

ICR Reference No. 200901-3060-012
OMB Control Numbers 3060-0793 and 3060-0986

Competitive Carrier Line Count Report and Self-Certification as a Rural Carrier § **BEFORE THE OFFICE OF**
§ **MANAGEMENT AND BUDGET**

WORLDCALL INTERCONNECT, INC. COMMENTS

TO: NICHOLAS A. FRASER, OFFICE OF MANAGEMENT AND BUDGET, AND
JUDITH B. HERMAN, FEDERAL COMMUNICATIONS COMMISSION:

A. Summary

Worldcall Interconnect, Inc. (“WCX”) submits these Comments on ICR Reference No. 200901-3060-012, OMB Control Numbers 3060-0793 and 3060-0986; *Competitive Carrier Line Count Report and Self-Certification as a Rural Carrier*.

The Federal Communications Commission’s (“FCC” or “Commission”) Supporting Statement acknowledges that WCX provided comments in response to the FCC’s initial internal request, Supporting Statement pp. 3, 7. The Supporting Statement then claims the FCC will resolve the issues WCX raised at a “later date.” The Commission’s proposals, however, do not in fact defer all of WCX’s issues. Approval would operate to deny rights presently held by WCX and would change collections in a manner that adversely impacts WCX.

The information collection request involves implementation of statutory methods of granting subsidy payments to telecommunications carriers as part of the federal universal service program.¹ This program is mandated by the Communications Act and has been implemented by

¹ These payments come from a specific fund established and overseen by the FCC (the Universal Service Fund or “USF”) that collects required assessments on all telecommunications carriers and then distributes the money to authorized recipients. *See* § 254(d). The Universal Service Administrative Company (“USAC”) – a wholly-owned subsidiary of the National Exchange Carriers Association, which represents and advocates on behalf of the incumbent local exchange carriers and therefore has every incentive to advantage its members and disadvantage non-ILECs and non NECA members – presently administers the USF on a contract basis, including the dispersal of funds. WCX is a wireless carrier and is not a local exchange carrier, so it cannot join NECA so as to begin enjoying NECA’s “advocacy” instead

the Federal Communications Commission through several decisions and rules. A further description of the program and history is provided below, but the main point of WCX's comments is that the FCC's proposals under Control Number 3060-0793 and 3060-0986 will violate several of the fundamental principles behind Universal Service. Specifically, the result would render the support received (or more properly not received) by certain competitive carriers *not* specific, *not* predictable, *not* sufficient and *not* competitively neutral.

Contrary to the assertion in the Supporting Statement on page 2, the submission will "change the information collection requirements for self-certification as a rural carrier" for the specific sub-set of carriers that operate in "rural" areas where the incumbent Local Exchange Carrier is a "non-rural ILEC" and desire to receive support based on their own costs. The approach proposed by the FCC will functionally prevent this sub-set of competitive carriers (which includes WCX in the state of Texas) from being able to self-certify at all. The present information collection method for self-certification as a rural carrier under Control Number 3060-0793 does not prevent a competitive carrier that provides supported services in "rural" areas that happen to be also served by "non-rural ILECs" from self-certifying that the competitive carrier nonetheless serves a "rural" area. The FCC proposed changes would, for the first time operate to do so. This is a material change. The FCC's assertion that there would be no change is simply wrong.

The OMB should reject the request and instead insist that the FCC honor a competitive carrier's right to receive support based on its own costs – either using current collection mechanisms or "in any reasonable manner." In the context of this collection, the OMB should

of the enmity that presently prevails. Nonetheless, payments to ETCs are "benefits" in the sense intended by 5 C.F.R. § 1320.6(c).

reject the proposal to the extent it prohibits some carriers operating in rural areas from self-certifying their rural status.

B. Background and History of Underlying Subject for Which Information is Collected Under Control Numbers 3060-0793 and 3060-0986

1. *Universal Service*

Since 1934 the United States had the goal of reasonably priced telecommunications service in all parts of the nation. This is the so-called “Universal Service” concept. *See* 47 U.S.C. § 151 (directing the Federal Communications Commission “to make available, so far as possible, to all people of the United States ... a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges ...”). Federal universal service programs have subsidized service in rural and insular areas, which usually face higher costs of service due to low population density, terrain and other factors. *See, e.g.,* Order on Remand, *Federal State Board on Universal Service*, 18 FCC Rcd 22559, n. 25 (2003). In 1996, Congress amended the Communications Act to introduce competition into local telephone service, which traditionally was provided through regulated monopolies. *See* 47 U.S.C. §§ 251, 252. At the same time, Congress added new universal service provisions to the Communications Act. *See* 47 U.S.C. §§ 214(e), 254. These provisions supplanted the previous more general and broadly stated universal service goal for consumers in high-cost areas. 47 U.S.C. §§ 214(e), 254(b)(3), (e), (j).

