

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal	)	CC Docket No. 96-45
Service Seeks Comment on Proposals to	)	
Modify the Commission's Rules Relating to	)	
High-Cost Universal Service Support	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
REPLY COMMENTS**

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COOPERATIVE ASSOCIATION

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October 31, 2005

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## SUMMARY

A key element common to all four Federal-State Joint Board USF proposals is delegating the Commission's authority to define and allocate federal USF support to the state commissions through state block grant programs. In addition to violating the Communications Act of 1934 (Act) and the Tenth Amendment as NTCA discussed in its earlier comments,<sup>1</sup> the Commission would risk reversal and vacation of any delegation of its decision-making authority to state commissions over federal USF fund allocations under legal theories espoused in the *USTA II* decision.

Most commenters urged the Joint Board not to recommend state block grant programs, arguing that delegating the Commission's decision-making authority is illegal, will create unlawful unpredictability of support, and would add enormous regulatory costs to the industry. Commenters claimed that the state block grant program will do little to reduce the size or growth of the universal service fund, will place the Commission in the role of regulating and auditing the states to ensure compliance and accountability, and will discourage investment in needed rural telecommunications infrastructure. State block grant programs could cause universal service support to become insufficient for many small rural providers and would be too administratively complex. Furthermore, the state block grant proposals are beyond the scope of the Joint Board referral from the Commission and can impose significant burdens on urban customers within that state.

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<sup>1</sup> NTCA Comments, pp. 7-9.

The Joint Board should recommend that the Commission continue to allow rate of return carriers to use their study area average costs to recover their investment in the total network facilities needed to provide comparable rates and services to customers living in rural and high-cost areas. Basing federal USF support on statewide averages would reduce rural ILEC support dramatically and would significantly undermine a rural ILEC's ability to invest in its network.

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**REPLY COMMENTS  
OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

The National Telecommunications Cooperative Association (NTCA)<sup>2</sup> submits these reply comments in response to the initial comments filed on September 30, 2005, as part of the Federal Communications Commission's (Commission or FCC) public notice seeking comment on the four Federal-State Joint Board proposals in the above-referenced docket.<sup>3</sup> NTCA silence on any positions raised by parties in this proceeding connotes neither agreement nor disagreement with their positions or proposals. Unless specifically stated below, NTCA reasserts its positions described in its September 30, 2005 initial comments filed in this docket.

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<sup>2</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>3</sup> Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission's Rules Relating to High-Cost Universal Service Support, *Public Notice*, CC Docket No. 96-45, FCC 05J-1(rel. August 17, 2005) (Public Notice).

## I. INTRODUCTION

The Joint Board has offered for comment four thoughtful proposals to modify the FCC's rules concerning the future basis of high-cost universal service support for rural ILECs and competitive eligible telecommunications carriers (CETCs). Many interested parties have expressed their views on aspects of each proposal. NTCA submits the following reply comments summarizing those views and focusing on two critical aspects – state block grants and statewide averaging.

## II. THE JOINT BOARD SHOULD NOT URGE THE COMMISSION TO DELEGATE ITS USF MANDATES UNDER SECTION 254 TO STATE COMMISSIONS BECAUSE OF THE RISKS OF POLICY DRIFT AND JUDICIAL REVERSAL.

The Joint Board should not recommend that the Commission subdelegate its Section 254 obligations to state commissions through a state block grant program because the Commission may well find itself reversed, once again, after expending much effort at the state and federal level in reviewing the block grant applications. The state block grant proposal parallels an earlier proposal in the context of the Commission's Triennial Review Order (TRO), in which the Commission unsuccessfully subdelegated its Section 251(d)(2) decision-making authority on unbundled network elements (UNEs) to state commissions. *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).<sup>4</sup> On March 2,

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<sup>4</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, 18 FCC Rcd 16978, (August 21, 2003) (Triennial Review Order (TRO)), corrected by Errata, FCC 03-227, 18 FCC Rcd 19020 (September 17, 2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), 360 U.S.App.D.C. 202 (D.C.Cir. Mar. 02, 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, and 04-18

