Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption"	)	WC Docket No. 08-152

To: Wireline Competition Bureau

REPLY COMMENTS OF THE USA COALITION

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SUMMARY

The USA Coalition consists of eight of the nation's leading rural providers of wireless services, and is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The Coalition seeks to ensure that our nation's universal service programs are technologically and competitively neutral, which ultimately will facilitate competition that benefits consumers.

The AT&T Petition does not address universal service reform. Nonetheless, various parties addressed universal service reform in their initial comments regarding the AT&T Petition. Accordingly, the USA Coalition files these reply comments to emphasize the importance of rejecting any proposal:

- to use universal service support to insulate certain carriers from the economic impact of intercarrier compensation reform; or
- to extend the interim cap on support for competitive eligible telecommunications carriers ("competitive ETCs").

The USA Coalition agrees with the New York State Department of Public Service, TEXALTEL, and Feature Group IP that the nation's universal service programs must be technologically and competitively neutral.

The use of universal service funds to shield specific carriers from the economic impact of intercarrier compensation reform would be fundamentally inconsistent with the 1996 Act. Any intercarrier compensation reform predicated upon simply providing additional universal service support to offset shrinking revenues for any carrier without regard to geography – or, more importantly, to the statutory framework for universal service – is a failure. Under the 1996 Act, universal service support must be used in a technologically and competitively neutral manner solely to achieve universal availability of affordable services for all consumers.

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REPLY COMMENTS OF THE USA COALITION

The Universal Service for America Coalition ("USA Coalition" or "Coalition"),[1] by its attorneys, hereby submits these reply comments in the above-captioned proceeding[2] to consider the petition for interim declaratory ruling and limited waivers filed by AT&T Inc. on July 24, 2008 (the "AT&T Petition").[3] The AT&T Petition does not address universal service reform. Nonetheless, various parties addressed universal service reform in their initial comments regarding the AT&T Petition. Accordingly, the USA Coalition files these reply comments to emphasize the importance of rejecting any proposal:

- to use universal service support to insulate certain carriers from the economic impact of intercarrier compensation reform; or
- to extend the interim cap on support for competitive eligible telecommunications carriers ("competitive ETCs").

The USA Coalition agrees with the New York State Department of Public Service, TEXALTEL, and Feature Group IP that the nation's universal service programs must be technologically and competitively neutral.

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1 The members of the USA Coalition include Carolina West Wireless, Cellular One, Cellular South, Corr Wireless Communications, Mobi PCS, SouthernLINC Wireless, Thumb Cellular LLC and US Cellular.

2 *See* Public Notice on the AT&T Petition for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152, DA 09-1725 (rel. July 24, 2008) ("Public Notice").

3 Petition of AT&T Inc. For Interim Declaratory Ruling and Limited Waivers, *Petition of AT&T inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption,"* WC Docket No. 08-152 (filed July 17, 2008).

INTRODUCTION

The USA Coalition consists of eight of the nation's leading rural providers of wireless services, and is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The Coalition seeks to ensure that our nation's universal service programs are technologically and competitively neutral, which ultimately will facilitate competition that benefits consumers.

A vibrant, robust, and redundant communications network is essential to the economic strength of the United States and the public safety of its citizens. In order to ensure the strength of the communications network in rural, insular, and high-cost areas, service must be affordable to residents of those areas. In some rural, insular, and high-cost areas, however, service will be affordable only with support from the Universal Service Fund ("USF").

Universal service support must be made available in a technologically and competitively neutral manner so that technological innovation can be implemented into the communications network as rapidly and efficiently as possible.[4] Favoring one type of technology or class of carriers, whether explicitly or implicitly, will only slow the integration of technological innovation into the communications network and increase inefficiencies.[5] The USA Coalition

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4 *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); *see also infra* note 17 discussing principles of competitive neutrality.

5 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, ¶ 7 (Aug. 8, 1996) ("By reforming the collection and distribution of universal service funds, the states and the Commission would ensure that the goals of affordable service and access to advances services are met by means that enhance, rather than distort, competition.") (*Local Competition Order*).

believes that allowing residents and businesses in rural, insular, and high-cost areas to select the services, technologies, and service providers of their choice is the best means for ensuring the vibrancy, robustness, and redundancy of the communications network.

