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

In the Matter of)	
)	
Federal-Joint Board on Universal Service)	CC Docket No. 96-45
)	
Merits of Using Auctions to Determine High-Cost)	WC Docket No. 05-337
Universal Service Support)	

To: Federal-State Joint Board on Universal Service

**COMMENTS OF CROSS TELEPHONE COMPANY, CIMARRON TELEPHONE
COMPANY, POTTAWATOMIE TELEPHONE COMPANY, CHICKASAW
TELEPHONE COMPANY, AND SALINA-SPAVINAW TELEPHONE COMPANY**

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Cross Telephone Company, Cimarron Telephone Company, Pottawatomie Telephone Company, Chickasaw Telephone Company, and Salina-Spavinaw Telephone Company (the "Oklahoma Carriers") respond to the Joint Board's request for comment on the use of reverse auctions to determine high cost universal service support to eligible telecommunications carriers ("ETCs") pursuant to Section 254 of the Communications Act of 1934, as amended (the "Act").¹

I. INTRODUCTION & SUMMARY

The Oklahoma Carriers provide, directly or through affiliates, local exchange, exchange access, Internet access, long-distance, wireless, and other telecommunications and information services in rural areas of Oklahoma. Each of the Oklahoma Carriers is a rural telephone company, as defined in Section 153(37) of the Act.²

¹ Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support*, WC Docket No. 05-337, CC Docket No. 96-45, FCC 06J-1 (rel. Aug. 11, 2006) ("Public Notice").

² 47 U.S.C. § 153(37).

The Oklahoma Carriers oppose the use of reverse auctions (also referred to as “competitive bidding”) to determine ETC designations or universal service high-cost fund support levels. As an initial matter, reverse auctions appear to be irreconcilable with several universal service mandates set forth in the Act. For example, a reverse auction of universal service support likely would: (1) contravene the universal service principles set forth in the Act requiring, among other things, that support be “sufficient” and “predictable” to ensure provision of affordable, high-quality telecommunications services and advanced services to rural communities; (2) run afoul of the Act’s exemption of rural carriers from obligations to make their networks available to competitive carriers; and (3) infringe on the authority reserved for the states by making pronouncements on the number of ETCs in a service area and the optimum geographic area for support. The Joint Board must work through each of these statutory issues before recommending use of reverse auctions.

Furthermore, implementation of a reverse auction scheme presents practical issues that likely would be insurmountable. Issues surrounding criteria for choosing a winning bidder, the duration of ETC designations, minimum performance standards, transition between outgoing ETCs and winning bidders (including stranded investment), and remedies where ETCs fail to meet their obligations, all would likely have profound impacts on rural communities. Especially in instances where a competitive ETC becomes the carrier of last resort, and fails to adequately maintain the public switched telephone network in a study area, rural communities could face economic and public safety consequences.

If the Joint Board or the Commission seek to lower the burdens on consumers that contribute to the universal service fund, there are far more prudent measures that should be taken before reverse auctions should be considered. The growth of the universal service high-cost fund

stems from the overly permissive designation and funding of competitive ETCs. To that end, the Oklahoma Carriers propose that the Joint Board recommend that the Commission adopt stringent, mandatory criteria for designating competitive ETCs, including a rebuttable presumption that designation of multiple ETCs in rural markets does not serve the public interest. This step, alone, would result in a substantial reduction in the size of the high-cost fund by eliminating funding where such entities do nothing to expand service coverage or otherwise enhance service to consumers.

Notwithstanding the many issues counseling against adoption of reverse auctions, if the Joint Board decides to recommend their use, auctions should be used only to allocate the support provided to competitive ETCs. In no event should the Joint Board recommend any system that would jeopardize support to the ILEC as the carrier of last resort in each rural service area.

For these reasons, the Joint Board should not recommend use of reverse auctions in the administration of universal service high-cost support.

II. REVERSE AUCTIONS APPEAR CONTRARY TO SEVERAL OF THE ACT'S REQUIREMENTS

The Public Notice requests that parties "comment on how the concept of utilizing competitive bidding to administer certain functions in the universal service program fits into the statutory scheme established by Congress."³ As the Joint Board recognizes simply by asking this question, there is much reason to doubt that competitive bidding could be reconciled with the Act. The major thrust of the reverse auctions proposal is to minimize the cost of universal service to consumers who contribute to the fund. Of course, the Joint Board and the Commission

³ Public Notice at ¶ 5.

should strive for responsible administration of the universal service fund, but the goal of driving down costs must not take precedent over the Act's explicit mandates.