Congress recognized that the introduction of competition into local telecommunications markets as a result of the 1996 amendments to the Communications Act would necessarily threaten the implicit subsidy system that had traditionally supported universal service. Congress therefore required the FCC to replace the then-existing patchwork of explicit and implicit

subsidies with “specific,” “predictable” and “sufficient” Federal and State mechanisms to preserve and advance universal service.” *See*, 47 U.S.C. § 254(b)(5).

Section 254(b) of the Act sets out six enumerated principles. Among other things, § 254(b) states that: there should be specific, predictable, and sufficient federal and state universal service mechanisms (47 U.S.C. § 254(b)(5)); quality services should be available at just, reasonable, and affordable rates (47 U.S.C. § 254(b)(1)); and consumers in all regions of the nation – and particularly those in rural and high-cost areas – should have access to telecommunications and information services that are reasonably comparable in rates and quality to those provided in urban areas (47 U.S.C. § 254(b)(3)).² The FCC then adopted the additional principle of “competitive neutrality” pursuant to its authority under § 254(b)(7) to adopt “other” universal service principles in the public interest. In the context of § 254(b)(7), “competitive neutrality means 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.” First Report and Order, *Federal-State Board on Universal Service*, 12 FCC Rcd 8776 ¶ 47 (1997) (“*Universal Service First Report and Order*”). Another universal service provision, 47 U.S.C. § 254(e), requires that federal universal service support be “explicit and sufficient to achieve statutory purposes.”

² The FCC has a rule defining “rural area” for purposes of the comparability test. *See* 47 C.F.R. § 54.316(c):

(c) Definition of “rural area.” For the purposes of this section, a “rural area” is a non-metropolitan county or county equivalent, as defined in the Office of Management and Budget’s (OMB) Revised Standards for Defining Metropolitan Areas in the 1990s and identifiable from the most recent Metropolitan Statistical Area (MSA) list released by OMB. At a state’s discretion, a “rural area” may also include any wire center designated by the state as rural for the purposes of this section. In the event that a state designates a wire center as rural, it must provide an explanation supporting such designation in its certification pursuant to paragraph (a) of this section.

In order to receive support, carriers must receive regulatory approval or “designation.” Designated entities are called “eligible telecommunications carriers” or “ETCs.” *See* § 214(e). Competitive ETCs are called “CETCs.” An ETC, which may be designated by a state commission or the FCC, *see* 47 U.S.C. § 214(e)(2), (6), must offer the services supported by the federal universal service mechanisms and advertise the availability of those services in media of general distribution within the service area for which it has received ETC designation. *See* 47 U.S.C. § 214(e)(l). Further, the ETC must provide supported services at regulated rates, and when it comes to high-cost rural service those rates are invariably significantly below the actual cost the carrier incurs to provide the supported services.³ Universal service support is the mechanism by which the carrier can recover the difference between the cost of providing supported services in high-cost and rural areas and the much lower regulated rate for supported services in those areas.

The Commission first implemented the new universal service provisions of the Act in its May 1997 *Universal Service First Report and Order*. That Order defined a set of “core” “supported services” that are eligible for universal service support, delineated a mechanism to support those services, and established a specific timetable for implementation. The federal Universal Service Fund (“USF”) is the explicit support mechanism that the FCC established to fund the universal service subsidy programs required by the Act.

