

STATE OF FLORIDA

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Public Service Commission

November 20, 2006

VIA ELECTRONIC FILING

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-45, Federal-State Joint Board on Universal Service
WC Docket No. 05-337, High-Cost Universal Service Support

Dear Ms. Dortch:

Forwarded herewith are *ex parte* comments of the Florida Public Service Commission in the above dockets with regard to the use of the use of auctions to determine high-cost support for carriers.

Greg Fogleman at (850) 413-6574 is the primary staff contact on these comments.

Sincerely,

/ s /

Cindy B. Miller
Senior Attorney

CBM:tf

cc: Antoinette Stevens, Wireline Competition Bureau
Best Copy and Printing, Inc.
Brad Ramsay, NARUC

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

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

**EX PARTE COMMENTS OF THE
FLORIDA PUBLIC SERVICE COMMISSION
IN RESPONSE TO THE FEDERAL COMMUNICATIONS COMMISSION'S
PUBLIC NOTICE SEEKING COMMENT ON BEHALF OF THE
UNIVERSAL SERVICE JOINT BOARD**

CHAIRMAN LISA POLAK EDGAR
COMMISSIONER J. TERRY DEASON
COMMISSIONER ISILIO ARRIAGA
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November 20, 2006

Introduction

The Florida Public Service Commission (FPSC) submits these comments in response to the Public Notice (Notice) released August 11, 2006. In this Notice (FCC 06J-1), the Federal-State Joint Board (Joint Board) seeks comment on issues relating to the use of auctions to determine high-cost support for carriers. The FPSC is generally supportive of any action that would make the high-cost program more equitable, efficient, and effective.

As noted by numerous commenters in this proceeding, the high-cost program has been growing at an alarming rate. Embarq correctly noted that the growth in the number of competitive eligible telecommunications carriers (CETCs) and the support they receive has strained the program. In 2002, fewer than 30 designated CETCs received approximately \$189 million in high-cost support. Four years later, the approximately 650 designated CETCs are receiving more than \$1 billion in support. What once represented a small proportion of the high-cost fund now represents almost one quarter of that program. Unless the Joint Board and the FCC take action to reform the program, the continued growth in the size of the fund is unlikely to end.

Moreover, the escalation of the size of the fund threatens the affordability that the program was intended to safeguard. As the Tenth Circuit recognized, “excessive subsidization may affect the affordability of telecommunications services, thus violating the principle in §254(b)(1).”¹ In general, prior efforts to rationalize and impose reasonable constraints on the high-cost funds have focused primarily on three approaches. First, proposals have been considered that have the effect of limiting what is to be funded. For example, the Act requires that the services to be supported by federal universal service mechanisms be periodically revisited, to determine whether “supported services” should be expanded or contracted. Similarly, in 2004, the Joint Board recommended to the FCC that only a single connection per household be supported, although the FCC did not adopt this recommendation. Second, restrictions may be imposed that could limit the amount of funding available.² The current indexed cap on the embedded high-cost loop mechanism is an example. Third, restrictions may be imposed on the number of entities to whom funding is provided. The FCC’s adoption in 2005

¹ *Qwest Communications International v. FCC*, 398 F.3d 1222, 1234 (2005).

² See proposals and topics for comment in FCC 04J-2, released: Aug. 16, 2004 and FCC 05J-1, released: Aug. 17, 2005 in CC Docket No. 96-45.

of ETC designation guidelines applicable where the FCC conducts the ETC designation is representative.

Based on our review of the comments filed in this proceeding, it appears that a properly structured reverse auction mechanism may address the second aspect, the third aspect, or both. Specifically, an auction mechanism could limit the number of carriers receiving support in extremely high-cost areas, and potentially reduce the high-cost funding requirement by having carriers competitively bid against one another to receive high-cost support. Bids would be based on their own estimates of the cost to serve an area.

Role of Auctions

While the Joint Board has received a well-represented assortment of comments, it does not appear that any commenter has put forward a proposal that addresses all of the administrative and policy issues in sufficient detail to be adopted immediately. However, a number of commenters have raised interesting points and concerns that the FPSC believes may, taken together, advance the discussion in a constructive manner.

