

**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)	
)	
High Cost Universal Service Support)	WC Docket No. 05-337

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance (“RICA”) files these Comments in response to the Notice of Proposed Rulemaking (“NPRM”) in this Proceeding.¹ RICA is a national association of competitive local exchange carriers (“CLECs”) providing service in rural areas. RICA members are all affiliated with Incumbent Rural Telephone Companies. RICA members are directly impacted by the rules at issue in this proceeding and the court’s decision in *Qwest II*.²

I INTEREST OF RICA

RICA member CLECs provide facilities based competition exclusively in rural areas. These CLECs generally operate in exchanges of much larger carriers adjacent to their affiliated ILEC. These areas are typically low density, high cost areas in which the large company neither maintained nor upgraded its facilities, and did not provide any local point of contact with the result that subscribers were highly dissatisfied. When the

¹ FCC 05-205, 12.9/05

² *Qwest Corp. v. F.C.C.*, 398 F.3d 1222 (10th Cir. 2005).

rural CLECs overbuilt these ill-maintained and obsolete facilities of the incumbent, they quickly obtained substantial market share.³

Two key elements of the Commission's Universal Service mechanism have, in operation, worked to deny USF support to these rural CLECs where they operate in areas for which a rural ILEC would receive meaningful support. First, the "portability" rule, Section 54.307, denies rural CLECs the opportunity the rural ILECs have to demonstrate that their cost of service is sufficiently high that a portion of their cost recovery should come from the USF. Instead, a rural CLEC receives USF support only to the extent that the ILEC with which it competes receives support. There is no rational basis for this rule, especially in the context of rural CLECs competing in only a small portion of the geographic footprint of much larger carriers. In addition, the rule has had the apparently unanticipated consequence of creating a very significant growth in the total fund because it tends to benefit wireless carriers that have very different cost structures from ILECs.⁴

Second, even assuming, *arguendo*, that the "portability" rule has a rational basis, because the non-rural USF mechanism provides support only in states which have well above average statewide costs, as determined by the Commission's model, CLECs operating in high cost areas of average cost states get no support. This denial of support

³ See, *Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules*, CC Doc. No. 96-45, FCC 06-29, rel. Mar. 15, 2006; *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It To Be An Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Notice of Proposed Rulemaking, WC Doc. 02-78, 19 FCC Rcd. 23070 (2004).

⁴ Although the "portability" rule decouples support from costs, all support recipients are still required to certify that they use the support only for the purposes intended. 47 C.F.R. 54.7, 54.313 The Commission has never explained how such certifications can be made, or audited, where there is no connection between the amount of support received and a carrier's cost of providing the supported services.

occurs despite the fact that the CLEC's legitimate cost of providing the quality service in is substantially above the ILEC's study area average cost. The result is that neither the ILEC nor the CLEC receives support for high cost areas. These are areas that the ILEC has historically underserved, yet the non-rural model is based on the unlikely proposition that the ILEC, facing more competition in its urban markets, will devote resources to maintaining and upgrading its rural areas.

These two irrational rules, which provide windfalls to many CMRS carriers, deny support to facilities based CLECs in high cost areas, and deny support to the high cost areas of non-rural ILECs, are at the core of the issues raised by the 10th Circuit's Decision in *Qwest II*. While RICA members' immediate concerns would be largely addressed by elimination of the "portability" rule, in the long run it is important to all carriers and their subscribers that the entire Universal Service Mechanism be made rational and consistent with the Congressional objective and the that the problems identified by the 10th Circuit be properly resolved. In the short run, if the Commission continues to fail to act on the long standing "portability" phase of this docket, it should at least provide support to non-rural ILECs in their high cost areas, regardless of their state-wide average costs.

Finally, although the Court has required the Commission to resolve the problems with the definitions in the context of the non-rural USF mechanism, it is apparent that any revision of the definition of basic terms of the Act will be applicable to the rural USF mechanism as well. Thus rural CLECs, who are now, or may become, subject to those rules have an interest in this proceeding.

II DEFINITIONS OF ‘SUFFICIENT’ AND ‘REASONABLY COMPARABLE’

- A. Definitions of Act Terms Must Be Consistent With Purpose of Act, Rather than to Achieve Some Predetermined Objective.

