

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

In the Matter of)	
)	
Elimination of Rate-of-Return Regulation of Incumbent Local Exchange Carriers)	RM 10822
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	

OPPOSITION TO PETITION FOR RULEMAKING

The South Dakota Telecommunications Association (SDTA),¹ North Dakota Association of Telecommunications Cooperatives (NDATC),² Montana Independent Telecommunications Systems (MITS),³ Townes Telecommunications, Inc. (Townes),⁴ 3 Rivers Telephone Cooperative, Inc., Paul Bunyan Rural Telephone Cooperative, Penasco Valley Telecommunications, Prairie Grove Telephone Company, Smart City Telecommunications, L.L.C., and South Slope Cooperative Telephone Company, Inc. (collectively referred to as “the Companies”), by their attorneys, hereby oppose the Petition for Rulemaking to Eliminate Rate-of-Return Regulation of Incumbent Local Exchange Carriers filed by Western Wireless Corporation (WWC). In the Petition, WWC seeks the elimination of rate-of-return (ROR) regulation of rural incumbent local exchange carriers (RLECs), for purposes of determining federal high-cost universal service support and interstate access charges. The local exchange carriers represented by the Companies

¹ SDTA represents thirty-one rural incumbent local exchange carriers (ILECs) in the state of South Dakota.

² NDATC represents seventeen rural ILECs in the state of North Dakota.

³ MITS represents nine rural ILECs operating in Montana, North Dakota, Wyoming and Nevada.

are “rural telephone companies,” as defined by the Communications Act of 1934, as amended (the Act),⁵ whose interstate access charges and high cost universal service support are determined via ROR regulation and, therefore, are interested persons in this proceeding.

Introduction

The Companies provide local exchange service, including all of the services supported by the federal Universal Service Fund (USF), in high-cost, rural areas of the country. They have invested extensively in network infrastructure in their service territories to provide affordable, high-quality services on a ubiquitous basis. They serve as the carrier-of-last-resort in their service territories.

The Companies’ networks, through which the Companies provision high-quality, affordable services and further the universal service goals of the Act, were built and maintained in the environment of ROR regulation. Thus, this regulatory system should not be replaced before it is demonstrated that any alternative mechanism works as well.

The Time is not Right for Consideration of WWC’s Proposed Rulemaking

In the Petition, WWC argues that ROR regulation should be eliminated for larger RLECs beginning in 2006, and for smaller RLECs over a transition period in subsequent years. WWC also advocates instituting extensive new safeguards during the transition period for ROR carriers. In support of its Petition, WWC argues that the time is right for the proposed rulemaking because it is related to a number of pending and proposed rulemaking proceedings. For example, WWC argues that the proposed ROR rulemaking is closely related to the pending *Joint Board Portability Proceeding*, which addresses the method for calculating support for eligible

⁴ Townes is comprised of seven rural ILECs serving areas in Arkansas, Colorado, Florida, Kansas, Missouri and Texas.

⁵ 47 U.S.C. §153(37)

telecommunications carriers (ETCs) in competitive study areas⁶ and that it is relevant to the forthcoming comprehensive review of the high-cost mechanisms for rural and non-rural carriers announced by the Commission in the *Fourteenth Report and Order*.⁷ WWC also argues that the Commission has committed to transitioning high-cost universal service support to a forward-looking cost-based system in the universal service orders and that “[i]t is time for the Commission to deliver on these commitments.”⁸

Contrary to WWC’s position, the time is not right for the proposed rulemaking as it would interfere with the pending Joint Board proceeding. In fact, it appears that WWC would like the Commission to usurp the work of the Joint Board through the proposed rulemaking. Thus, WWC states that the Commission “should open a proceeding to develop a more appropriate high-cost funding system based on forward-looking costs to determine identical support amounts for all ETCs serving a particular geographic area,”⁹ even though the issue of whether all ETCs should receive identical support is pending before the Joint Board. Further, WWC states that the proposed rulemaking to eliminate ROR regulation “would serve the public interest far more efficiently – and would control the growth of the [high-cost universal service]

⁶ *Federal-State Board on Universal Service Seeks Comment on The Commission’s Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, Public Notice, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003) (“*Joint Board Portability Proceeding*”).