One of the fundamental questions to be considered is the nature of what is being auctioned. Is it the exclusive entitlement to receive universal service support or is it the right to set the monthly per line support amount that all ETCs that serve an area can receive? In general, it appears that most competitive carriers believe auctions should set only the per line support amount that all ETCs can receive. These commenters cite both the overall pro-competitive nature of the Telecommunications Act (the Act) as well as the provision found in §214(e)(2) and §214(e)(6) that requires the designation of more than one ETC in a non-rural study area on request. We disagree with the position taken by those carriers.

The universal service program was not intended to be a vehicle within the Act to promote competition. Rather, it was intended to offset any potentially adverse effects of competition to ensure that consumers in rural and high-cost areas continue to have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas at reasonably comparable rates.³ Other parties have also expressed this position.⁴ Regarding the statutory requirements allegedly arising from §§214(e)(2) and (6), the

³ §254(b)(3).

⁴ Comments of Qwest at pages 7-8, Reply Comments of the Montana Public Service Commission at page 4.

FPSC finds the arguments of Verizon to be persuasive. Specifically, Verizon notes that this section of the Act (as well as §254) merely indicates that an ETC is eligible to receive high-cost support but that there is no express provision mandating funding once a carrier has been designated as an ETC.

Verizon further argues that the “statutory language, structure, and legislative history make clear that designation as an ETC under §214 merely affords carriers the opportunity to receive universal service subsidies, not a guarantee that they will in fact receive subsidies in all areas.”⁵ In particular, the language of §254(e) states “only an eligible telecommunications carrier designated under §214(e) shall be eligible to receive specific Federal universal service support.” 47 U.S.C. §254(e). Verizon points out that the use of the term “eligible” was deliberate and meant to convey its normal meaning, which is “fitted or qualified to be chosen or used.” Therefore, eligibility to receive universal service support does not confer an entitlement to receive universal service support. It may be that the final set of ETCs selected to receive funding is a subset of those ETCs eligible for support.

Verizon contends that, “whether a carrier receives funding turns not on its ETC designation, but instead on whether it satisfies the criteria of whatever funding mechanism the Commission establishes pursuant to §254(e).”⁶ With respect to reverse auctions as a funding mechanism, it may be that the criterion for receiving universal service support is not simply ETC designation, but also the ETC’s submission of the low bid for support within the auction. This structure would maintain the benefits of the Act’s requirement for multiple ETC designations in non-rural study areas while providing for the possibility of a single ETC recipient of universal service support in certain areas. The FPSC believes a reverse auction that selects an exclusive ETC to receive support would minimize the burden imposed on consumers to support the high-cost program, while maintaining the availability of comparable telecommunications services.

Jurisdictional Roles

The Joint Board has asked for comments regarding the appropriate roles of the FCC, the State Commissions, and the Universal Service Administrative Company (USAC) relative to the administration of an auction process, oversight of bidders and the distribution of the funds.

⁵ Comments of Verizon at page 16.

⁶ Comments of Verizon at page 18.

Many of the commenters link states' primary role in conducting §214 ETC designations to a requirement that state commissions should (or must) be responsible for selecting the auction winner. While we agree that states should play a role in the conduct of auctions, the FPSC believes that selection of an auction winner should be subject to overarching federal guidelines. In order for reverse auctions to achieve the desired objectives, we believe it is necessary to have consistency in the implementation and administration of the reverse auction process; absent federal guidelines, we have concerns that inconsistencies will occur.

For the same reasons noted above, the designation of ETC is not an entitlement to funding, and thus, while the states have a primary role in the designation, the FCC should have the ultimate responsibility of determining who should receive support under a competitive bidding mechanism. Further, just as states have currently had an incentive to designate multiple ETCs,⁷ states may also have an incentive to select a winner based on characteristics that go beyond those necessary to provide supported services. While the FPSC largely has supported the states' active role in telecommunications policymaking, this may be a case where the consistent application of procedures and consistent implementation are necessary to achieve desired objectives. For this reason, the FCC, with input from the states, should establish the applicable procedures and implementation guidelines for administration of auctions that should be applied nationally.

The FCC should select the auction winner in consultation with the state commission. This is necessary in order for the FCC to consider any state-specific factors such as carrier-of-last-resort obligation and service quality requirements existing under state law. We note that the FCC already has experience within its Wireless Telecommunications Bureau that could aid in the implementation of the competitive bidding proposal. At this time, the FPSC also sees no reason why USAC's role in distributing universal service funding should be altered.

