BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of National Cable & Telecommunications Association Petition for Rulemaking	GN Docket No. 09-51 WC Docket No. 05-337 RM-11584

COMMENTS OF THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION, THE OREGON TELECOMMUNICATIONS ASSOCIATION AND THE COLORADO TELECOMMUNICATIONS ASSOCIATION

January 7, 2010

INTRODUCTION

By Public Notice released December 8, 2009, under DA 09-2558, the Federal Communications Commission has called for comment on the National Cable & Telecommunications Association (NCTA) Petition for Rulemaking. These Comments are filed on behalf of the Oregon Telecommunications Association (OTA), the Washington Independent Telecommunications Association (WITA) and the Colorado Telecommunications Association (CTA). OTA is the trade association that represents rural incumbent local exchange carriers serving rural and high cost areas in the State of Oregon.[1] WITA is the trade association representing rural incumbent local exchange carriers serving rural and high cost areas in the State of Washington.[2] CTA is the trade association representing rural incumbent local exchange

[1] OTA's members are as follows: Asotin Telephone Company d/b/a TDS Telecom, Beaver Creek Cooperative Telephone Company, Canby Telephone Association d/b/a Canby Telcom, Cascade Utilities, Inc., CenturyTel of Oregon, Inc. d/b/a CenturyLink, CenturyTel of Eastern Oregon, Inc. d/b/a CenturyLink, Clear Creek Telephone & Television, Colton Telephone Company, Eagle Telephone System, Inc., Gervais Telephone Company, Helix Telephone Company, Home Telephone Company d/b/a TDS Telecom, Midvale Telephone Exchange, Molalla Communications, Inc. d/b/a Molalla Communications, Monitor Cooperative Telephone Company, Monroe Telephone Company, Mt. Angel Telephone Company, Nehalem Telecommunications, Inc., North-State Telephone Co., Oregon-Idaho Utilities, Inc., Oregon Telephone Corporation, People's Telephone Co., Pine Telephone System, Inc., Pioneer Telephone Cooperative, Roome Telecommunications Inc., St. Paul Cooperative Telephone Association, Scio Mutual Telephone Association, Stayton Cooperative Telephone Company, Trans-Cascades Telephone Company and United Telephone Company of the Northwest, d/b/a CenturyLink.

[2] WITA's members are as follows: Asotin Telephone Company d/b/a TDS Telecom, CenturyTel of Cowiche, Inc., d/b/a CenturyLink, CenturyTel of Inter-Island, Inc., d/b/a CenturyLink, CenturyTel of Washington, Inc., d/b/a CenturyLink, Ellensburg Telephone Company d/b/a FairPoint Communications, Hat Island Telephone Company, Hood Canal Telephone Co., Inc. d/b/a Hood Canal Communications, Inland Telephone Company, d/b/a Inland Networks, Kalama Telephone Company, Lewis River Telephone Company, Inc. d/b/a TDS Telecom, Mashell Telecom, Inc. d/b/a Rainier Connect, McDaniel Telephone Co. d/b/a TDS Telecom, Pend Oreille Telephone Company, Pioneer Telephone Company, St. John Co-operative Telephone and Telegraph Company, Tenino Telephone Company, The Toledo Telephone Co., Inc., United Telephone Company of the Northwest, d/b/a CenturyLink, Western Wahkiakum County Telephone Company d/b/a Wahkiakum West, Whidbey Telephone Company, d/b/a Whidbey Telecom, and YCOM Networks, Inc., d/b/a FairPoint Communications.

carriers serving rural and high cost areas in the State of Colorado.[3] CTA, OTA and WITA oppose the NCTA Petition for Rulemaking as ill-founded and proposed with a motive to provide a competitive advantage to NCTA's members. The Petition should be rejected.

THE PROPOSAL

NCTA is proposing that the Commission establish a two step process by which high cost support received by an incumbent local exchange carrier (ILEC) can be reduced. In the first step, any party can petition the Commission to demonstrate that either (1) wireline competitors offer service to more than seventy-five percent of the customers in the ILEC's study area without support; or (2) that at least fifty percent of the households within the study area have such an option and the cost characteristics of the portion of the study area not served by competitors are similar to the cost characteristics in the competitive portion of the study area; or (3) that the retail rates for local exchange service offered by the ILEC have been deregulated throughout the "relevant area."[4] If the Commission finds that one of these triggers[5] has been met, the second step of the proceeding would entail a demonstration by the ILEC of what level of support is needed to serve the "non-competitive" portion of the study area.[6]