⁷ *Federal-State Joint Board on Universal Service and Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001), as corrected by Errata, CC Docket No. 96-45, 00-256 (Acc. Pol. Div. Rel. June 1, 2001) (*Fourteenth Report and Order*), recon. pending. See also WWC Petition at notes 9-12 referencing additional ongoing Commission rulemaking proceedings.

⁸ WWC Petition at 17 (emphasis added).

⁹ WWC Petition at 31.

fund much more effectively - than some of the anti-competitive proposals that the ILECs have advocated in the *Joint Board Portability Proceeding*.¹⁰

The Joint Board has been examining various issues concerning high-cost support for almost a year and its recommendation is expected soon. Rather than prejudge issues pending before the Joint Board, the Commission should decline to initiate the rulemaking requested by WWC and let the Joint Board process proceed.

WWC's recitation of various Commission statements concerning the relative merits of rate-of-return regulation and forward-looking cost principles also fails to demonstrate why the proposed rulemaking is appropriate at this time. On the contrary, WWC's Petition offers nothing new to this debate. Rather, WWC recounts the Commission's findings that, theoretically, forward-looking cost is an appropriate mechanism for determining universal service support. WWC, however, glosses over the fact that the Commission has found that the current forward-looking mechanisms are not appropriate for rural carriers. Thus, although the Commission adopted the use of forward-looking economic costs for determining universal service support for non-rural LECs, it continued the use of embedded cost for rural carriers because of their unique circumstances. For example, in the *First Report and Order*, the Commission found that "rural carriers generally serve fewer subscribers, serve more sparsely populated areas, and generally do not benefit as much from economies of scale and scope."¹¹ The Commission also found that for many rural carriers, universal service support provides a large share of the carriers' revenues, and thus, any sudden change in the support mechanisms may disproportionately affect rural carriers' operations. Because of the diverse circumstances of rural carriers, the Commission concluded

¹⁰ WWC Petition at 48.

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8936 (1997) (*First Report and Order*) (subsequent history omitted).

that the available forward-looking mechanisms could not accurately predict the costs of serving rural areas. In the *Fourteenth Report and Order*, the Commission found that it was still not able to move to a forward-looking mechanism for rural carriers.¹²

WWC's Petition presents no information to demonstrate that this concern has changed or that there is an appropriate mechanism to replace the use of embedded costs for RLECs. Accordingly, WWC's Petition to eliminate ROR regulation would be imprudent. The current "ROR mechanism" for determining universal service support in rural areas has been instrumental in making universal access to high-quality telecommunications services in rural America a reality. It also has allowed the Companies, and other rural carriers, to continue to invest in network infrastructure, including the provision of broadband facilities, and to provide services at affordable rates that are reasonably comparable to rates for similar services in urban areas. It would be folly to discard a mechanism that has worked so well to achieve the universal service objectives of the Act when no viable replacement mechanism is available.

Universal Service should not be Endangered to Promote Competition

WWC contends that ROR regulation must be eliminated because it is inconsistent with local competition. According to WWC, the existing ROR system is "pernicious" for three reasons: 1) it precludes the development of competition on a level playing field and thereby harms consumers in rural areas deprived of benefits of competition; 2) it gives carriers incentives to operate inefficiently and discourages them from introducing technological innovations to the detriment of rural consumers; and 3) it creates opportunities for waste, fraud and abuse and causes the unwarranted expansion of the universal service fund.¹³

¹² *Fourteenth Report and Order*, 16 FCC Rcd at 11256.

¹³ WWC Petition at 17-18.

Although competition is an important goal of the Act, the Act also requires the Commission to preserve and advance universal service.¹⁴ This requires a balancing of the two goals. Thus, when considering WWC's proposed rulemaking, the Commission must examine not only the extent to which it may promote competition but also the extent to which it would harm universal service. As shown below, the examples provided in WWC's Petition do not justify endangering universal service.