Support also must be allocated and distributed in the manner that best facilitates the universal availability of affordable services. This goal requires the Commission to focus primarily upon the consumer, rather than upon the service provider.[6] Consumers want, and need, the ability to choose among various types of affordable services, service providers, and technologies. The support distribution methodology should neither encourage nor require any carrier to become more inefficient, or to comply with unnecessarily burdensome requirements, merely to receive universal service support. At a minimum, mandated inefficiency increases the cost of providing service, which will cause the fund to grow unnecessarily. In a worst case scenario, carriers would choose to forgo support and not offer service, which would limit the options available to consumers in rural, insular, and high cost areas where support is necessary to ensure the availability of affordable services. Therefore, the USA Coalition urges the Commission to ensure that universal service support is distributed as efficiently as possible in a technologically and competitively neutral manner. Because competitive ETCs now contribute more than 40% of the Fund,[7] the USA Coalition has an interest in ensuring that all carriers and their affiliates, not solely competitive ETCs, are encouraged to utilize funds efficiently.

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6 *See Alenco Commc'ns v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.").

7 *See* Telecommunications Industry Revenues 2006, FCC Wireline Competition Bureau, Industry Analysis & Technology Division, Table 12 (rel. August, 2008).

I. UNIVERSAL SERVICE SUPPORT SHOULD NOT BE USED TO INSULATE SOME CARRIERS FROM THE ECONOMIC IMPACT OF INTERCARRIER COMPENSATION REFORM

The initial comments of some parties urge the Commission to reform intercarrier compensation, but only if the agency uses the USF to insulate them from the economic impact of reform.[8] For example, the National Telecommunications Cooperative Association ("NTCA") claims that "[rate-of-return] carriers need to recover costs lost to declining access revenues through increases in [rate-of return] rural ILEC Interstate Common Line Support."[9] Similarly, both the United States Telecom Association and Windstream Communications make clear that they expect intercarrier compensation reform and USF reform to be a zero sum game for the incumbent LECs; to the extent intercarrier compensation is reduced, they expect the shortfall to be made up by the USF.[10] These carriers, like AT&T, all want universal service support to defray a portion of local landline carriers' annual revenue losses resulting from any mandated intercarrier compensation rate decreases.[11]

The USA Coalition joins the opposition of the New York Department of Public Service ("NYDPS"), TEXALTEL, and Feature Group IP to the use of universal service support to shield specific carriers from the economic impact of intercarrier compensation reform. The use of universal service funds to protect any specific carrier's revenues is inappropriate, particularly in a competitive market.[12] As the NYDPS correctly points out, "the effect of this proposal would be to move $1.5 billion in access revenues, which are presently at risk due to intermodal

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8 The Commission cannot effectuate universal service reform as a by-product of this proceeding, which was initiated to consider a petition that does not raise any universal service issues, without violating the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 *et seq.*

9 NTCA Comments at 5.

10 USTA Comments at 4; Windstream Comments at 12.

11 Missoula Plan at 63.

12 New York State Department of Public Service at 5.

competition, into a safer [for the incumbent LECs] government-mandated subsidy mechanism funded, in large part, by customers of the ILEC's competitors."[13] TEXALTEL similarly observed that this type of plan "targets excessive subsidies to firms who do not necessarily need them, it shelters these subsidies from competitive losses, and [it ensures that these subsidies] are only funneled to one part of the marketplace – ILECs."[14]

The use of universal service support in this manner would be fundamentally inconsistent with the Communications Act of 1934, as amended (the "Act"), which mandates the establishment of a "pro-competitive, de-regulatory national policy framework."[15] For example, this use of universal service support would violate the principle of competitive neutrality, which is a key part of policy framework mandated by the Act.[16] As CTIA has commented, "[a]ccess replacement is universal service support by another name and must be available to all carriers on

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13 *Id.*

14 TEXALTEL Comments, *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (filed Oct. 25, 2006).

15 *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87 at ¶ 23 (1996) (*Joint Explanatory Statement*) (cited in *First Report & Order*, 12 FCC Rcd at 8802, ¶ 48); *see also* Letter from Senators Rockefeller, Pryor, Dorgan, Klobucher, and Smith, to Commissioner Tate and Oregon PUC Chairman Baum (May 21, 2007) ("It seems worthwhile to us ... [to] seriously consider competitively neutral proposals, ensure accountability for how funds are used, and promote build out of advanced services in rural regions through effective targeting of funds to high-cost areas.").