First, the Commission must ensure that a reverse auction framework is consistent with the enumerated universal service principles in Section 254 of the Act. Section 254 requires not only that supported telecommunications service be affordable, but also that the universal service fund support "quality services" that are "reasonably comparable to those services provided in urban areas."⁴ The federal universal service fund also must promote the deployment of advanced telecommunications services and information services.⁵ In order to meet these goals, Congress mandated that support must be "specific, predictable and sufficient."⁶

A reverse auction process raises serious questions as to service quality and investment incentives. It is troubling that the Public Notice goes so far as to ask "whether winning bidders should be selected solely based on price, or whether other factors [such as service quality and greater service capabilities] should inform the decision."⁷ The Oklahoma Carriers respectfully suggest that service quality and capabilities not only should "inform the decision" of which carriers receive support, but that the Act requires that these statutory requirements must be *primary factors* in the Commission's decision.

Moreover, any system in which support could terminate every few years, based on which company is willing to take the least amount of funding, by definition, undercuts the predictability of how much support, if any, will be available in any market, contrary to Section 254 of the Act. Auction participants likely would be tempted to bid below what is necessary to

⁴ 47 U.S.C. §§ 254(b)(1), (3).

⁵ *Id.* § 254(b)(2).

⁶ *Id.* § 254(b)(4).

⁷ Public Notice at ¶ 12.

provide the quality services that the statute demands, in order to at least receive *some* universal service high-cost support. Such a result could degrade services to rural America and would not be supported by Section 254 of the Act.

Second, there are considerable issues as to the relationship between a competitive bidding regime and the Act's exemption of rural telephone companies from the requirement to make their network elements available to competing carriers.⁸ The "Discussion Proposal" appended to the Public Notice suggests that "the ETC relinquish or share at fair market value any essential facilities or rights" necessary "to provide universal service."⁹ This proposal appears to be contrary to Congressional intent. The Joint Board should be mindful of the rural telephone company exemption set forth in Section 251(f)(1) of the Act, and consider whether the Commission has the statutory authority to require a rural ILEC to sell or lease some or all of its network to a reverse auction winner.

Third, as the Public Notice recognizes, "[t]he Act specifies an important role for State commissions in the designation of carriers eligible to receive universal service support."¹⁰ In particular, with regard to areas served by a rural telephone company, the state has discretion to determine whether to designate more than one ETC,¹¹ and may do so only upon a finding that such designation will serve the public interest.¹² Further, for each ETC designation, the Act specifies that ETCs serving areas served by a rural telephone company must be designated for the rural company's entire study area, "unless and until the Commission *and the States*, after

⁸ 47 U.S.C. § 251(f).

⁹ Public Notice, Attachment, Section IV.

¹⁰ *Id.* ¶ 7.

¹¹ 47 U.S.C. § 214(c)(2).

¹² *Id.*

taking into account recommendations of a Federal-State Joint Board” establish a different definition of service area for the particular rural telephone company.¹³ The states also are empowered to determine whether the rural exemption should be maintained or lifted for rural telephone companies within its jurisdiction.¹⁴ Thus, any determinations that the Joint Board makes with regard to federal mandates regarding: (1) designation of competitive ETCs; (2) the geographic area for support different from the rural carrier’s study area; and (3) use of the networks of rural telephone companies by competitive ETCs must be reconciled with the requirements set forth in the Act.

In sum, the Joint Board faces significant statutory hurdles in recommending a reverse auctions scheme.

III. A REVERSE AUCTION SCHEME WOULD PRESENT A HOST OF PRACTICAL PROBLEMS

In addition to the statutory hurdles that face a reverse auction framework for universal service, implementation of a reverse auction system would pose significant practical concerns. The Commission and the Joint Board already have rejected competitive bidding for universal service support because of the administrative complexities competitive bidding would pose.¹⁵

¹³ *Id.* § 214(e)(5) [emphasis added].

¹⁴ *Id.* § 251(f).