The NPRM correctly recognizes that the Commission’s task is to revise its definitions so that they take into account all of the principles and objectives of the Act.⁵ RICA recognizes the difficulties inherent in this undertaking, but suggests that the third trip of these questions to the Court is more likely to be successful if the Commission can avoid the temptation to try to define terms with predetermined objectives in mind on such issues as which carriers get support and how much. At the same time it is true that ultimately the money raised to make support payments comes from subscribers and that at some point the amount of contribution required may be either economically or politically unsustainable, but until the Commission goes through the exercise which the Court has now required, it really can not determine where that point is.

- B. “Sufficient” support is support that is likely to lead to provision of service that reasonably reflects all the principles of Section 254(b).

As stated above, the NPRM recognizes the court’s requirement that it evaluate the sufficiency of its USF mechanisms in relation to all of the principles in the Act, and that the Commission does have authority to seek a balance where equal compliance with all principles is not achievable.⁶ The principles in Section 251(b) of the Act are generally not in conflict, but reflect different aspects of the meaning of “service” and must be read in the context of Section 254(b)’s reference to preservation *and* advancement of universal

⁵ NPRM at para. 7.

⁶ NPRM at para. 8.

service and Section 254(c)(1) which states that universal service is an “evolving level” of services.

The placement of the term “quality” at the beginning of the list of principles makes clear that Congress did not intend for services supported by the USF to be inferior in quality, while at the same time it added to the traditional requirement of “just and reasonable” the principle of affordability.⁷ The Congressional intent that universal service should evolve to “advanced” services is stated in both subsections (2) and (3) of Section 254(b). Section 254(b)(5) implicitly recognizes that investment by carriers is required if consumers are to receive services and that sufficiency of support is measured not just in economic terms, but that it must be specific and predictable. Specific means that the amount of support can be accurately determined. Predictable recognizes that in a capital intensive industry, substantial unpredictable variations in revenue over time are a disincentive to investment.

The only potential for conflict between the principles of Section 254(b) arises when the price tag for meeting these principles becomes too great with the result that the contributions requirements themselves threaten the affordability of service. The Commission’s challenge is thus to develop programs based upon the principles, but which do not overburden the subscribers who pay for them. In order to reduce this potential conflict, the Commission should obtain valid, current estimates of underlying costs which will be incurred as services evolve, which costs are not obtainable from the

⁷ It is important to keep in mind the distinction between service and facilities, and to recognize that aspects of a service are generally not themselves a service. Thus the Commission’s list of supported “services,” 47 C.F.R. 54.101, is more accurately a list of the essential attributes of basic telephone service.

existing cost model which is obsolete and in any event, never properly validated.

Second, the Commission should revise its rules to eliminate provisions such as the “portability” rule which provides support without any requirement for showing of need.⁸

- C. “Reasonably Comparable” means that rural subscribers obtain services at quality levels and rates that are not substantially different from those of urban subscribers.

The essential reason RICA members were able to obtain sufficient market share to overbuild the networks of large carriers in rural areas is that the large carriers did not provide reasonably comparable service. Subscribers were motivated to choose an alternative carrier primarily by differences in quality. These differences included not only modern features and basic reliability and signal quality, but also the availability of local contacts and management who could communicate with subscribers and understand their circumstances. As discussed in Section I, above, the failure of the present system to provide support in rural areas to either the non-rural ILEC or the CLEC competing with them, means that the system is not consistent with the principles of the Act.

This is not to say that comparable rates are not important also. RICA agrees with the proposal in the NPRM to determine rate comparability by looking at both local and long distance rates⁹. A valid comparison of local rates on a national level is simply unattainable for several reasons. First, the vast differences in calling scope between urban and rural areas illustrate that the word “local” is insufficient for a valid comparison. Second, substantial changes in the market since 1966, including the bundling of services and the absorption of the major stand-alone interexchange carriers

⁸ Because the portability rule treats differently situated entities as if they were identical, it actually violates the “competitive neutrality” principle added by the Commission.

⁹ NPRM at para. 21.

by the large ILECs have substantially reduced the significance of the local-toll distinction from the consumer's perspective.

III CONCLUSION

In order to satisfy the Court that it has adopted Universal Service rules consistent with the Act, the Commission must adopt a mechanism designed to achieve comparability in service quality as well as rates. To accomplish this goal, the Commission should abandon its state-wide averaging approach to non-rural support. At the same time, the Commission should abandon the "portability" rule in order to both encourage legitimate competition in the rural areas served by non-rural carriers and to eliminate the pressure on the size of the fund resulting from windfall payments whose use is essentially unauditible.

Respectfully submitted

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March 27, 2006

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Comments of the Rural Independent Competitive Alliance was served this day by electronic means on the following:

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