In the Petition, WWC argues that ROR regulation precludes the development of competition on a level playing field and thereby harms consumers in rural areas deprived of the benefits of competition. WWC's Petition demonstrates, however, that ROR regulation clearly has not precluded the development of wireless service.¹⁵ As WWC states, it provides commercial mobile radio service in 18 Metropolitan Statistical Areas and 88 Rural Service Areas in 19 states. It also has been designated as an ETC in 14 states and the Pine Ridge Reservation.¹⁶

Moreover, the elimination of ROR regulation will not lead to a "level playing field" as indicated by WWC. On the contrary, non-ILECs, like WWC, have been given numerous advantages through this Commission's policies and rules, which ensure that the playing field is tilted in their favor.¹⁷

WWC also argues that ROR regulation gives carriers incentives to operate inefficiently and discourages them from introducing technological innovations to the detriment of rural consumers. The truth, however, is that ROR regulation has allowed RLECs to invest in

¹⁴ 47 U.S.C. §254.

¹⁵ Whether wireless service is a substitute or a complement to wireline service is an issue before the Joint Board.

¹⁶ WWC Petition at 2-3.

¹⁷ Some of the advantages enjoyed by wireless carriers include no equal access requirement, universal service based on the costs of the ILECs, the designation of the entire MTA as local, and no requirement to build-out their facilities to serve all customers.

infrastructure and they have done so at tremendous rates. For example, the 2003 NTCA broadband survey reported a full ninety-seven percent of respondents offered broadband service to part of their customer base and plan to deploy fiber to the node to an average of 68 percent of their customers by year-end 2003, fiber to the curb to 7 percent, and fiber to the home to 8 percent.¹⁸ Paul Bunyan Rural Telephone Cooperative has invested over \$20,000,000 in the last five years to construct 146 fiber-fed ringed electronic node sites throughout its 3,300 square mile service territory. Not only did this investment greatly enhance the quality and redundancy of the voice network, it allowed the company to offer high speed DSL internet access to over 90% of its subscriber base. Similarly, Midstate Communications, Inc. and Interstate Telecommunications Cooperative, Inc. (both members of SDTA), invested \$25,900,000 and \$35,000,000, respectively, in telecommunications infrastructure from 1998-2003.

WWC contends that ROR regulation interferes with incentives for carriers to operate efficiently and to reduce their operating costs.¹⁹ WWC argues that ROR regulation allows carriers to be “small and inefficient” and that it “creates very strong, uneconomic incentives for large ILECs to sell exchanges to small ones, even though there are economies of scale that can be achieved by the larger carriers.”²⁰ WWC cites a recent transaction, involving the acquisition of the Williston, North Dakota exchange by Missouri Valley Communications, Inc. (MVCI), a subsidiary of Nemont Telephone Cooperative, Inc. as an example.

It is odd that WWC would point to this transaction as an example of the harmful effect of ROR regulation. Prior to the acquisition, the Williston exchange was a Qwest facility, which was then briefly acquired and operated by Citizens Telephone Company of North Dakota.

¹⁸ *NTCA 2003 Internet/Broadband Availability Survey Report*, May 2003, p. 3.

¹⁹ WWC Petition at 4.

²⁰ WWC Petition at 23.

According to information provided by Qwest, Qwest essentially had made no improvements to the exchange in over 20 years. For example, Qwest information stated that 84.70% of the loop facilities were installed prior to 1970; 15.36% were installed during the 1980's; and .01% were installed in the 1990's. A physical examination of the outside plant by MVCI confirmed this state of affairs. Further, MVCI determined that some of the plant in the central business district of the Williston exchange dated from the early 1950's. MVCI also found that the main feeder cables out of the Central Office were obsolete lead-sheath, paper-insulated cables, which would require the installation of new facilities. MVCI determined that the antiquated, obsolete facilities interfered with the ability to provide reliable advanced services.²¹

The simple facts of this example are that a large company did not invest in the facilities of a rural community and a small company has committed to investing and upgrading these facilities to provide high quality, advanced services to the community. Accordingly, the state commission and this Commission found that the transaction was in the public interest. Thus, rather than a failure of ROR regulation, this example is a success story for the goals of universal service.