2004, the U. S. Court of Appeals for the District of Columbia Circuit in *USTA II* rejected the Commission’s decision to delegate its definitional, decision-making authority on impairment in the mass market to state commissions and held that the Commission had no authority to delegate that responsibility:

“We consider first whether the Commission’s subdelegation of authority to the state commissions is lawful. We conclude that it is not. ... When an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. See *NARUC*, 737 F.2d at 1143 n.41; cf. *Printz v. United States*, 521 U.S. 898, 922–23 (1997). Also, delegation to outside entities increases the risk that these parties will not share the agency’s “national vision and perspective,” *Stanton*, 54 F. Supp. 2d at 14, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme. In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship. The fact that the subdelegation in this case is to state commissions rather than private organizations does not alter the analysis. ... We therefore hold that, while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”

*USTA II*, 359 F.3d at 564-566. The Courts have permitted the Commission to delegate its fact-gathering function. *Assiniboine & Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 795 (9th Cir. 1986). The state block grant proposals, however, go beyond mere fact finding; rather, the state block grant proposals would delegate to states the authority to decide who receives federal funds and the level of federal USF funding. Once again, *USTA II* parallels arise:

“While the FCC has sought to characterize the state commissions’ role here as fact finding, see Order ¶¶ 186, 493, in fact the Order lets the states make crucial decisions regarding market definition and application of the FCC’s general impairment standard to the specific circumstances of those markets, with FCC

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(June 30, 2004). See also *United States Telecom Ass’n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court’s mandate through June 15, 2004) (*USTA II Stay Order*).

oversight neither timely nor assured. The Commission’s attempted punt does not remotely resemble nondiscretionary information gathering.”

*USTA II*, 359 F.3d at 567. The Joint Board should review the *USTA II* decision and consider its impact on the wasted state commissions efforts and the Commission’s own efforts in reviewing UNE mass market impairments before plunging the Commission again into “the risk of policy drift” and judicial reversal due to subdelegation.<sup>5</sup>

**III. COMMENTERS AGREED THAT THE COMMISSION SHOULD NOT DISTRIBUTE FEDERAL USF SUPPORT USING STATE BLOCK GRANTS.**

Nearly all of the commenters agreed that the Joint Board should not recommend that the Commission use state block grants as a means of distributing federal USF funds. Rural carrier trade associations, including the Montana Independent Telecommunications Systems (MITS), Montana Telecommunications Association (MTA), Independent Telephone and Telecommunications Alliance (ITTA), Minnesota Independent Coalition (MIC), Nebraska Rural Independent Companies (NRIC), the Washington Independent Telephone Association (WITA), and the Western Telecommunications Alliance (WTA), came out strongly against allocating federal support via block grants to states and delegating federal authority to state commissions to distribute federal support to eligible telecommunication carriers.<sup>6</sup>

Other rural carrier groups rejected the block grant program. Frontier and Citizens ILECs, a mid-sized holding company of rural carriers, urged the Commission to reject any proposal that supports block grants: “These proposals would create unlawful

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<sup>5</sup> See in accord AT&T Comments, p. 7; Frontier and Citizens ILECs Comments, pp. 10-12; MIC Comments, pp. 4-5; WTA and ITTA Joint Comments, pp. 5-6; ITCI Comments, pp. 6-8; NASUCA Comments, p. 29, n. 100; and NECA Comments, p. 4, n. 10.

