

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

In the Matter of	)	
	)	
Request for Universal Service Fund Policy	)	WC Docket Nos. 05-337, 06-122
Guidance by the Universal Service	)	CC Docket No. 96-45
Administrative Company	)	
	)	DA 09-2117



**REPLY COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> responds to the October 28, 2009 initial comments filed regarding the Federal Communications Commission (Commission or FCC) September 28, 2009 Public Notice (Public Notice) regarding the Universal Service Fund Administrative Company's (USAC) request for clarification of several issues arising from audits of the Universal Service Fund (USF).<sup>2</sup> Commenters agreed with NTCA that Subchapter S carrier corporate income taxes should flow through to shareholders as expenses which are recoverable through the carrier's revenue requirement and USF support. Several also agreed that eligible telecommunications carriers (ETCs) should be allowed to

<sup>1</sup> NTCA is a premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 585 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service rural local exchange carriers (LECs) 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>2</sup> *In the Matter of Request for Universal Service Fund Policy Guidance Requested by the Universal Service Administrative Company*, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45, DA 09-2117, Public Notice (rel. Sep. 28, 2009) (Public Notice). Silence on any positions raised by parties in these proceedings connotes neither NTCA's agreement nor disagreement with their positions or proposals.

combine elements into a simplified advertising listing of “local telephone service.” Furthermore, most commenters agreed that high-cost program documentation retention rules should not be applied retroactively. Finally, the Commission should resolve other USAC audit issues and grant NTCA’s August 28, 2008 Petition for Clarification and/or Limited Waiver to allow rate-of-return ILECs to assign and allocate their USAC OIG audit expenses as interstate expenses.

**I. COMMENTERS AGREE THAT SUBCHAPTER S INCOME TAXES ARE RECOVERABLE THROUGH USF.**

USAC has raised the question of how to treat income taxes from Subchapter S Corporations – should they be recoverable as expenses through the USF, or should they not.<sup>3</sup> NTCA and other commenters urge the former.<sup>4</sup> The Commission should instruct its auditors that, for purposes of universal service support, income taxes attributable to Subchapter S corporation activities are includable in the carrier’s revenue requirement and are therefore recoverable through universal service support.

The Subchapter S corporate structure creates a situation where income taxes are not avoided but are paid at the shareholder level, as the United States Telecom Association (USTelecom) and others correctly observed.<sup>5</sup> Fairness to Subchapter S shareholders and carriers dictate that Subchapter S income taxes should be recoverable expenses. The Nebraska Rural Independent Companies (NE RIC), the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Western Telecommunications Alliance (OPASTCO and WTA) agreed.<sup>6</sup> NTCA agrees with the National Exchange Carrier Association (NECA) that the current industry practice is to include income taxes attributed to Subchapter S

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<sup>3</sup> USAC August 19, 2009 Guidance Letter, p. 4; Public Notice, p. 1.

<sup>4</sup> NTCA Comments, p. 2.

<sup>5</sup> USTelecom Comments, p. 5.

<sup>6</sup> NE RIC Comments, p. 8; OPASTCO and WTA Joint Comments, p. 9.

shareholders in a carrier's revenue requirement.<sup>7</sup> This "pass-through" approach is also used by limited liability companies, partnerships, and Subchapter S cable television companies.

Commenters concurred.<sup>8</sup> Pass-through for Subchapter S carriers is consistent with rate-making practices, according to NECA, and NTCA agrees.<sup>9</sup> NECA supports NTCA in urging the Commission to permit Subchapter S income taxes to pass through shareholders as a revenue requirement expense and recoverable through the USF.<sup>10</sup>

## **II. OTHERS SUPPORTED NTCA'S POSITION THAT SIMPLIFIED ADVERTISING FOR LOCAL TELEPHONE SERVICE IS IN THE PUBLIC INTEREST.**