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[3] CTA's members are as follows: Agate Mutual Telephone Cooperate Association, Big Sandy Telecom, d/b/a FairPoint Communications, CenturyTel of Colorado, Inc., d/b/a CenturyLink, CenturyTel of Eagle, Inc., d/b/a CenturyLink, Columbine Telephone Company, d/b/a FairPoint Communications, Delta County Tele-Comm, Inc., d/b/a TDS Telecom, Dubois Telephone Exchange, Inc., Eastern Slope Rural Telephone Assn., Inc., Farmers Telephone Company, Inc., Haxtun Telephone Company, Nucla-Naturita Telephone Company, Nunn Telephone Company, Peetz Cooperative Telephone Company, Phillips County Telephone Co., d/b/a PC Telcom, Pine Drive Telephone Company, Plains Cooperative Telephone Assn., Inc., Rico Telephone Company, Roggen Telephone Cooperative, Rye Telephone Company, South Park Telephone Company, Stoneham Cooperative Telephone Corp., Sunflower Telephone Company, Inc., d/b/a FairPoint Communications, Strasburg Telephone Company, Inc., d/b/a TDS Telecom, Union Telephone Company, Wiggins Telephone Association and Willard Telephone Company.

[4] The term "relevant area" is not defined by NCTA in its proposed rule. Since other portions of the proposed rule use the term "study area," the intent must be to reference something other than study area. What that something else is meant to be is unknown. This is just one example of the deficiencies in the proposed rule.

[5] NCTA characterized the proposal as having two triggers for the first step of the rule. In fact, as described above, there are three triggers in the rules proposed by NCTA.

[6] NCTA Petition at p. 5.

BACKGROUND

The Commission should keep in mind that the cable providers that are entering ILEC service areas, particularly in the case of rural ILEC service providers, are often very large entities with economic scope and scale far beyond what most rural ILECs have available. NCTA reports that the five largest cable providers all serve over three million customers.[7] This list includes Comcast Corporation with 23,891,000 customers; TimeWarner Cable, Inc. with 13,048,000 customers; Cox Communications, Inc. with 5,316,000 customers; Charter Communications, Inc. with 4,930,000 customers; and Cable Vision Systems Corporation with 3,093,000 customers. Compare this to the typical rural ILEC serving in Colorado, Washington and Oregon. For example, Gervais Telephone Company serves 908 working loops.[8] Even the relatively larger 5,745 working loops served by Molalla Communications pales in comparison to the size of the cable companies.[9] This is no different than the case in the State of Washington where the typical rural ILEC such as Kalama Telephone Company serves 2,968 working loops[10] or, for example, Toledo Telephone Company which serves 2,020 working loops.[11] Nor does this change in Colorado where twenty-four of its twenty-six members serve less than 5,000 access lines. Typical are Blanca Telephone Company with 1,080 access lines and Pine Drive Telephone Company with 874 access lines.[12]

The Commission should also keep in mind that the cable companies built their networks initially to provide cable TV service and then, for the most part, only where densities would make cable service financially viable on its own. With relatively small incremental investment,

[7] The data comes from NCTA's web site and can be found at www.ncta.com/Stats/TopMSOs.aspx.
[8] Working loop data is taken from USAC Report HC05 for the first quarter of 2010.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Access line information is supplied by the Colorado Telecommunications Association.

cable providers can now provide telecommunications service as well as cable service over the same facilities. On the other hand, for rural ILECs to enter the cable television business, they would have to make a relatively large investment in such things as cable head ends and other facilities.

This relative advantage in economic scope and scale allow cable providers to enter rural markets as a telecommunications provider and operate initially at a loss in those telecommunications markets. The cable provider's rural telecommunications operations are supported by their large urban market operations. Thus, the motive behind NCTA's Petition appears to be to allow their large cable operators to attack the support received by rural ILECs and eventually force those rural ILECs out of the market, leaving the rural market for telecommunications services to the cable providers themselves. At that time, one can well expect that customers in those rural markets will receive large increases in rates for telecommunications services from the cable providers. The cable providers' history of raising cable television rates is ample evidence of that likely result.

ANALYSIS OF PETITION

In this section of the Comments, OTA, WITA and CTA will focus on the substantive issues raised by the language of the Petition itself and the triggers proposed by NCTA.

1. A Challenge Can Be Raised By "Any Party."

Under NCTA's proposal, "any party" can bring a challenge to the support received by a rural ILEC. That means that any person or any entity, whether they are in the rural ILEC study area as a competitor or not, can bring a challenge. This has the potential to produce a very strange set of results. Take the case of Beaver Creek Cooperative Telephone Company (BCT).