Prior to the 1996 Act, only incumbent local exchange carriers (“ILECs”) received high-cost support. But in the *Universal Service First Report and Order* the FCC found that high-cost

³ If rates in high-cost and rural areas fully recovered actual costs they would be much higher than those for in low-cost urban areas. That would violate the “reasonably comparable” criterion in 47 U.S.C. § 254(b)(3). Hence prices are regulated and required to be below actual cost, but the difference is supposed to be made up through universal service support subsidies.

support should be “portable” to any carrier that serves a particular customer, even if that carrier is a new entrant. The Commission provided that “[a] competitive carrier that has been designated as an eligible telecommunications carrier” under the Act “shall receive universal service support to the extent that it captures subscribers’ lines formerly served by an ILEC receiving support or new customer lines in that ILEC’s study area.” *Id.* ¶ 287. The FCC found that this policy would “aid the emergence of competition.” *Id.*

Incumbent Local Exchange Carriers (“ILECs”) receive high-cost support in various ways. Some receive support based on their own costs. Some are required to use “forward looking” cost studies that do not reflect actual investment and expense. The large Incumbent carriers like AT&T and Verizon do not recover explicit support from USF; instead they rely on continued implicit subsidies flowing from “above cost” prices for service in urban and lower cost areas, and from other “high margin” services like access charges. These profits are then implicitly used to support for “below cost” services in their rural areas and high-cost areas.

The Commission decided in 1997 that the “least burdensome way to administer” portability and support to competitive carriers would be to provide a competitive ETC the same per-line support as the ILEC, regardless of the competitive ETC’s own cost of providing service. The Commission reasoned that it could lawfully use the ILEC’s cost rather than “requiring” or “compelling” CETCs to submit cost studies. *Universal Service First Report and Order* ¶ 313.⁴

⁴ 313. We conclude that determining a rural ILEC’s per-line support by dividing the ILECs’ universal service support payment by the number of loops served by that ILEC to calculate universal service support for all eligible telecommunications carriers serving customers within that rural ILEC’s study area will be the least burdensome way to administer the support mechanisms and will provide the competing carrier with an incentive to operate efficiently. Besides using a forward-looking or embedded costs system, the alternative for calculating support levels for competing eligible telecommunications carriers consists of requiring the CLECs to submit cost studies. Compelling a CLEC to use a forward-looking economic cost methodology without

ETCs are therefore not *required* to document their own costs to receive high-cost support; instead, they may opt to receive support for each of their lines based on the same per-line support the ILEC receives in the relevant service area. *Id.*; 47 C.F.R. § 54.307(a)(1).⁵ This method of calculating high-cost support for competitive ETCs is known as “identical support” or the “identical support rule.”⁶ But the rule cannot be read to mandate identical support since the Commission has said in at least three cases that CETCs have the present option to receive support based on their own costs.

There is another important but sometimes confusing distinction under the Commission’s rules. Whether a local exchange carrier (“LEC”) is “rural” or “non-rural” depends primarily on its size and does not necessarily reflect the geographic nature of the territory it serves. *See* 47 C.F.R. §§ 51.5 (definition of “rural telephone company”),⁷ 54.5 (cross-referencing, for universal

requiring the ILEC’s support to be calculated in the same manner, however, could place either the ILEC or the CLEC at a competitive disadvantage. We thus disagree with commenters that assert that providing support to eligible CLECs based on the incumbents’ embedded costs would violate Section 254(e).

⁵ Section 54.307 speaks only to identical support. But the FCC has said CETCs have the option to submit their own costs in three separate cases, so the rule cannot be read to **require** identical support. *See* Order, *High Cost Universal Service Report*, 23 FCC Rcd. 8834, 8848-8849, ¶ 21 (2008) (“*CETC Cap Order*”); MO&O, *In the Matter of Applications of AT&T, Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd. 20295, 20330 (2007) (“*Dobson Order*”); MO&O, *Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee For Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-185, 22 FCC Rcd 19517, 19521, ¶¶ 9-12 (2007) (“*ALLTEL Order*”). The decisions would make no sense and have no meaning or effect if § 51.307 could be read to prohibit anything other than identical support for CETCs.

⁶ “Identical support” is “identical” only when it comes to explicit payments directly from the USF. As noted, AT&T and Verizon still receive implicit subsidies and often explicit subsidies from non-federal programs. Competitive carriers often do not have the same kind of service or revenue mix that would allow them to rely on implicit subsidies and often can not qualify for non-federal programs. For example, wireless carriers do not receive “access” revenues. Some competitive carriers do not serve urban areas and instead focus almost entirely on high-cost or rural areas. They therefore cannot enjoy support through implicit subsidies like AT&T and Verizon. Mandating identical support under the current approach would violate the “competitive neutrality” principle enunciated in the *Universal Service First Report and Order*.

⁷ Rural telephone company. A rural telephone company is a LEC operating entity to the extent that such entity:

service purposes, section 51.5 definition of “rural telephone company”). The definition of “rural telephone company” that the Commission adopted, for universal service purposes, mirrors the definition of “rural telephone company” found in § 153(37) of the Act. *See* 47 U.S.C. § 153(37); *Universal Service First Report and Order* ¶ 10.