Geographic Unit to Auction

Within the Public Notice, the Joint Board seeks comments on how the auction should be designed to appropriately target support to areas in need of funding. Those comments that address this issue note that ILEC study areas do not conform exactly to those of their competitors. Some commenters argue that in defining an area to be auctioned, one party (either

⁷ Embarq comments at page 12.

competitor or incumbent) could receive a competitive advantage by specifying the area to be auctioned in such a way that it matches only one provider. Conducting an auction over too large an area would likely result in erecting barriers to participation in the auction. This would not be advantageous to the process since one of the generally accepted criteria to a successful auction is to maximize the number of potential bidders. Thus, we would suggest that the appropriate level of disaggregation would be at the wire center level. CETCs are already required to identify the existing wire centers in which they have sought and received ETC designation. While it may be desirable to develop a non-ILEC based geographic level to auction, the FPSC does not believe that it should necessarily impede the implementation of a reverse auction process.

While conducting a reverse auction nationwide on a wire center basis would undoubtedly be a Herculean task, the FPSC suggests, as does Verizon, that the areas in which auctions are conducted could be limited. The FPSC proposes that the FCC limit the initial rounds of auctions to those wire centers which receive the most high-cost support (i.e., the top 50 or 100 wire centers) and in which there are already more than three ETCs designated. This would afford the FCC the opportunity to refine the process as it learns from each auction and target the areas that are most likely to yield successful auctions.

Service Quality

The FPSC is concerned about whether a competitive bidding program may adversely affect the service quality provided to consumers. Several commenters point out that CETCs generally rely on the network of the incumbent wireline provider. For example, the incumbent's wireline network supports services offered through resale, terminates calls that originate on a wireless network and terminate on the wireline network, connects cell towers, and transports wireless long distance traffic. Clearly, it is an important element to most competitive providers. Therefore, when exclusive support is awarded to a carrier other than the incumbent, the FCC and the state would have to carefully ensure that the winning carrier is able to meet its service quality obligation. Should the funded ETC be unable to sustain service quality standards, the FCC should either revoke the carrier's designation as the funded ETC and hold a new auction, or impose significant penalties and prescribe remedial actions required of the bid winner. We agree with other commenters that required service quality standards must be set out in the initial request for proposals, with penalties delineated.

Transitions

To the extent that the incumbent carrier does not win the auction, the FPSC believes that it would be appropriate to provide federal transitional support to the carrier in order to minimize the risk of rate shock. The FCC has provided such transitional support in the past. Specifically, “hold-harmless” support was provided when non-rural carriers were transitioned from support based on embedded costs to support based on the FCC’s high-cost model. This decision was based on the Joint Board’s recommendation in order to mitigate the risk of rate shock on consumers in affected study areas. The FPSC believes that a similar transition would be needed for the incumbent carrier should it lose in a competitive bidding mechanism.

As some commenters note, there would also be a need for a transition period in order for federal and state laws to be harmonized. AT&T suggests that state laws may need to be revised. The Independent Telephone and Telecommunications Alliance states that an auction would be difficult to reconcile with state and federal law. In Florida, state law does not appear to comport with the auction process envisioned in the FCC’s Public Notice, because Florida law currently requires each incumbent local exchange telecommunications company to furnish basic local exchange service to any person requesting service within the ILEC’s service territory. Thus, carriers cannot refuse to provide service within their territory under current Florida law. The auction concept allows companies to not bid, and to not serve. Florida’s carrier-of-last-resort obligation is scheduled to expire January 1, 2009. It is possible that this date will not be extended, although it has been extended previously. If the date is extended, Florida law would be at odds with a reverse auction concept.

If a state were to implement a reverse auction process, it likely would need an expressly stated enabling statute in order for the state commission to do so. We believe that there probably would need to be at least a two-year transition period to allow states to pass any necessary enabling statutes. If the FCC is to implement the reverse auctions process, states might still need time to revise any state laws that conflict.

Strengthen ETC Designation Process

Concurrent with other reforms, the FPSC supports Embarq’s comments to further strengthen the FCC’s existing ETC designation requirements. As noted by Embarq, the Fifth

Circuit found that the FCC could not preclude a state commission from imposing additional eligibility requirements,⁸ but the Court did not address whether the FCC is precluded from establishing minimum standards or from offering an inducement to states to adopt certain standards in addition to mere encouragement. The FPSC believes that there is merit in examining and possibly establishing such minimum national standards.