<sup>6</sup> MITS Comments, pp. 5-9; MIC Comments, pp. 2-3, 6-8; NRIC Comments, p. 3; WTA and ITTA Joint Comments, pp. 10-21; and WITA, MTA, and Monroe Telephone Company Joint Comments, pp. 2-3.

unpredictability of support, would be unlawful delegations of federal authority and would add enormous regulatory costs to the industry without corresponding benefits.”<sup>7</sup> Texas Statewide Telephone Cooperative, Inc. (TSTCI) noted that “state allocation plans, such as being proposed, may be more costly and burdensome to administer than the current mechanism, and will do little to reduce the size or growth of the universal service fund. Such proposals place the Commission in the role of regulating and auditing the states to ensure compliance and accountability.”<sup>8</sup> Interstate Telecom Consulting Inc. (ITCI) opposed any plan that would allocate federal support distribution to the states, contending that any plan that would employ a state allocation/distribution method would: 1) create uncertainty and disruptions that will discourage investment in needed rural telecommunications infrastructure; 2) make the administration of the fund more expensive than the existing national system; 3) cause universal service support to become insufficient for many small rural providers.<sup>9</sup> General Communication, Inc. (GCI), Home Telephone Company, Inc. (HTC) and PBT Telecom (PBT) argue that states should not be given the authority to distribute federal high cost funds through block grants.<sup>10</sup>

Several trade associations, including NECA and NASUCA, expressed concern over any of the proposals that would allow state agencies to allocate federal high-cost support dollars at the state level.<sup>11</sup> NASUCA correctly notes that some states have lost jurisdictional control over requiring carriers to file cost studies.<sup>12</sup> CTIA – The Wireless Association (CTIA) contended that Section 254 of the Act does not allow the

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<sup>7</sup> Frontier and Citizens ILECs Comments, summary page.

<sup>8</sup> TSTCI Comments, p. 7.

<sup>9</sup> ITCI Comments, pp. 11-15.

<sup>10</sup> GCI Comments, p. 18; and HTC and PBT Joint Comments, p. 5.

<sup>11</sup> NECA Comments, pp. 4, 7; and NASUCA Comments, pp. 27- 29.

<sup>12</sup> NASUCA Comments, p. 28.

Commission to delegate responsibility for overseeing the federal USF funds to the states because: “the proposals leave the Commission with too little discretion to ensure that the responsibilities given to the FCC under the Act are fulfilled.”<sup>13</sup> CTIA also found the state block grant program to be too administratively complex given the existing reporting requirements to USAC and the need for wireless carriers to submit additional information in all 50 states.<sup>14</sup>

Non-rural companies expressed their objections to the state block grant proposal. AT&T called the proposal calling for block grants as “premature” and none of the proposals contains enough information to assess all consequences.<sup>15</sup> Bell South opposed allowing state commissions to determine how to distribute federal USF support among the eligible telecommunications carriers (ETCs).<sup>16</sup> BellSouth questioned the legality and the practicality of delegating the responsibilities to 51 different jurisdictions.<sup>17</sup>

While Qwest Communications International (Qwest) and three state public service commissions (Maine, Vermont and Oregon) supported state block grants,<sup>18</sup> none of these supporters examined the legal complexities involved in delegating the Commission’s decision-making authority to an outside agency. See Section II regarding *USTA II, supra*. The Regulatory Commission of Alaska (RCA), however, warned against using state block grants and said that: “Any state block program should also recognize that a state’s universal service program can impose significant burdens on urban

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<sup>13</sup> CTIA Comments, pp. 15-16.

<sup>14</sup> *Id.*, p. 18.

<sup>15</sup> AT&T Comments, pp. 2, 6.

<sup>16</sup> BellSouth Comments, pp. 2-4.

<sup>17</sup> *Id.*, p. 5.