BCT competes with Comcast as a CLEC outside of BCT's ILEC study area.[13] Since BCT is a cooperative whose basic residential services rates are not regulated by the Oregon Commission, under the NCTA proposal, Comcast could, for its own competitive interests, challenge the support received by BCT. If its high-cost support is removed, BCT would have no choice but to substantially increase rates to cover costs it incurs in the rural areas it serves as an ILEC. In the more urban areas where it is a CLEC, BCT could continue to offer lower rated service because of density issues. However, the rate disparity would cause its members to question BCT's ILEC operations and wonder if there was cross-subsidy. It is not far-fetched that its members would demand BCT drop its CLEC activities. Comcast would have removed a competitor. All of this because a competitor wanted to cause trouble where it could. The "any party" basis for challenge is problematic.

2. <u>The Competitive Entry Trigger is Deficient</u>.

Under NCTA's competitive entry trigger, support could be removed for a rural ILEC if a petitioner[14] demonstrates that either (1) seventy-five percent of the households in the study area have access to a competitive voice provider or (2) fifty percent of the households in the study area have access to such a provider and the cost characteristics of the non-competitive areas are similar to those in the "competitive" area. NCTA lists only population density as a cost characteristic in the proposed rule. It is an assumption is that other factors such as geologic conditions would also apply. There are a number of problems with this approach.

A. <u>NCTA's Proposal Fails to Address Market Failure</u>.

Besides the "any party" issue there is an important consideration with the competitive

[13] BCT does not use a separate affiliate for its CLEC operations.

[14] NCTA's proposal requires competition to be from a wireline, facilities-based provider. However, as just discussed, the petition can be "any party" under the rule.

entry trigger that is not clearly addressed by NCTA's Petition. The issue is that the NCTA Petition fails to take into account is market failure. What happens if a rural ILEC support is removed and the competitor fails and exits the market? There is no provision in the NCTA proposal for support to be restored. Market failure is not to be taken lightly. For example, Charter Communications, Inc. is going through a Chapter 11 reorganization.

B. NCTA's Proposal to Recalculate Support Below the Study Area Level May Increase the Size of the USF.

In previous comments, parties have pointed out that proposals to disaggregate support at below-study area levels could lead to increases in overall USF support levels. For example, in its December 7 comments, NECA described an analysis of support payments for the former Northwestern Bell-North Dakota study area which showed while the study area as a whole does not qualify for support under the Commission's hybrid cost proxy model, 21 of the 35 wire centers in the state would qualify under the model if they are treated separately.[15] This would substantially increase model-based support in that area.

Similarly, AT&T's comments on the NBP Public Notice No. 19 explained why proposals to disaggregate support for broadband services between competitive and non-competitive areas would either harm broadband deployment or fail to produce reductions in USF support payments:

> If the Commission were to reduce or eliminate support in those parts of a study area in which a competitor is offering broadband, and keep the per-line support the same in those parts in which there is no competitor, the Commission likely would reduce the size of the fund. Of course, in that event, the incumbent would be left to serve the other, highest cost parts of the study area, without adequate support .... As a consequence, the incumbent ultimately would be unable to maintain and/or upgrade its network in those highest cost areas, and thus could not viably continue providing basic telephone (let alone broadband) services at affordable rates.

[15] See, NECA Comments to NBP Public Notice No. 19 at 22, citing "Wirecenter Support Spreadsheet" on FCC's Hybrid Cost Proxy Model website at http://www.fcc.gov/wcb/tapd/hcpm/welcome.html.

> If, on the other hand, the Commission were to re-calibrate its high-cost support to remove the cost of serving those parts of a study area with competition, and to provide support based on the per-line costs of serving those areas without competition (which are likely to be the highest cost lines in the study area), the amount of support necessary to meet universal service objectives could remain the same, or even go up.[16]

This concept is underscored by the NCTA proposal. Under the trigger, the seventy-five percent threshold would most likely be met by the competitor seeking to serve the town or "core" of the study area. The higher-cost, both per-line and where the bulk of the costs lie, more rural areas comprise the rest. Savings in USF support estimated by NCTA are very likely to be grossly overstated.

AT&T goes on in its December 7, 2009, Comments to suggest that if the Commission were to reduce or eliminate high-cost support in areas in which competitors are offering broadband, it should relieve the incumbent of any carrier of last resort obligations and other regulatory restrictions (including rate regulation) in those areas. Needless to say, NCTA's proposal fails to incorporate any method for reducing regulatory obligations on incumbents, even in areas where competitive alternatives are found to exist or to consider the public policy considerations of such actions in rural study areas.