¹⁵ *See, Federal-State joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 324 (1997) (noting the “limited utility” of a reverse auction system and the need for further study). The Commission and Joint Board have subsequently sought comment on reverse auctions, each time identifying considerable administrative questions surrounding such an approach to universal service management. *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission’s Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*. CC Docket No. 96-45, Public Notice, 18 FCC Rcd 1941 ¶ 20 (2003); *see also Federal-State Joint Board on Universal Service: Promoting Deployment and Subscriberhip in Unserved and Underserved Areas*.

Most importantly, the Joint Board and the Commission must ensure that rural communities that rely on supported telecommunications and advanced services continue to receive high-quality telecommunications services, and do not experience any deterioration in service as a result of any competitive bidding experiment.¹⁶ But a reverse auction system that rewards the cheapest service above all else, and which adds uncertainty as to whether support will end after a specified term, would likely cause a sharp decline in service quality and network investment.

Any fixed ETC term would pose problems. The shorter the ETC term, the greater the likelihood of stranded investment, dampening incentives to invest in capital intensive projects. Although longer terms would provide greater certainty, longer terms would also lock in cost assumptions for longer periods of time, and would potentially stifle the winning ETC's ability to deploy changing technologies and meet evolving consumer demands over the course of the ETC's term. Moreover, *any* fixed ETC term would dampen investment incentives over time,

Including Tribal and Insular Areas, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177, ¶¶ 93-114 (1999); *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45 Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (following up the 1999 Further Notice of Proposed Rulemaking by choosing to use competitive ETC designation criteria other than competitive auctions).

¹⁶ As explained by FCC Commissioner Michael Copps:

Rural carriers face unique and very serious challenges to bring the communications revolution to their communities. As we move forward on all of our proceedings, including, among others, universal service decisions . . . we just must do everything we can to make certain that we understand the full impact of our decisions on rural America. If we get it wrong on these rural issues, we will consign a lot of Americans to second-class citizenship.

Statement of Michael J. Copps, Commissioner, Federal Communications Commission, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, Feb. 26, 2003, at 4.

as the end of the term approaches. It is hard to imagine an ETC would risk capital on a network that it soon might be required to turn over to a new auction winner.

Inherent in any reverse auction scenario are issues involving the transition from supporting an outgoing ETC to supporting the new winning bidder. This would be particularly problematic if the bidding would replace the ILEC, the only service provider with a ubiquitous network in many service areas. It is unclear under what authority the Commission could require rural ILECs to open their networks to the incoming new ETC.¹⁷ And it seems axiomatic that the ILEC could not continue to maintain and invest in its network without universal service support. Conversely, the Joint Board asks whether an ILEC that does not win support through the auction process should be “relieved of certain pricing, service, carrier of last resort, or other regulation.”¹⁸ The answer is a resounding “Yes.” ILECs currently receive support based on documented costs, which are commensurate with the higher regulatory obligations shouldered by ILECs. If the ILEC ceases to receive universal service support, it no longer should bear the substantial costs of carrier of last resort obligations and dominant carrier regulation.

The reverse auctions process also promises to be an administrative nightmare, posing countless difficulties. The very act of choosing the auction winner (or winners) would be fraught with difficulties. As described above, the decision must be based on more than pure dollars. For example, the Commission would need to decide, among other things, a set of national criteria for the geographic area to be served, the services to be offered, performance criteria, and the rates at which service should be provided (to ensure affordability). The selection process presumably would need to use a sliding scale for when higher service quality and

¹⁷ See 47 U.S.C. § 251(f).

¹⁸ Public Notice at ¶ 13.

investment levels would be selected over lower costs. More difficult still would be to discern when a bid is “too good to be true.” In a reverse auction framework, potential ETCs would face considerable pressure to under-bid, making it unlikely that some ETCs would be able to comply with the terms of their bid proposal if selected.

The administrative difficulties of reverse auctions would only increase after the auction is complete, as the Commission attempts to monitor compliance with the Act, any minimum standards adopted by the Commission, and other commitments set forth in the winning bids. As part of this review, the Commission must ensure that the federal universal service support is being used for the purpose that the support was intended.¹⁹ The winning bidder should also be required to demonstrate that it is upholding all applicable quality of service and investment criteria, whether those criteria are national minimum standards or case-by-case standards that led to the selection of a particular company to receive support.