Joint Board Discussion Proposal

As part of the Notice, the Joint Board attached a proposal to stimulate discussion. The discussion proposal would explicitly support both wireless mobility and broadband access, services currently not supported by the federal programs. The proposal would allow two ETCs within a service area: one would be required to provide broadband services, while the second would have to provide wireless services. In addition, both ETCs would have to provide voice service.

This proposal, as drafted, expands the list of supported services to specifically include wireless mobility and broadband access. Currently, wireless carriers are eligible to receive support not because their service is wireless, but because their service is able to meet the definition of supported services. To date, there has been no determination that wireless service or broadband access satisfies the statutory requirements to be deemed “supported services” eligible for universal service funding. Moreover, the discussion proposal does not contain a demonstration that these services meet the Act’s legal standards to receive support.

The FPSC does not believe that such an expansion is necessary or appropriate at this time, given that the market has already proven effective at providing incentives to providers to expand their broadband networks without receiving direct support from the federal high-cost program. Further expanding the definition of supported services is well beyond the scope of the referral presently before the Joint Board.⁹ When the Joint Board last addressed this issue, it specifically concluded not to recommend expansion of the definition of supported services to include broadband or wireless mobility.¹⁰ The FCC determined in its Report to Congress that

⁸ “We reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.” *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (1999)

⁹ FCC, Referral Order, CC Docket No. 96-45 (FCC 04-125); Adopted: June 2, 2004; Released: June 28, 2004.

¹⁰ Recommended Decision in CC Docket No. 96-45 (FCC 02J-1); Adopted: July 9, 2002; Released: July 10, 2002.

advanced services have been deployed in a reasonable, timely manner.¹¹ Furthermore, the federal universal service programs already have an explicit broadband component for schools, libraries, and rural health care providers. The FPSC does not believe that expansion of supported services is appropriate or needed. To do so will significantly expand the size of the fund, which is ultimately paid for by consumers.

As part of the discussion proposal, an ETC would be required to provide service throughout the service area, unless it obtained a waiver. Its own network would have to be capable of providing service to 90 percent or more of the households in the area supported, although this requirement could be phased in during the contract period. While the FPSC generally supports this provision, the 90 percent level seems arbitrary and without any record support.

The proposal then goes on to specify that an ETC would serve the remaining households, whenever possible, by purchasing and reselling the most comparable service available from another vendor. For example, the broadband ETC presumably would be required to purchase broadband cable or satellite service, where available, and resell this service to consumers not accessible by its own network at the same price it charges for its own service. The FPSC questions what statutory requirement the Joint Board would cite that requires broadband providers, which currently are not telecommunications providers, to offer their services for resale.

The discussion proposal also specifies that each winning carrier would be required to enter into a contract in which both carriers would be the only two ETCs in an area for a period of ten years. The plan envisions that the incumbent ETC would relinquish or share at fair market value, any essential facilities or rights in the served area at the end of its contract term. The goal of the provision is to ensure that the winning bidder for the subsequent term would be able to provide universal service in instances where it did not own sufficient facilities. Some may consider this to be an unconstitutional taking.

The Joint Board's discussion proposal includes a phase-in which allows the incumbent wireline provider to elect to be treated as the winning broadband network bidder in its current service area for the first ten-year term. This seems inconsistent with the FCC's previous

¹¹ FCC, Availability of Advanced Telecommunications Capability in the United States - Fourth Report to Congress (FCC 04-208), September 9, 2004.

decisions to support competitive neutrality.¹² The plan specifies that as the broadband ETC, the incumbent carrier would have to meet all of the ETC requirements in return for annual universal service support equal to the support it actually received for the most recent full year, plus an allowance for inflation.

In areas where broadband has not been deployed, the current level of support may not be sufficient to deploy broadband-capable network facilities. This raises an interesting question. Assuming the definition of supported services is expanded to include broadband services, would the current level of support be in conflict with the legal requirement of a “sufficient” fund pursuant to Section 254(b)(5) of the Act?