The larger incumbent carriers like AT&T and Verizon serve many areas that are indisputably “rural”⁸ and/or “high-cost” but they are nonetheless considered to be “non-rural ILECs” and they receive support largely through continued implicit subsidies and non-federal

(1) Provides common carrier service to any local exchange carrier study area that does not include either:

(i) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) Has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.

⁸ See 47 C.F.R. § 51.316(c) *supra*. This rule expressly recognizes that “non-rural” incumbents do provide service in “rural” areas.

The FCC has also defined “rural area” for other parts of the universal service program. *See*, 47 C.F.R. § 54.5 (definition of “rural area”):

Rural area. For purposes of the schools and libraries universal support mechanism, a “rural area” is a nonmetropolitan county or county equivalent, as defined in the Office of Management and Budget’s (OMB) Revised Standards for Defining Metropolitan Areas in the 1990s and identifiable from the most recent Metropolitan Statistical Area (MSA) list released by OMB, or any contiguous non-urban Census Tract or Block Numbered Area within an MSA-listed metropolitan county identified in the most recent Goldsmith Modification published by the Office of Rural Health Policy of the U.S. Department of Health and Human Services. For purposes of the rural health care universal service support mechanism, a “rural area” is an area that is entirely outside of a Core Based Statistical Area; is within a Core Based Statistical Area that does not have any Urban Area with a population of 25,000 or greater; or is in a Core Based Statistical Area that contains an Urban Area with a population of 25,000 or greater, but is within a specific census tract that itself does not contain any part of a Place or Urban Area with a population of greater than 25,000. “Core Based Statistical Area” and “Urban Area” are as defined by the Census Bureau and “Place” is as identified by the Census Bureau.

subsidy programs. Under the identical support rule currently implemented through Form 525 (handled by Control Number 3060-0986), a competitive ETC (“CETC”) can not receive explicit federal support even in a rural and high-cost area when the incumbent LEC that also serves the area is supported implicitly from its other revenues or explicitly from another program rather than explicitly via federal USF payments. As a consequence the identical support rule provides an incentive for competitive carriers to avoid the highest cost areas served by the large ILECs. The FCC has recognized this effect: it found in 2008 that the identical support rule “fails to create efficient investment incentives for competitive ETCs” because a competitive ETC has an “incentive to expand the number of subscribers . . . located in the lower-cost parts of high-cost areas” instead of expanding the geographic scope of its network, particularly into areas with the lowest population densities (and correspondingly, the highest costs). Order, *High Cost Universal Service Report*, 23 FCC Rcd 8834 ¶ 21 (2008) (“*CETC Cap Order*”). This result “contraven[es] the Act’s universal service goal of improving the access to telecommunications services in rural, insular, and high-cost areas.” *Id.* (citing 47 U.S.C. § 254(b)(3)).

2. *Regulatory Decision Makers Encourage CETCs to Exercise “Own Costs” Option But Program Functionaries Frustrate Any Attempt To Do So*

The identical support rule has therefore fallen out of favor with regulatory decision makers. Both the Federal-State Joint Board and the FCC have criticized the operation and result of identical support, and each has proposed to eliminate it. *See*, Referral Order, *Federal-State Joint Board on Universal Service* 17 FCC Rcd 22642 (2002); Recommended Decision, *Federal-State Joint Board on Universal Service*, 19 FCC Rcd 4257 (2004) (“...funding a competitive ETC based on the incumbent LEC’s embedded costs may not be the most economically rational method for calculating support.”); Joint Statement of FCC Commissioners Copps, Adelstein,

Tate and McDowell regarding Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, 2008 WL 4821 (2008) (expressing “a tentative but growing measure of consensus” on key issues, such as (possibly) “eliminating the identical support rule” and moving toward “support based on a company’s own cost.”). The rule has not yet been formally changed and it technically remains in effect. The administrative functionaries in the bowels of the agency and within the ILEC-captured USAC are still completely wedded to identical support and they are assiduously undercutting and frustrating any and all attempts by CETCs like WCX to receive support under the “own cost” method the FCC has repeatedly said exists and has present vitality and effectiveness.