For these reasons alone, NCTA's proposal is not well founded. However, there are even more deficiencies in the NCTA proposal.

3. The Substantial State Deregulation Trigger Is Ill-Conceived.

NCTA proposes that if there has been substantial state deregulation, then the support for a rural ILEC can be removed. There are many problems with this proposal. First, NCTA states in its Petition that this trigger would be applied where "the state has found sufficient competition

[16] AT&T Comments, GN Docket Nos. 09-47, 09-51 and 09-137 (Dec. 7, 2009) at 17.

to substantially deregulate the retail rates charged by an incumbent local exchange carrier (ILEC)." (Emphasis supplied.)[17] NCTA goes on to argue that where the state has made a finding that ILEC's rates no longer need to be regulated this means that there are market forces which are sufficient to ensure the service in the deregulated area will be provided at reasonable rates.[18] While these arguments might have some merit where there are actual state commission findings that there is sufficient competition in a market for rates to be deregulated, that is not what the rule as proposed by NCTA actually states. There is no requirement in the rule language proposed by NCTA that there be a finding of sufficient competition for deregulation. Rather, all the petitioner has to do is to demonstrate that the ILEC either is not regulated for the rate charged for local exchange service on a stand-alone basis or the ILEC has the authority to provide local exchange service in a bundle for which the total rate of the bundle is not regulated.[19] Under NCTA's proposed rule language, no state finding of competition is required. The proposed rule language is inconsistent with NCTA's stated rationale for the proposal.

It might first appear on its face that if local exchange service rates are not regulated, then that must mean that there has been a determination that market forces will keep prices reasonable and that there is substantial competition. However, that is not the case. For example, a large portion of the rural ILECs operating in the State of Oregon are cooperative corporations. The Oregon Public Utility Commission has determined that as a matter of law, it has never had authority to regulate local service rates of a cooperative.[20] There is no "finding" of competition. It is a matter of the extent of jurisdiction under state law.

[17] NCTA Petition at Executive Summary.
[18] NCTA Petition at p. 14.
[19] NCTA Petition, Attachment A, p. 2.
[20] It should be noted that the Oregon Public Utility Commission does regulate and review on an annual basis the access charges assessed by cooperatives to interexchange carriers. The OPUC's authority to do so is in ORS 759.200 and 220.

Does this mean that there are competitive market forces at work? The answer is no. If the answer is "no," then what is the mechanism that substitutes for market forces? The answer is very simple. A cooperative is owned by its members. A cooperative is not going to take money from one pocket to simply put it in another pocket. Further, a cooperative operates on a system of patronage refunds where monies in excess of that needed to operate are returned to the members. It is the community that owns the telecommunications system. That is the substitute for actual competition. These are still rural, high-cost areas. The services and rates need to be comparable to urban areas to satisfy Section 254 of the Telecommunications Act of 1996.

However, under the NCTA proposal, any entity, even if it has no relationship to the cooperative's study area, can bring a petition and say that the support should be removed because the cooperative's local rates are not regulated. This would lead to substantial increases in rates in areas without competition. This would be a result clearly contrary to the meaning and spirit of Section 254.

Just as many difficulties are found with the second portion of the trigger, which is the existence of authority to offer "bundled services." In Washington, a rural ILEC may receive authority to offer service in a bundle so long as the price of the bundle does not exceed the cost of the regulated services included within the bundle. RCW 80.36.332. The language in the statute reads as follows:

> (1) A noncompetitive telecommunications company may petition to have packages or bundles of telecommunications services it offers be subject to minimal regulation. The commission shall grant the petition where:
>
> (a) Each noncompetitive service in the packages or bundle is readily and separately available to customers at fair, just, and reasonable prices;
>
> (b) The price of the package or bundle is equal to or greater than the cost for tariffed services plus the cost of any competitive services as determined in accordance with RCW 80.36.330(3); and

(c) The availability and price of the stand-alone noncompetitive services are displayed in the company's tariff and on its web site consistent with commission rules.

(2) For purposes of this section, "minimal regulation" shall have the same meaning as under RCW 80.36.330.

(3) The commission may waive any regulatory requirement under this title with respect to packages or bundles of telecommunications services if it finds those requirements are no longer necessary to protect public interest.

NCTA argues that bundled pricing means that there is competition. That is not always the case. Bundles are a very popular means of pricing services. A rural ILEC that does not have competition may want bundled authority simply so it can demonstrate to its customers that it has packages of services available like those available in more urban areas. It may have nothing to do with the presence of competition.