WWC argues that ROR regulation creates opportunities for waste, fraud and abuse and causes the unwarranted expansion of the universal service fund.²² In support of its position, WWC cites examples of state commission cases in which certain claimed costs were adjusted or disallowed. In comparison to the number of RLECs, the examples listed by WWC are few. Moreover, the examples show that the current regulations governing ROR carriers do allow regulators, and competitors, to challenge RLEC filings. Accordingly, it would be just as

²¹ See, Ex Parte Letter of Missouri Valley Communications, Inc. in CC Docket No. 96-45, November 18, 2002.

²² WWC Petition at 24.

reasonable to conclude that the current ROR regulations are sufficient to protect the public from any potential waste, abuse or fraud. Of course, this stands in sharp contrast to WWC's own conduct in charging fees and in receiving universal service funds which are subject to review by no one.

Finally, there is no support for WWC's claim that ROR regulation is the true cause of the growth in the high-cost universal service fund. On the contrary, high-cost support is relatively fixed – even in the case of an acquisition of an exchange by a RLEC. In the *Fourteenth Report and Order*, the Commission allowed carriers to receive increased high-cost support for additional lines and support for their incremental expense adjustment associated with new investment.²³ However, the amount of support for RLECs was capped. In the case of an acquired exchange, the acquiring carrier's support is capped at the per-line level received prior to the transfer, except for an opportunity to receive safety valve support for investments in the acquired lines, which is also capped. The acquiring company may also receive additional support in the form of Interstate Common Line Support (ICLS), which is a replacement for access charge revenues. In the MVCI acquisition case, the Commission found that the amount of ICLS, in addition to any amounts that MVCI may be eligible to receive in safety valve support, “will not have an adverse impact on the universal service fund.”²⁴

²³ The safety net support mechanism was modified to ensure that carriers meeting the threshold requirement for eligibility would receive support for their incremental investment, but not recover more than the costs incurred as a result of the additional investment. See also 47 C.F.R. § 54.305.

²⁴ *Nemont Telephone Cooperative, Inc. Missouri Valley Communications, Inc. Reservation Telephone Cooperative and Citizens Telecommunications Company of North Dakota; Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission's Rules; Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission's Rules, CC Docket No. 96-45, Order, 18 FCC Rcd 838, 843 (para. 11)(rel. Jan. 18, 2003).*

Richard D. Coit, General Counsel
South Dakota Telecommunications
Association
P.O. Box 57
Pierre, SD 57501
(605) 224-7629

Michael C. Strand
CEO and General Counsel
Montana Independent Telecommunications
Systems
P.O. Box 5237
Helena, MT 59604-5237
(406) 443-1940

David Crothers, Exec. Vice President
North Dakota Association of
Telecommunications Cooperatives
PO Box 1144
Mandan, ND 58554

Dated: January 16, 2004

CERTIFICATE OF SERVICE

I, Douglas W. Everette, hereby certify that copies of the foregoing "Opposition To Petition For Rulemaking" were served by first class U.S. mail on this 16th day of January, 2003 to the persons listed below:

Gene A. DeJordy,
Vice President of Regulatory Affairs
James Blundell
Director of External Affairs
Western Wireless Corp.
3650 131st Ave., S.E., Ste. 400
Bellevue, WA 98006

Mark Rubin
Director of Federal Government
Affairs
Western Wireless Corp.
401 Ninth St., N.W., Ste. 550
Washington, D.C. 20004

Michele C. Farquhar
David L. Sieradzki
Hogan & Hartson L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20554
Counsel for Western Wireless Corp.

/s/

Douglas W. Everette