The identical support rule, however, was never mandatory. Any CETC could at any time reject identical support and proceed under “own cost.” In several decisions over the last few years, the FCC has expressly recognized, indeed emphasized, this option.⁹ Further, the FCC has relied heavily on this option in its defense of its decision to freeze CETC identical support payments in the *CETC Cap Order*. See, FCC Response Brief on Appeal, *Rural Cellular Association v. FCC*, D.C. Circuit Court of Appeals, No. 08-1284 and 08-1285, pp. 37, 59-60, 62-64 (March 25, 2009).¹⁰

⁹ *CETC Cap Order, supra; Dobson Order, supra; ALLTEL Order, supra.*

¹⁰ The *Order* capped the “total annual competitive ETC support” in each state “at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis.” *Id.* ¶ 1. Under the interim cap, competitive ETCs will see a reduction in their per-line high-cost support if the number of competitive ETC lines in a state increases. The Commission found, however, that because “competitive ETC support is based on the incumbent LEC’s costs, rather than on the competitive ETCs’ own costs, there is no reason to believe - and no record data showing - that support subject to an interim cap would necessarily result in insufficient support levels.” *Id.* ¶ 14. Nonetheless, to protect against any possibility that the interim cap might deny competitive ETCs sufficient support, the Commission provided that a competitive ETC “will not be subject to the interim cap to the extent that it files cost data” with the

Commission “demonstrating that its costs meet the support threshold in the same manner as the [ILEC].” *Id.* ¶ 1.

The Commission reasonably interpreted section 254(b)(5) of the Act to require sufficient, but not excessive, universal service support. Regardless, Petitioners failed to demonstrate that their high-cost support would actually be insufficient under the interim cap. The Commission found no record evidence for such a claim. Moreover, if a competitive ETC believes its high-cost support is insufficient, the *Order* offers competitive ETCs an exception - a competitive ETC will not be subject to the interim cap if it files cost data demonstrating that its costs meet the support threshold in the same manner as the ILEC.

Regardless, Petitioners (and amicus curiae Corr Wireless) failed to demonstrate before the Commission that their high-cost support would, in fact, be insufficient under the interim cap. As the Commission found, “because competitive ETC support is based on the incumbent LEC’s costs, rather than on the competitive ETC’s own costs, there is no reason to believe - and no record data showing - that support subject to an interim cap would necessarily result in insufficient support levels.” *Id.* ¶ 14.

Nonetheless, to ensure the sufficiency of high-cost support, the *Order* offers competitive ETCs an exception from the interim cap if their capped support truly is insufficient. Specifically, “a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” *Id.* ¶ 31. Thus, there is simply no merit to amicus Corr Wireless’s allegations that under the interim cap, competitive ETCs will “receive only a portion of the subsidy which they need to meet their costs,” Amicus Br. 4, or that the interim cap has made it “impossible” for Corr Wireless to “recover anywhere near [its] needed level of support.” Amicus Br. 5. Rather, under the exception outlined above, Corr Wireless and other competitive ETCs may submit cost data to the Commission to secure greater per-line support if their high-cost universal service support under the interim cap proves insufficient. *Order* ¶ 31.

The availability of this exception, which neither Petitioners nor their amicus even mention, also undercuts their allegation that the interim cap will prevent newly designated competitive ETCs from receiving high-cost support in states that received no competitive ETC high-cost support prior to March 2008. Br. 49. A competitive ETC will be eligible for support in these states if it makes the cost showing required by the *Order*.

In all events, the Commission did not violate the principle of competitive neutrality when it enacted the interim cap, even if that principle were viewed in isolation. As previously discussed, the per-line high-cost support a competitive ETC receives under the Commission’s existing rules is based on the ILEC’s costs, not the competitive ETC’s own costs. To the extent that a competitive ETC believes it should be entitled to greater per-line high-cost support than the amount disbursed under the interim cap, the *Order* permits a competitive ETC to obtain an exception from the interim cap upon “fil[ing] cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” *Order* ¶ 31. If the competitive ETC cannot make this showing, it is hard to argue that reducing a competitive ETC’s per-line high-cost support below that of the ILEC violates the principle of competitive neutrality.