16 In addition to the six statutory principles that govern the universal service program, the Commission exercised its authority under 47 U.S.C. § 254(b)(7) to adopt a seventh principle that mandates that the universal service support mechanism operate in a competitively neutral manner. Competitive neutrality is defined to mean that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, ¶ 47 (1997) (*First Report & Order*). The United States Court of Appeals for the Fifth Circuit similarly has held that competitive neutrality is an integral component of ensuring that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. *See Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 616 (5th Cir. 2000).

a competitively neutral basis."[17] Unless the Commission is willing to institutionalize predatory pricing by the wireline carriers and relegate rural American communities to monopolistic backwaters, all carriers must be eligible for universal service support on a technologically and competitively neutral basis.[18]

The use of universal service funds to shield specific carriers from the economic impact of intercarrier compensation reform would also be fundamentally inconsistent with the universal service provisions of the Act. As Feature Group IP correctly observes, Congress did not intend to create a "special interest grab that falls woefully short of fulfilling its stated and unstated policy goals" while protecting the interests of certain incumbents.[19] Rather, the Commission intended that the marketplace, driven by consumer choice, should ultimately determine which company or technology ultimately gains the advantage over the other companies and technologies in the marketplace. Any intercarrier compensation reform predicated upon simply providing additional universal service support to offset shrinking revenues for any carrier without regard to geography – or, more importantly, to the statutory framework for universal service[20] – is a failure. Under these circumstances, universal service support would merely mask the flaws in the intercarrier compensation reform, which would be inappropriate.

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17 *See* CTIA Comments, *High Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 18 (filed Apr. 17, 2008).

18 *See* Centennial Comments, *High Cost Universal Service Support*, WC Docket No. 05-337, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, at 3-4 (filed Apr. 18, 2008).

19 Comments of Feature Group IP at 55.

20 Section 254 of the Act requires the Commission to base its universal service policies on several principles, chief among them that "[consumers living] in rural, insular, and high-cost areas, should have access to 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." 47 U.S.C. § 254(b)(3). Furthermore, rates must be "specific, predictable and sufficient" to "preserve and advance universal service." 47 U.S.C. § 254(b)(5).

II. THE INTERIM CETC CAP CANNOT BE EXTENDED FOR ANY REASON

NTCA makes clear that it seeks greater USF support for its members.[21] In an effort to allay predictable objections that its proposal would cause an increase in size to the USF, NTCA suggests that the interim competitive ETC Cap ("the Cap") should be maintained. Specifically, NTCA argues that "[a]ccess costs that are unrecovered from those capped rates should be recovered from interim USF funding as another component of ICLS," which allegedly will not cause an increase in the size of the USF "because of the Commission's recent establishment of a cap on support for [competitive ETCs]."[22]

The USA Coalition joins its voice to the many other parties that believe that the competitive ETC Cap is fundamentally inconsistent with the Act, even on an interim basis.[23] Moreover, NTCA's suggestion that the Cap should be maintained in order to facilitate intercarrier compensation reform is also fundamentally inconsistent with the Commission's

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21 NTCA Comments at 3.

22 *Id.* ("[T]he overall universal service fund size will likely not increase because of the Commission's recent establishment of a cap on support for [competitive ETCs]."); *see also High-Cost Universal Service Support; Federal State Joint Board on Universal Service, Alltel Communications Inc. et al. Petitions for Designation as ETCs; RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, WC Docket No. 05-337, CC Docket No. 96-45, Order, FCC 08-122, 6-7 (rel. May 1, 2008) ("[W]e adopt an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (ETCs) can receive.") (*Interim Cap Order*).