Inevitably, some winning bidders will fail to comply with the terms of their bids, and enforcement will be required. The potential repercussions of failure to meet ETC responsibilities could be huge. Failure to maintain and invest in telecommunications infrastructure could jeopardize the reliability of the communications network in a service area. Beyond the inconvenience of unacceptable service quality or lack of customer support, degradation of a community’s communications network could have with implications for public safety. Less quantifiable, but equally important, would be trying to calculate the negative effect of network and service degradation on the economy in rural communities. In short, choosing a winning bidder that cannot uphold its responsibilities could be devastating for rural consumers and the country as a whole.

¹⁹ 47 U.S.C. § 254(e).

IV. THERE ARE BETTER WAYS THAN AUCTIONS TO EASE THE BURDENS OF THE FUND ON SUBSCRIBERS

Competitive bidding is an extreme way to address the burdens of the universal service high-cost support on subscribers. There are many steps that the can be taken before resorting to this type of wholesale change to the fund.

One obvious step would be to restrict the number of ETCs in a rural market to the ILEC and at most one competitive ETC. Over the last several years, competitive ETC funding has been, by far, the single largest driver of growth in the universal service high cost fund.²⁰ The Oklahoma Companies respectfully suggest that, for the typical service area that is eligible for high-cost funding, one competitive ETC could be optimal to provide consumer choice and the competitive dynamic that can drive superior innovation and service quality. Indeed, in rural areas, Congress set forth a rebuttable presumption that only the ILEC would receive federal universal service support.²¹ The competitive ETC designation process has gone awry, however, making designation of multiple competitive ETCs routine in many states, with denials of competitive ETC certifications few and far between. The Joint Board should recommend that the Commission adopt a presumption that designation of multiple competitive ETCs in a study area does not serve the public interest. The more modest step of limiting the number of competitive ETCs in a study area is a more reasonable approach to reducing the funding burden than layering on the risks and complexities of a reverse auction.

The Commission also should curb abuse of the fund by adopting mandatory certification guidelines that hold competitive ETCs to a comparable standard in order to warrant

²⁰ McLean & Brown, *Universal Service, Rural Infrastructure at Risk*, at 25 (April 2006) (demonstrating that competitive ETC funding has been the largest contributor to fund growth since 2003).

²¹ 47 U.S.C. § 214(e).

federal funding at the same level as the ILEC. Just like ILECs, competitive ETCs should be required to document what investments they have made in the market in order to justify the support they receive. As is the case for ILECs, support should be based on documented, actual investment, and *not* based on promises of future expenditures. Further, the Commission's competitive ETC guidelines should be made mandatory.²² Requiring competitive ETCs to justify their support will better ensure that competitive ETCs use universal service support to benefit consumers and not just their shareholders.

V. ANY REVERSE AUCTIONS EXPERIMENT SHOULD INCLUDE ONLY COMPETITIVE ETCs

As discussed above, universal service reverse auctions would threaten to harm service quality and investment in rural communities, and would be administratively unworkable. If, however, the Joint Board determines to recommend the use of reverse auctions, that recommendation should limit the use of reverse auctions to competitive ETCs. Rural ILECs are the carriers of last resort in their study areas. While competition serves the public interest in many rural study areas, competition is a luxury compared to the importance of ensuring the continued viability of the ILEC network through continued universal service support.

In most of the markets served by the Oklahoma Carriers, there would be no voice, broadband or mobile service without the ILEC network. In contrast, if one takes the ILEC out of the reverse auction equation, the public interest risks are somewhat diminished: Rural consumers would still be assured of the continued provision by the carrier of last resort of high-quality, highly reliable wireline telecommunications service and information services. Such a

²² See *Federal-State Joint Board on Universal Service*, Petition for Reconsideration of Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and TDS Telecommunications, CC Docket No. 96-45 (filed June 24, 2005) (requesting, among other things, that the Commission impose mandatory competitive ETC designation criteria).

limitation on reverse auctions would thus decide only which carrier would serve as the second ETC in the area (and subsequent ETCs, as applicable), without putting the carrier of last resort at risk.

VI. CONCLUSION

For the foregoing reasons, the Joint Board should decline to recommend reverse auctions for high cost universal service support, and instead should urge the Commission to adopt more stringent, mandatory standards for competitive ETC designation and receipt of support. If auctions are pursued, they should be approached with caution, to avoid disastrous results in rural markets. At a minimum, further study is needed, and at least the carrier of last resort must continue to receive sufficient support.

Respectfully submitted,

/s/

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