The Commission, in fact, found that “it is not clear that identical support has . . . resulted in competitive neutrality.” *Id.* ¶ 22. Identical support also “fails to create efficient investment incentives for competitive ETCs” and “contraven[es] the Act’s

As alluded to earlier, in 2008 the FCC “capped” the “identical support” payments “in each state at the level of support that CETCs in that state were eligible to receive during March 2008 on an annualized basis,” pending a full elimination of the identical support rule. *CETC Cap Order* ¶ 1. Also, as noted, the Commission expressly reaffirmed the “own cost” option it had already set out in two prior orders: “a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” *Id.* ¶ 31.¹¹ The FCC consistently points to this option as a substantial basis for the lawfulness of the cap itself, which must mean that the option is viable, immediately available and meaningful.

C. Discussion of Proposed Changes and Impact on WCX

WCX has received CETC designation in Texas and has a pending application before the FCC for CETC status in New York.¹² WCX plans to seek CETC status for Puerto Rico and the

universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas.” *Id.* (citing 47 U.S.C. § 254(b)(3)). “Because a competitive ETC’s per-line support is based solely on the per-line support received by the [ILEC], rather than its own network investment in an area,” the competitive ETC has an “incentive to expand the number of subscribers . . . located in the lower-cost parts of high-cost areas” instead of expanding the geographic scope of its network, particularly into areas with the lowest population densities (and correspondingly, the highest costs). *Id.*

(Emphasis added), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-289602A1.pdf.

¹¹ CETCs’ right to use their own costs had always existed, at least implicitly. The Commission had already recognized and articulated CETC’s “own cost” rights in the *Dobson Order* and the *ALLTEL Order*. The “exception” therefore applies to the cap; it serves to limit applicability of the cap to only those CETCs that choose to continue to receive identical support. CETCs retain the option they have had since 1996 to receive support based on their own costs if they do not want to use the identical support rule and when they exercise this option then the identical support cap does not apply.

¹² See Public Notice, *Comment Sought on the Petition of Worldcall Interconnect, Inc. for Designation as an Eligible Telecommunications Carrier in the State of New York*, DA 08-2638, CC Docket No. 96-45 (rel. Dec. 4, 2008). The FCC’s comment cycle on the application finished on January

Virgin Islands. The areas in which WCX does and will operate as a CETC are indisputably “rural” under the OMB’s rules and any reasonable measure.¹³ Each of the areas has higher costs of service due to low population density, terrain and other factors. The prices that WCX will be allowed to charge for supported service will be far below the actual costs WCX incurs to provide supported services.

WCX has been a critic of the identical support rule because of the very problems regulators have now acknowledged. WCX has strongly supported elimination of identical support in favor of requiring each ETC to receive support based on its own costs. Therefore, after the FCC repeatedly emphasized the present availability of the option to receive support based on a CETC’s own costs, WCX began the process of attempting to submit its own costs just like the FCC said it could do.

The FCC told the D.C. Circuit just a few weeks ago that if petitioners in the appeal of the *CETC Cap Order* truly believe they will “receive only a portion of the subsidy which they need to meet their costs,” or that the interim cap has made it “impossible” to “recover anywhere near [its] needed level of support” “they and other competitive ETCs may submit cost data to the Commission to secure greater per-line support if their high-cost universal service support under the interim cap proves insufficient.” WCX has done precisely that very thing. Specifically, WCX has submitted “cost data demonstrating that its costs meet the support threshold” and it has done so “in the same manner as [an] incumbent LEC.”

21, 2009 and there was no opposition to the application. The Commission, however, has not issued a decision on the wholly uncontested application. WCX believes the delay is due in very large part to the fact that WCX made it clear it would be seeking to recover support based on its own costs and there are at least some within the agency that do not want to publicly address that topic in an order. They have instead chosen to try to eviscerate the “own cost” by functionally prohibiting actual operation of the option by engaging in opaque bureaucratic gambits like the one proposed here.

¹³ Some (but not all) of these areas are served by “non-rural” ILECs like AT&T or Verizon, but they are still both rural and there is a high cost to serve.

Apparently the FCC staff and the FCC contract administrator (Universal Service Administrative Corporation or “USAC”) did not receive that memo. On April 16, 2009 WCX received an email¹⁴ from USAC refusing to allow WCX to submit its own costs. The message said, in pertinent part:

[T]he own cost exception for CETCs seeking High Cost support cannot be implemented until the Commission receives approval from the Office of Management and Budget (OMB) for the data collection. Until this occurs, USAC cannot process any cost data submitted to us by CETCs. In the meantime, you may submit your line counts on the FCC Form 525 and receive High Cost support under the identical support rule, if the incumbent in whose territory you serve receives any High Cost support.