23 *See, e.g.,* Comments of CTIA, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 22 (filed June 6, 2007); Dobson Comments, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 4-5 (filed June 6, 2007); Comments of RCA-ARC, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 3-14 (filed June 6, 2007); Comments of U.S. Cellular, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 14 (filed June 6, 2007). *See* Letter from Senators Sununu, McCain, DeMint, and Ensign to Joint Board Chairman Tate (Apr. 13, 2007) ("We strongly request that the Board recommend an *overall* cap on the entire USF program. ... We do not support any plan that would cap only one select group of providers but not others, as we believe such a fix would unfairly skew the market place").

stated justification for imposing the Cap. Specifically, the Commission claimed that the extreme measure of capping USF support to competitive ETCs was justified by the so-called "dramatic growth" of the Fund allegedly caused by competitive ETCs, but only on a temporary basis until the agency could adopt permanent reforms to address the causes of fund growth.[24] Accordingly, the Commission cannot now justify retaining the cap on competitive ETCs indefinitely in order to minimize fund growth caused by the adoption of a new subsidy for non-competitive ETCs, nor can it justify the adoption of a new subsidy for non-competitive ETCs by relying upon the presence of the interim Cap. In fact, as most wireless carriers serving rural areas have now received their designations to receive high-cost funding, fund growth has slowed as expected. The USF contribution rate has actually *decreased* from the second quarter of 2007.[25]

The suggestion that the Commission could use the USF to facilitate intercarrier compensation reform is a transparent effort by some ILECs to gain additional subsidies that are

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24 *Interim Cap Order* ¶¶ 6-7 (rel. May1, 2008). The USA Coalition disagrees with the Commission's claim that wireless carriers are responsible for "dramatic" fund growth or the creation of an "emergency" situation for the USF. After the 1996 Act was implemented, competitive ETCs began receiving funds to build and supply service to rural areas as the Act mandated. Rapid growth during this time period (both in contributions and expenditures) was to be expected because of wireless services' utility as a public safety, business, and personal communications tool. *See, e.g.,* Testimony of Billy Jack Gregg before Senate Commerce, Science and Transportation Committee, at 6-7 (March 1, 2007) ("It should not be surprising that funding for competitive ETCs has increased. After all, before the advent of competition incumbents received 100% of high cost funding. It was expected that as competitors gained ETC status and won customers in high cost areas, their high cost funding would rise."). As growth in wireless penetration rates has slowed, fund growth has also slowed as expected. In any event, payments to incumbent ETCs actually underwent a greater net increase than those to competitive ETCs from 1997 until 2007. During that time period, payments to competitive ETCs increased by $1.13 billion. By contrast, payments to incumbent ETCs increased by $1.4 billion. *See* 2007 Universal Service Monitoring Report, Table 3.15.

25 *Compare Proposed Third Quarter 2008 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 08-1393 (rel. June 11, 2008) (setting contribution factor for 3rd quarter of 2008 to 11.4%) *with Proposed Second Quarter 2007Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 07-1330 (rel. Mar. 15, 2007) (setting contribution factor for 2nd quarter of 2007 to 11.7%)

denied to their competitors.[26] This proposal simply cannot be reconciled with the Act's universal service or competitive neutrality requirements, and thus must be rejected.

III. THE COMMISSION MUST DEFINE THE GOALS OF THE USF AND ADOPT NEUTRAL CRITERIA TO ACHIEVE THOSE GOALS

The Commission cannot adequately consider any reform proposal until it has adopted objective, measurable goals for universal service support that are consistent with the Act and the Commission's universal service policies. However, the Commission has failed to put into place metrics that would allow it to evaluate reform proposals, including taking into account new technologies in the ever-changing telecommunications marketplace. Only after the Commission has articulated clear metrics for evaluating proposals will it be able to determine the advantages or disadvantages of any of the proposed universal service reform plans.

As a start, the Commission must adopt definitions for several of the key terms in the universal service provisions of the Act, including "reasonable comparability," "affordability," and "sufficiency."[27] Indeed, the United States Court of Appeals for the Tenth Circuit has twice invalidated the Commission's universal service orders because the agency failed to consider adequately the principles enumerated in the Act or key terms of statutory mandates.[28] These cases make clear that the Commission must better describe the objectives of the USF, as well as how the achievement of those objectives will be determined, before it can adopt any reforms that will survive judicial review. The agency must then adopt goals for universal support that are

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26 Feature Group IP Comments at 56 (citing Comments of USFon, Inc., *High-Cost Universal Service Support; Federal State Joint Board on Universal Service,* CC Docket No. 96-45, WC Docket No. 05-337 (filed Apr. 17, 2008)).

