵ *Id.*, 201 F.3d at 622 (emphasis added).

⁴⁶ *See ACS comments* at 4; *ITTA comments* at 12-13; *MTA comments* at 5; *USTA comments* at 3.

Even when the ILEC must extend its network pursuant to its COLR obligations, the requirement to do so often is limited by the terms and conditions of its line extension tariff, which mitigate substantially any “burden” on the ILEC.⁴⁷ In Alaska, for example, ACS’ line extension tariffs require any customer that is more than 1,000 feet away from existing facilities to pay the *full cost* of extending those facilities beyond 1,000 feet. In other words, the ILEC’s rate base *only* includes the cost of the first 1,000 feet of line construction. In addition, the customer must agree to pay, in advance, for four years of basic local service, which is offset against construction fees. If the customer moves or otherwise drops service for any reason, the customer loses the prepaid service fees.

As an economic matter, the cost of the first 1,000 feet of a line extension is further offset by other revenue the COLR receives from the customer during its four years of prepaid basic local service. Revenues in addition to the basic local service charges – such as vertical feature revenue or toll calling – provide additional revenue to ACS with little incremental cost. Thus, rather than imposing a substantial net burden on ILECs, in GCI’s experience, COLR provides the rural ILEC with a significant competitive advantage over other ETCs.

GCI, in fact, has voluntarily proposed to share COLR responsibilities in the local and long distance markets in Alaska.⁴⁸ Thus, rural ILECs claiming that COLR responsibilities

⁴⁷ *See Complaints Against ACS of Anchorage, Inc. and ACS of Fairbanks, Inc. for Failure to Provide Service to New Subdivisions and Customers in Fairbanks and Anchorage, Order Addressing Issues, Requiring Filings, and Issuing Partial Waiver of State Modernization Requirements, Regulatory Commission of Alaska, Docket No. U-01-37, Order No. 2 at 3 (May 7, 2003) (“ACS COLR Order”).*

⁴⁸ *See Consideration of the Revision to Regulations Governing the Competitive Local Exchange Market in Alaska; Commission Review of the Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies, and Competition in Telecommunications, GCI’s Comments on Proposed Regulation, Regulatory Commission of Alaska, Docket Nos. R-02-06, R-03-03 at 8-10 (filed Jan. 13, 2004).* Because it is very difficult or impossible to determine what COLR issues may arise in

should be used to justify continued support for the ILEC even after it loses a line to a CETC propose a “solution” without identifying any real “problem.” There is no evidence of a substantial “burden” from COLR requirements that the universal service fund needs to support.

D. Administrative Complexity Is No Reason to Delete the Last Sentence of Section 54.307(a)(4) from the Commission’s Rules

ACS complains that implementation of the last sentence of Section 54.307(a)(4) “would be overly burdensome and impractical.”⁴⁹ Yet the Commission can’t simply ignore its own rules if they prove difficult to implement. Indeed, the requirements of the last sentence of Section 54.307(a)(4) have been in effect since the Commission issued the *Fourth Order on Reconsideration* in 1997. Moreover, as the Nebraska Rural Independent Companies point out, the Commission received a petition for expedited rulemaking from NTCA in 2002 requesting that the Commission define the terms “new” and “captured” subscriber lines for purposes of receiving universal service support pursuant to Section 54.307.⁵⁰ The Commission requested and received comment on NTCA’s petition, but has not ruled on that petition yet.

GCI does not dispute that USAC does not appear immediately prepared to begin to implement rule 54.307(a)(4), or that implementing the rule requires USAC and the Commission to promulgate forms and instructions that better delineate the scope of lines for which the CETC replaces the ILEC and the ILEC therefore should lose support, as opposed to CETC lines that

the future, GCI has asked the Regulatory Commission of Alaska to address questions related to COLR when a specific situation arises, rather than attempting to address them on a prospective basis through broad-based rules. GCI encourages that Commission to adopt the same approach.

⁴⁹ *ACS comments* at 3; *see also* Comments of the Nebraska Rural Independent Companies, CC Docket No. 96-45 at 4-6 (filed Aug. 17, 2005) (“*Nebraska comments*”).

⁵⁰ *Nebraska comments* at 4-5, *citing* *Petition for Rulemaking to Define “Captured” and “New” Subscriber Lines for Purposes of Receiving Universal Service Support Pursuant to 47 C.F.R. § 54.307 et seq.*, Order, RM 10522, DA 02-2214 (rel. Sept. 9, 2002).

simply supplement ILEC service. As implementation proceeds, however, it is all the more important for the Commission to act promptly now to clarify its rules, ensuring that carriers know the rules of the road. Moreover, at all times during this implementation period, the Commission should ensure that UNE-based and facilities-based CETC entry are treated comparably and consistently. And the Commission should set a hard and firm deadline for full implementation of all aspects of portability, including ILEC loss of support.

If the Commission takes any action other than granting GCI's request for clarification, then it will have embarked on a path of treating a CETC's UNE-based service differently from that same CETC's full-facilities-based service. The Commission would be hard-pressed at that time to explain the differential treatment, for which there is no record and prior findings to the contrary. As a practical matter, adoption of such a disparity would call for an explanation of how an ILEC can receive support under Section 254(e) for facilities that are not being used to provide universal service to an end user customer, because the customer is being served entirely by another carrier.

VI. CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling that revises the correcting amendment to Rule 54.307 that was published in the Federal Register on June 22, 2004 so as to reinstate the last sentence of Section 54.307(a)(4), which was erroneously deleted by clerical changes made in either the *Ninth Report and Order* or in the *June 22, 2004 Federal Register Notice*. Alternately, the Commission should rescind the *June 22, 2004 Federal Register Notice*.

Respectfully submitted,

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August 31, 2005