There is a significant problem here: USAC will not allow CETCs to submit their own costs even though the FCC has been trumpeting the “own cost” option in multiple orders in 2007 and 2008 and is right now telling the D.C. Circuit that the option is presently available and is meaningful.

The email blames OMB. Actually, however, the delay is entirely attributable to the FCC itself, because it has chosen not to seek approval to the extent there is some need to change collections (which WCX denies). The Supporting Statement for the proposals in Control Number 3060-0986 says the Commission intends to come back at some unknown time – probably in the distant future – to actually formalize the collection methods, forms and procedures that will be used to actualize the “own cost” option. Supporting Statement pp. 2, 7.

The present collections, however, already provide a means for a CETC to present its own costs. The CETC can presently do so – just like the FCC said in its *CETC Cap Order*, in the brief

¹⁴ A true and correct copy of the email is appended to these comments.

to the D.C. Circuit and in the Federal Register¹⁵ when it sought comment on this collection effort – by filing “cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent local exchange carrier.” That is what WCX did: WCX used the same accounting methods the rural ILECs use, and submitted its findings directly to USAC. The present position expressed by USAC that there must be some “new” collection and some “new” form and some “new” process for CETCs that is *different* than the current methods used by the ILEC is completely at odds with the express words used by the FCC on multiple occasions, including in the Federal Register publication for this collection. The FCC says the CETC is to submit its own cost data demonstrating that its costs meet the support threshold “*in the same manner as the incumbent local exchange carrier.*” But now they are saying a CETC must submit its costs in some *different* and not-yet-developed “manner” that is not used by “the incumbent local exchange carrier.” This is simply wrong.

The command in § 254 and the FCC’s additional criterion that support be “specific,” “predictable,” “sufficient” and “competitively neutral” mandates some present method for CETCs to recover support based on their own costs. The FCC must permit CETCs to submit their own costs “using any other reasonable manner” pending formalization of any data collections and assignment of OMB Control Numbers that they (wrongly) perceive they need to process. Denial of a benefit is a “penalty” under 5 C.F.R. § 1320.6(c) and 44 U.S.C. § 3512(a). WCX cannot be penalized merely because there is (or is wrongly perceived to be) not presently

¹⁵ See 74 FR 3035 (January 16, 2009) [“...a competitive ETC will not be subject to the interim cap to the extent it files cost data demonstrating that its costs meet the support threshold *in the same manner as the incumbent local exchange carrier.*” (emphasis added)].

an approved Control Number associated with¹⁶ part of the information collection necessary to provide the benefit. *See* 5 C.F.R. § 1320.6(c).

WCX is already a CETC in Texas, and is providing service in rural areas at mandated, regulated rates that are significantly below the cost of service. WCX is trying to build a network to continue expanding into more rural areas in Texas and other states. The present refusal to process WCX's submissions and funding demonstrations is denying WCX money to which it is presently entitled under the "own cost" option violates the "specific" and "sufficient" commands in § 254. In addition, the uncertainty concerning when – or even if – the FCC will ever start the process of formalizing the option it recognized several years ago and is vigorously using to defend its past orders in court is harming WCX's ability to raise capital. This is a clear violation of the "predictable" criterion in § 254. The attempt to force WCX to use only "identical support" pending further deliberations and formalities violates the "competitive neutrality" principle as well.

With regard to the current request under Control Number 3060-0986, the OMB should reject the proposal to eliminate the self-certification currently under Control Number 3060-0793 and incorporate it into Control number 3060-0986. The reason is that doing so will functionally prevent CETCs that serve rural areas – and particularly those that serve rural and high cost areas served by "non-rural" ILECs like AT&T and Verizon – from submitting the self-certification that they serve rural or high-cost areas.

¹⁶ Existing Control Number 3060-0793 contains part of the information collection that would be associated with WCX submitting its own costs in rural areas because at present it allows WCX to self-certify that it serves rural areas. As explained below the FCC, however, is for some reason proposing to merge that collection into another collection within Control Number 3060-0986. The result of this approach would for the first time functionally prevent WCX from self-certifying it serves rural areas.

This is so because Control Number 3060-0986 uses Form 525,¹⁷ which is entirely focused about CETC reporting using the identical support rule.¹⁸ A CETC who serves a rural area that happens to be also served by a “non-rural ILEC” must make an entry on the form to that effect. Once the CETC makes this entry then USAC will no longer allow a claim that the carrier serves rural areas¹⁹ and will not process any request for explicit support for rural or high-cost areas. Form 525 therefore will prohibit CETCs that provide service in high-cost or rural areas that happen to be also served by “non-rural” ILECs. The certification will only be possible if the ILEC in the area is a “rural ILEC.”