Auditors of the high-cost USF program have questioned whether eligible telecommunications carriers (ETCs) should be required to separately list each of the nine components of service that comprises the ETC's "local telephone service" per section 54.201(d)(2) of the Commission's rules.<sup>11</sup> NTCA and others reasonably contend that a simplified listing, rather than a complex, detailed listing of "local telephone service" is in the public interest and minimizes customer confusion.<sup>12</sup>

The Nebraska Rural Independent Companies (NE RIC) agreed with NTCA, saying "the supported services enumerated in Section 54.101 are not separately offered to the public, are not customarily regarded by consumers as separate product offerings, and to avoid consumer confusion, should not be required to be advertised as though the services are separately offered to the public."<sup>13</sup> Sprint Nextel adopted the same position, explaining that customers can be

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<sup>7</sup> NECA Comments, p. 5.

<sup>8</sup> OPASTCO and WTA Joint Comments, p. 10; USTelecom Comments, p. 5; NECA Comments, p. 5.

<sup>9</sup> NECA Comments, p. 6.

<sup>10</sup> NECA Comments, p. 7.

<sup>11</sup> 47 C.F.R. § 54.201(d)(2). The nine supported elements of local telephone service are listed in 47 C.F.R. § 54.101(a)(1-9).

<sup>12</sup> NTCA Comments, p. 5.

<sup>13</sup> NE RIC Comments, p. 4.

confused by too much data and, for the most part, prefer a simple listing and simple advertisements for local telephone service or cell phone service.<sup>14</sup> The Rural Telecommunications Group (RTG), examining the issue from a “customer expectation” viewpoint, rationally contended that the common phrase “local service” will adequately satisfy the Commission’s advertising rules in this area.<sup>15</sup> Complex language that describes in detail each supported service merely serves to obfuscate the true meaning of “local telephone service.” USTelecom, OPASTCO, WTA and Qwest agreed.<sup>16</sup> The Commission should permit ETCs to combine together for advertising purposes the service offerings for “local telephone service.”

### **III. OVERWHELMING SUPPORT EXISTS TO APPLY DOCUMENT RETENTION RULES PROSPECTIVELY, NOT RETROACTIVELY.**

Most of the commenters, including NTCA, agreed that the Commission’s documentation retention rules for the high-cost USF program should be clarified to reflect their prospective application only.<sup>17</sup> The Commission should not penalize high-cost program participants for not complying with five-year retroactive documentation rules enacted March 1, 2008 for documents that participants may not have kept prior to 2008. NE RIC, Sprint Nextel, USTelecom, the Independent Telephone and Telecommunications Alliance (ITTA) and NECA agreed with NTCA that it is improper and patently unreasonable to penalize such a carrier using *ex post facto*-like laws.<sup>18</sup> As NECA noted, “The Commission has repeatedly acknowledged that retroactive rulemaking by administrative bodies is prohibited and ‘generally not favored under

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<sup>14</sup> Sprint Nextel Comments, pp. 1-2.

<sup>15</sup> RTG Comments, p. 2.

<sup>16</sup> USTelecom Comments, p. 2; OPASTCO and WTA Joint Comments, p. 8; ITTA Comments, p. 2; Qwest Comments, p. 2.

<sup>17</sup> NTCA Comments, p. 6.

<sup>18</sup> NE RIC Comments, p. 6; Sprint Nextel Comments, p. 3; USTelecom Comments, p. 3; NECA Comments, p. 8.

existing law.’’<sup>19</sup> NTCA concurs. These March 1, 2008 documentation retention rules, while meritorious, should be enforced on a going-forward basis only, as RTG, OPASTCO and WTA suggested.<sup>20</sup>