However, under NCTA's proposal, the mere existence of authority to offer bundled service where the price of the bundle is not regulated would mean that that rural ILEC could lose its high-cost support. Again, because of the way the proposal is structured, that support could be taken away by any entity, whether they are operating in the rural ILEC study area or not, pointing out to the Commission that a rural ILEC has authority to offer bundled services. That is an absurd result.

Further, NCTA does not explain how the second step of the proposed rule would work under this second trigger. If the cooperative's rates for basic service are not regulated by a state commission or a rural ILEC has authority to offer bundled services where the price of the bundled service is not regulated, there may not be actual competition in the rural ILEC's study area. In the case of the cooperative, it is a matter of the extent of state commission jurisdiction under state law. In the case of a bundled service, it may be a question of offering a comparable rate of services in one package in a rural area that are available in an urban area, not a question of competition. However, assuming that the condition for the NCTA "trigger" exists, how is the second step ever triggered under the NCTA proposal? There is no component of the study area that is not covered by the trigger in which a rural ILEC would then demonstrate its cost for the so-called "non-competitive" area. Under the NCTA proposal the entire study area, by definition, would be required to be deemed "competitive," even if it is not in reality. This would then result in rates in areas where there may be no competition at all to increase dramatically. This result would be contrary to Section 254's requirements and goals.

4. NCTA's Proposal Violates Section 254 and Would Lead to Needless Litigation.

NCTA's proposal means that support would become unpredictable. The support becomes unpredictable because at any time, "any party" can bring a challenge and seek to have support reduced and recalculated. This is a clear violation of Section 254.

Further, NCTA's proposal would immediately raise financial uncertainty, substantially threatening the ability of rural ILECs to gain access to capital to invest in broadband networks. If support can be removed at any time by a challenge from any party, no lender is going to view it prudent, particularly in today's economy, to invest on a long-term basis in a broadband project in a rural area. This result is contrary to the goals of the Commission's National Broadband Plan.

Very recently, CoBank wrote to the Commission to point out that because of regulatory uncertainty, CoBank has lowered rural ILECs' access to capital by thirty to forty percent over the past ten years. This reduction in access to capital is due to uncertainty about the sustainability of current cost recovery mechanisms. CoBank expects to continue to lower maximum allowable leverage if regulatory uncertainty continues.[21] Reduced access to low cost financing endangers

[21] Letter from Sarah Tyree, CoBank, to Marlene H. Dortch, FCC, GN Docket No. 09-51, WC Docket No. 05-337 and CC Docket Nos. 96-45 and 01-92 (December 16, 2009).

rural ILECs' ability to continue to invest in deployment of broadband networks in rural areas. If financing is available, it may be available only at increased costs, which in turn leads to increasing rates.

In addition to the regulatory uncertainty, NCTA's proposal to recalculate rural ILEC support through a two-step process will unnecessarily burden the Commission with litigation. This assumes, of course, that adoption of NCTA's proposal survives an extensive legal challenge that the proposal is in direct violation, on its face, let alone in its application, of Section 254.

Under the two-step process proposed by NCTA, each time a party challenges the level of support for a rural ILEC, the Commission is required to conduct a complex, fact-intensive adjudicatory proceeding to determine whether those assertions are true and then, if found to be true, how much support is required to serve the "non-competitive" area. This analysis will need to be case specific and the outcome will vary from case to case based upon the facts of the case. The Commission will be unable to quickly resolve the challenges based on general guiding principles.

As a result, the Commission would become mired in proceeding after proceeding, taking the Commission's resources away from other vital endeavors. Further, the very nature of the fact that there would be adjudicatory proceeding after adjudicatory proceeding underscores the point that NCTA's proposal makes universal service funding inherently unpredictable, contrary to the requirements of Section 254.

CONCLUSION

The NCTA proposal is not well-founded. The premise that "any party" can bring a challenge to support is fraught with mischief. The party need not have any relationship to the rural ILEC study area. Portions of the proposed rule are not clear. The proposed rule uses triggers that may have no relationship to actual competition. The NCTA proposal is an invitation to litigation, both on its face and in its execution, if adopted.

The Commission has a full plate before it. There are other USF reforms that can be more easily adopted as the Commission considers full revamping of the USF mechanisms. Two readily available proposals are the elimination of the "same support" rule and change in the contribution methodology. CTA, OTA and WITA respectfully urge that the Commission reject the NCTA Petition.

Respectfully submitted this 7th day of January, 2010.

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