Interim Reform Steps

As noted previously, the comments to date suggest that further proceedings would be necessary to develop a reverse auction plan. The FPSC believes that further consideration of reform measures including auctions can and should take place, but that the Joint Board should take steps now to reform the existing rural mechanism. Some modest reforms, such as those listed below, could be implemented and have a positive effect on the stability of the rural high-cost program in the near term. The record in this proceeding is sufficient to adopt these proposals, and the FPSC believes the Joint Board should recommend their adoption. The Joint Board could continue to evaluate the high-cost programs and the application of reverse auctions, but should recommend the following changes to the high-cost support mechanism for rural carriers:

- **Combine study areas:** All study areas within a state owned by a single company would be combined into one study area for high-cost universal service purposes. After consolidation, high-cost support would be based on cost data for the entire combined study area. This would recognize the efficiencies of scale and scope of each affected carrier. This has the result of reducing support to carriers in recognition of this fact. Currently, support for each study area is determined on a standalone basis without recognizing the efficiencies of carriers with multiple study areas.

¹² FCC, First Report and Order, CC Docket No. 96-45 (FCC 97-157); Adopted: May 7, 1997; Released: May 8, 1997.

- **Move large rural carriers to the model:** All rural carriers serving 100,000 lines or more within a state would have support determined pursuant to the FCC's high-cost model, just as it is for nonrural carriers. This proposal would affect 37 rural study areas serving 10.4 million access lines. Rural carriers with study areas serving fewer than 100,000 lines would continue to have support determined using the modified embedded cost method. The model is based on forward-looking economic costs, which are generally more reflective of current market forces than are historical embedded costs. Use of the model for larger carriers should reduce the total amount of high-cost support and eliminate problems with determining per line support for individual wire centers.
- **Determine support based on each ETC's own costs:** Currently, support for competitive ETCs is based on the per-line equivalent support amount distributed to the incumbent carriers, not on a competitive ETC's own costs. For those rural study areas remaining on embedded cost support, the amount of high-cost support per line should be based on each ETC's own costs, and capped at the per line support of the incumbent LEC. Capping support would prevent competitive ETCs from reaping unreasonable per line support on an embedded basis simply because they serve few lines. This would provide sufficient support in recognition of more efficient technologies.

The National Association of State Utility Consumer Advocates (NASUCA) estimates that these proposals would reduce the size of the high-cost fund by approximately \$200 million.¹³ The FPSC believes that it is important to take these modest steps now to stabilize the growth in the high-cost fund while further consideration is given to future modifications.

Conclusion

The FPSC urges the Joint Board and the FCC to reform the existing high-cost program. Unless action is taken to reform the program, the growth in the size of the fund will likely

¹³ Reply Comments of the NASUCA on Rules Relating to Rural High-Cost Universal Service Support to the FCC; CC Docket No. 65-45. December 14, 2004. Appendix 5.

continue. We are generally supportive of any action that would make the high-cost program more equitable, efficient, and effective.

If certain hurdles are overcome, the FPSC believes that a reverse auction could be a viable high-cost support mechanism in some areas. Options, if structured properly, could slow the growth of the fund and restrict the number of support recipients. Some of the hurdles include: 1) harmonizing state laws with the reverse auction approach; 2) creating provisions that do not create a disincentive for incumbents to invest in their infrastructure; 3) placing the FCC in the lead role in developing an overarching national framework for eligible telecommunications carriers; 4) instituting an explicit policy that recognizes that ETC designation is only a prerequisite for obtaining high-cost support, not an entitlement to funding; and 5) establishing service quality requirements to protect consumers from a winning bidder providing unacceptably low service quality or from abandoning service.

Given the administrative concerns noted by many of the parties, the FPSC suggests initially focusing on those areas where auctions are most likely to succeed and conducting auctions there first. The FPSC believes that reverse auctions have the potential to stop the alarming growth in the universal service fund, recognize the benefits of a market approach, and mitigate the inequities in the current program.

The FPSC believes that there is already record support for interim reform steps that can be taken. Specifically, combining study areas, moving large rural carriers to the synthesis model, and determining support based on each ETC's own cost are sound policy-based reforms that will serve to achieve the objective of minimizing the growth in the fund. We urge the Joint Board and the FCC to adopt these reforms.

Respectfully submitted,

/ s /

Cindy B. Miller
Senior Attorney

DATED: November 20, 2006