The entire premise behind the incorporation of part (h) in Control Number 3060-0986 (self certification) into Control Number 3060-0986 is defective. It will be impossible for CETCs to make the self-certification in any area that happens to be served by a “non-rural ILEC.” This is a material change from the present situation because it does not happen under the current “self-certification” mechanism approved under Control Number 3060-0793. The present information collection does not operate to prevent CETCs serving “rural” areas that also happen to be served by a “non-rural” ILEC from self-certifying. The new method proposed by the FCC would, for the first time, do so. Therefore, the representation on page 3 of the Supporting Statement that “[n]o revision to this information collection is submitted at this time to address any information

¹⁷ Form 525 is an information collection under the PRA. The FCC implicitly acknowledges this fact because it is seeking OMB approval for issues related to the form in this project.

¹⁸ WCX made this point in its comments to the FCC mentioned on pages 3 and 7 of the Supporting Statement. Indeed, Form 525 is completely irrelevant to a CETC that wants to use the “own cost” option. There is no need to use Form 525 at all because the CETC would report its loop count on both the High Cost submission and the Local Switching Support submissions.

¹⁹ This is an anachronism of the identical support rule that cannot logically be applied to CETCs that have chosen to reject the identical support rule and desire to receive support based on their own costs.

collection arising from the exception for competitive ETCs demonstrating their own costs” is simply wrong.

D. Conclusion

Eliminating the separate collection under Control Number 3060-0793 and trying to merge into Control Number 3060-0986 will for the first time functionally preclude a CETC from self-certifying rural status if it provides service in a rural area where the ILEC is a “non-rural ILEC” and the CETC wants to rely on its own costs. This self-certification, however, is one of the major steps for calculating and then obtaining the benefits to be received under the universal service program. The FCC’s proposal therefore violates the statute and it is completely inconsistent with its own declarations and decisions concerning support to rural and high-cost areas.

OMB should reject the proposal to eliminate the self-certification currently under Control Number 3060-0793 and incorporate it into Control number 3060-0986. OMB should also advise the FCC and USAC that OMB regulations do not prohibit the present operation of the “own cost” option because CETCs are allowed under 5 C.F.R. § 1320.6(c) to submit their own costs “in any reasonable manner.”

Respectfully Submitted



W. Scott McCollough
General Counsel, Worldcall Interconnect, Inc.

April 20, 2009

Rich Lewis

From: Karen Majcher [KMajcher@usac.org]
Sent: Thursday, April 16, 2009 5:15 PM
To: rlewis@worldcall.net
Cc: Jennifer McKee; Michael Spead
Subject: FW: Worldcall Interconnect, Inc. - Status of Subsidy Payments

Rich –

I am responding to the email that you sent to Mike Spead. As I believe you are aware, the own cost exception for CETCs seeking High Cost support cannot be implemented until the Commission receives approval from the Office of Management and Budget (OMB) for the data collection. Until this occurs, USAC cannot process any cost data submitted to us by CETCs. In the meantime, you may submit your line counts on the FCC Form 525 and receive High Cost support under the identical support rule, if the incumbent in whose territory you serve receives any High Cost support.

Regards,

Karen Majcher

*Vice President
High Cost Low Income Division
USAC*

From: Rich Lewis [mailto:rlewis@worldcall.net]
Sent: Tuesday, April 14, 2009 12:50 PM
To: Michael Spead
Subject: Worldcall Interconnect, Inc. - Status of Subsidy Payments

Mike,

As you are aware, Worldcall Interconnect, Inc. is operating “exempt from the cap” as allowed for under the May 2008 Interim Cap order that was approved in August 2008. Worldcall Interconnect, Inc. filed its revised LSS and High Cost data submission forms on 3/11/09 utilizing such a cost basis. Thus far we have not received any payment or heard anything back whatsoever from USAC regarding payment of the amounts to which we are entitled based upon our data submissions.

Please notify me as to the status of these payments and what, if any, actions USAC is taking or plans to undertake with respect to them.

Regards,
Rich

Rich Lewis
CFO
Worldcall Interconnect, Inc.
512-888-2313
rlewis@worldcall.net