#### **IV. THE COMMISSION SHOULD ACT ON OTHER PENDING AUDIT CONCERNS.**

USAC has raised seven insightful issue areas whose resolution will resolve many high-cost program audit discrepancies.<sup>21</sup> These seven issues, however, are not the only audit concerns that have been raised and are now pending before the Commission as petitions for waiver/clarification, requests for review or in other procedural forms.<sup>22</sup> The Commission should rule on pending requests for review and rulings regarding the Commission’s Office of Inspector General (OIG) USAC audits. One such request is NTCA’s pending August 29, 2008 Petition for Clarification and/or Limited Waiver of the Commission’s Part 36 Jurisdictional Separations Rules (Petition) regarding the allocation of USF audit expenses as solely interstate expenses.<sup>23</sup>

NTCA’s Petition, filed more than a year ago, urged the Commission to permit rate-of-return ILECs to recover federal USF OIG audit expenses from the interstate jurisdiction through the Part 36 separations process. NTCA’s small rural telcos feel a disproportionate impact from bearing the expenses of USF OIG audits because a substantial portion of the audit expenses, roughly one-third, is allocated to the intrastate jurisdiction and recovery is impracticable or impossible through state action. The mounting financial burden of these federal audit expenses should be fairly allocated to the federal interstate jurisdiction for jurisdiction separations

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<sup>19</sup> NECA Comments, p. 9.

<sup>20</sup> RTG Comments, p. 3; OPASTCO and WTA Joint Comments, p. 4.

<sup>21</sup> Public Notice, p. 1.

<sup>22</sup> See, e.g., USTelecom Comments, p. 1, fn. 2.

<sup>23</sup> *Petition Filed by National Telecommunications Cooperative Association for Clarification and/or Limited Waiver of the Commission’s Part 36 Jurisdictional Separations Rules*, CC Docket No. 80-286, DA 09-623 (filed Aug. 28, 2008).

purposes, and not separated according to the Big Three expenses under Account No. 6720 and allocated per 47 C.F.R. § 36.392, as is currently done. The State members of the Commission's Federal-State Joint Board and others agreed with NTCA.<sup>24</sup> The NTCA Petition has run its comment cycle and is ripe for decision.<sup>25</sup> The Commission should grant NTCA's Petition as part of its on-going efforts to address audit issues that remain in the USF high-cost program.

## V. CONCLUSION

For these reasons, the Commission should allow Subchapter S corporate income taxes to flow through to shareholders as expenses which are recoverable through the carrier's revenue requirement and USF support. The Commission should determine that eligible telecommunications carriers (ETCs) are allowed to combine elements into a simplified advertising listing of "local telephone service." Furthermore, the high-cost program documentation retention rules should not be applied retroactively. Finally, the Commission

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<sup>24</sup> State Members of the Federal-State Joint Board on Jurisdictional Separations Reply Comments, CC Docket No. 80-286 (filed May 5, 2009). "The State Members concur with those comments that support the NTCA petition. The audit costs involved are incurred to assist in the review of the functioning of the federal USF program and as such should appropriately be assigned to the *interstate* jurisdiction." *Id.* at 2. Also concurring with NTCA in CC Docket No. 80-286 were Alexicon Telecommunications Consulting (Alexicon) Comments, pp. 2-3; GVNW Comments, p. 2; Missouri Small Telephone Companies (Missouri) Group Comments, p. 1; and Telcom Consulting Associates, Inc. (TCA) Comments, p. 1.

<sup>25</sup> The Public Notice was released March 19, 2009. Initial comments were filed April 20, 2009, and reply comments were filed May 5, 2009. NTCA recently met with Wireline Competition Bureau staff urging the passage of the NTCA Petition on September 30, 2009. *See* NTCA Ex Parte (filed Sep. 30, 2009).

should resolve outstanding USAC audit issues and grant NTCA's Petition for Clarification and/or Limited Waiver to allow rate-of-return ILECs to assign and allocate their USAC OIG audit expenses as interstate expenses.

Respectfully submitted,



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November 12, 2009

**CERTIFICATE OF SERVICE**

I, Adrienne L. Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in WC Docket No. 05-337 & 06-122 and CC 96-45, DA 09-2117, was served on this 12<sup>th</sup> day of November 2009 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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