<sup>18</sup> Qwest Comments, p. 14; Maine Public Utility Commission and Vermont Public Service Board Joint Comments, p. 3; and Public Utility Commission of Oregon Comments, p. 10.

customers within that state.”<sup>19</sup> Other commenters attempted to discourage the Joint Board from recommending state block grants. Balhoff & Rowe asserted that high cost fund support should not be block granted or awarded through a “state allocation mechanism.”<sup>20</sup> TDS Telecommunications Corp. is also concerned about the complexity of state block grants.<sup>21</sup>

#### **IV. STATEWIDE AVERAGING SHOULD NOT BE PART OF THE JOINT BOARD’S FINAL USF RECOMMENDATIONS.**

The Joint Board should recommend that using study area average costs within the universal service rule framework best ensures that rural customers receive comparable services. If statewide averages, rather than study area averages, were used, then rural ILEC support would reduce dramatically and, consequently, undermine rural ILECs’ ability to invest in their networks. Rate of return rural carriers must be allowed to recover their investment costs using study area averages because these carriers cannot rely on low-density urban centers to offset costs. Statewide averaging would not provide sufficient support for rural ILECs.

Several commenters agreed that federal USF support should be based on study area averages, not statewide averages. Large and small rural companies and trade associations rejected the statewide average approach, including Frontier and Citizens ILECS, GCI, HTC, PBT.<sup>22</sup> TSTCI gives an example of the effect that statewide averaging would have on rural Texas ILECs : “In Texas, the TSTCI companies serve approximately 50% of the geography but less than 2% of the customers. ... The five-year

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<sup>19</sup> RCA Comments, p. 8.

<sup>20</sup> Balhoff & Rowe Comments, p. 3.

<sup>21</sup> TDS Comments, p. 7.

<sup>22</sup> Frontier and Citizens ILECs Comments, pp. 4-6; GCI Comments, p. 14; and HTC and PBT Joint Comments, pp. 5-6.

average amount of invested capital for 44 rural Texas companies is \$2,350.00 per line, however, SBC's five-year average amount of invested capital is \$971.00 per line.<sup>23</sup>

TSTCI uses this example to demonstrate that “the large disparity in average investment per line between the rural companies and the largest company in Texas shows how the statewide average cost can be skewed on a state-by-state basis.”<sup>24</sup> NRIC contends that statewide averaging will not provide adequate support for rural states and may result in incomparable rates across rural and urban areas.<sup>25</sup> WTA and ITTA contend that statewide area consolidation will discourage industry investment and will reduce targeting of federal high-cost support to the high-cost areas where it is most needed.<sup>26</sup>

State commissions are opposed to statewide averaging, as well. The Regulatory Commission of Alaska opposed the use of rigid statewide averaging and contended that any proposal should recognize that rural companies differ from non-rural companies: “Universal service support is generally developed based on individual company costs without consideration of statewide costs. ... As customers nationwide benefit by universal service, regardless of what state they live in, it is unreasonable to place an artificial boundary (*i.e.*, the state geographic area) as the dividing line between state and federal universal service responsibilities.”<sup>27</sup> RCA correctly describes the disparities that would arise from statewide averaging: “Not all states would have equitable responsibilities for universal service under this system. Alaska would be given responsibility for supporting universal service costs within its state boundary of 615,000

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<sup>23</sup> TSTCI Comments, p. 9, n. 9.

<sup>24</sup> *Id.*

<sup>25</sup> NRIC Comments, p. 7.

<sup>26</sup> WTA and ITTA Joint Comments, pp. 22-24.

<sup>27</sup> RCA Comments, p. 7.

square miles. In contrast ten states would be given cost responsibility within state borders of less than 30,000 sq. miles.”<sup>28</sup> NECA also questioned the economic sense of statewide averaging.<sup>29</sup>

## V. CONCLUSION

For all the reasons set forth in NTCA’s initial comments, the Joint Board should reject all proposals to delegate the Commission’s decision-making authority over federal USF support to the state. Furthermore, the Joint Board should not support the use of statewide averaging of costs in calculating USF support.

Respectfully submitted,

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<sup>28</sup> *Id.*

<sup>29</sup> NECA Comments, p. 6.

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in CC Docket No. 96-45, FCC 05J-1 was served on this 31<sup>st</sup> day of October 2005 either by first-class, United States mail, postage prepaid, or via electronic mail to the following persons.

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