27 Found in 47 U.S.C. § 254(b)(3), 47 U.S.C. § 254(b)(1), and 47 U.S.C. § 254(b)(5) respectively.

28 *Qwest II*, 398 F.3d at 1226; *Qwest I*, 258 F.3d at 1199-1200.

consistent with the Act and specific enough that success or failure in achieving the goals is transparent and objectively measurable.[29]

Any goals adopted by the Commission for universal service must include competitively and technologically neutral support for all carriers, regardless of the technology they use to provide telecommunications services. The Communications Act of 1934, as amended, defines "universal service" as "an evolving level of telecommunications services."[30] Today, this definition unquestionably includes wireless services; currently, almost 80% of Americans have wireless phones, and nearly one out of every six American households relies only upon wireless telephones for their phone service.[31] Wireless services are particularly important to the nation's most vulnerable residents: 27% of poor households rely only on wireless service, and 10% of non-metropolitan households rely only on wireless service.[32]

Wireless service frequently is the best option available to consumers in rural, insular, and high cost areas. Indeed, many geographic areas, including uninhabited areas and roads, are only served only by wireless carriers. During emergencies, wireless service frequently is the only service that remains functional, or the most useful among services that still function: it is the true carrier of last resort. In the aftermath of Katrina, for example, the quick action of wireless carriers to restore service was integral to reuniting families and locating individuals who had

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29 For example, the Commission could adopt, based upon study of telecommunications and information services in urban markets, a goal that 95% of the consumers in rural, insular and high cost areas have access to a well-defined bundle of services that offers, among other things, unlimited local and a specified minimum number of domestic long distance minutes at or below a specified monthly rate. The goal must be based directly upon the statutory standards and record evidence about services available in urban markets.

30 47 U.S.C. §254(c).

31 Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007*, National Center for Health Statistics, Center for Disease Control (rel. May 13, 2008).

32 *Id.*

been evacuated from Louisiana.[33] Similarly, numerous wireless phone calls were made from inside and around the World Trade Center following the September 11, 2001 attacks.[34] In many such cases, even when wireline phone service has been disabled, wireless service providers can utilize backup routing or authorized microwave links to provide emergency service to those who need it most. Indeed, competitive ETCs are in fact required by states and federal rules to assume the mantle of "carrier of last resort" upon request.[35] Accordingly, universal service support should be distributed in a competitively and technologically neutral manner so that consumers in rural, insular, and high cost areas are able to have the same choices that are available to their urban counterparts, including the choice of wireless service.

Only after the Commission has articulated clear goals for the universal service program can the agency determine which reform proposals would most efficiently achieve those goals. With clearly articulated goals that are grounded upon, and consistent with, the requirements of the Act, the Commission can then implement mechanisms to distribute support to any carrier, regardless of the carrier's competitive position or its underlying technology, that meets the criteria of the distribution mechanisms.

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33 *See* Testimony of David Radcliffe before the Senate Committee on Homeland Security and Governmental affairs (Nov. 16, 2005) (describing how SouthernLINC Wireless' network was operating at near pre-Katrina levels within 48 hours of the storm's end); *Tech Executive Thought She Was Prepared for Katrina*, MISSISSIPPI BUSINESS JOURNAL, 21 (Jan. 9, 2006) (describing how Cellular South was 100% operational less than two weeks following the storm).

34 *See* Jim Dwyer, *More 9/11 Emergency Calls to Be Released,* NEW YORK TIMES (Aug. 16, 2006) *available at* http://www.nytimes.com/2006/08/16/nyregion/16tapes.html

35 47 C.F.R. §§ 54.202(a)(1), 54.203.

CONCLUSION

For the reasons set forth above, the USA Coalition urges the Commission to reject proposals to adopt rules that the Commission did not submit for comment in this proceeding, and to reject proposals to use universal service support in ways that are neither competitively nor technologically neutral.

Respectfully submitted,

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