

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

In the Matter of)
)
Comment Sought on Petition for) MB Docket No. 10-71
Rulemaking to Amend the Commission's)
Rules Governing Retransmission Consent)

**COMMENTS of
THE ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
THE INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE;
THE WESTERN TELECOMMUNICATIONS ALLIANCE;
and the
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

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TABLE OF CONTENTS

SUMMARYii

I. INTRODUCTION 1

II. MARKET-BASED REFORM OF RETRANSMISSION CONSENT IS NECESSARY TO ENABLE AFFORDABLE END-USER RATES FOR VIDEO SERVICE AND TO INCREASE BROADBAND ADOPTION..... 2

III. THE COMMISSION SHOULD IMPLEMENT NEW MARKET-BASED RULES THAT ALLOW MVPDS TO: (A) PROVIDE CHANNELS FROM OUTSIDE OF THEIR DMA, (B) POOL BARGAIN, AND (C) HAVE ACCESS TO “MOST FAVORED NATION” PRICING FOR PROGRAMMING 4

 A. MVPDs should be permitted to seek local programming from outside their DMA 5

 B. Small and mid-size MVPDs should have the ability to pool bargain..... 6

 C. Small and mid-size MVPDs should have access to “most favored nation” pricing for programming, which allows them to request the same prices and conditions from any other existing retransmission agreements a broadcaster has entered into with other MVPDs..... 8

IV. IN ORDER TO PROTECT CONSUMERS AND ENCOURAGE MARKET-BASED NEGOTIATIONS, THE COMMISSION SHOULD IMPLEMENT RULES THAT PROVIDE FOR INTERIM CARRIAGE OF SIGNALS AND A DISPUTE RESOLUTION PROCESS IN THE EVENT OF AN IMPASSE.....9

V. CONCLUSION11

SUMMARY

The Commission should grant the petition filed by 14 entities requesting that a proceeding be initiated to amend and supplement the retransmission consent rules. Market-based reform of retransmission consent rules is necessary to enable small and mid-size MVPDs to offer affordable rates and more choices to their video customers, as well as to increase broadband adoption. The current retransmission consent rules insulate broadcasters from market forces, and prevent even-handed negotiations for access to broadcast signals from taking place. As a result, small and mid-size MVPDs are forced to either accept the prices and terms dictated by a broadcaster, or forgo access to the broadcaster's signal.

Therefore, the Commission should implement new market-based rules that allow MVPDs to: (a) provide channels from outside of their DMA, (b) pool bargain, and (c) have access to "most favored nation status" pricing for programming. The Commission's rules prevent MVPDs from carrying commercial broadcast stations from outside of their DMA. This forces small and mid-size MVPDs to pay whatever retransmission rates are required by the broadcast station in their own DMA. By permitting MVPDs to acquire programming in neighboring DMAs, it would enable rural MVPDs to consider and receive lower programming rates from alternative broadcast stations. In addition, small and mid-size providers should be permitted to pool their resources and negotiate as a group. This would provide them with some measure of bargaining power in negotiations, ultimately resulting in more equitable outcomes that would benefit consumers. Furthermore, the Commission should adopt a "most favored nation" provision that allows small and mid-size MVPDs to request the same prices and conditions from any of the other existing retransmission consent agreement a broadcaster has entered into with other MVPDs. This would address the discriminatory pricing that small and mid-size MVPDs must

often accept due to their lack of bargaining power, and help to reduce a barrier to video competition.

Finally, in the event of an impasse in negotiations, the Commission should protect consumers by instituting a “standstill” provision that would ensure that customers experience no loss of broadcast signals while negotiations and/or dispute resolution proceedings are still underway. This would also help inject market forces into the negotiation process by providing an incentive for broadcasters to bargain in good faith. The Commission should also establish one or more dispute resolution mechanisms. This would minimize the impacts of a dispute on consumers, help level the playing field, and increase the likelihood that mutually acceptable agreements will be reached through market-based negotiations.

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RURAL INDEPENDENT COMPETITIVE ALLIANCE**

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),¹ the National Telecommunications Cooperative Association (NTCA),² the Independent Telephone and Telecommunications Alliance (ITTA),³ the Western Telecommunications Alliance (WTA),⁴ and the Rural Independent Competitive Alliance (RICA)⁵ (collectively, the Associations) hereby submit these comments in response to the FCC's

¹ OPASTCO is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

² NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

³ ITTA represents mid-size LECs that provide a broad range of high quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 25 million customers in 45 states.

⁴ WTA is a trade association that represents approximately 250 rural telephone companies operating west of the Mississippi River. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

⁵ RICA is a national association of nearly 80 competitive local exchange carriers (CLECs) that are affiliated with rural ILECs and provide facilities based service in rural areas.

Public Notice⁶ on a petition filed by 14 entities requesting that the Commission institute a proceeding to amend and supplement its retransmission consent rules.⁷

The Associations support this petition, as the record clearly demonstrates that the current retransmission consent regime is detrimental to consumers, insulates broadcasters from market forces, and impedes broadband deployment and adoption. The Associations seek updates to the rules in order to facilitate even-handed, market-based negotiations for retransmission consent rights. Enabling small and mid-size providers to compete more vigorously in the video marketplace will enhance consumers' choices, while augmenting providers' ability and incentive to expand their offerings of video and broadband services.

II. MARKET-BASED REFORM OF RETRANSMISSION CONSENT IS NECESSARY TO ENABLE AFFORDABLE END-USER RATES FOR VIDEO SERVICE AND TO INCREASE BROADBAND ADOPTION

As the petition explains, technology and the marketplace have changed dramatically over time, while the rules for retransmission consent have remained static. This has resulted in a skewed playing field that favors broadcasters and prevents free-market retransmission consent negotiations from taking place.⁸ Network non-duplication, exclusivity, and mandatory carriage rights enjoyed by broadcasters leave multichannel video programming distributors (MVPDs), especially small and mid-size MVPDs, with the Hobson's choice of either accepting the prices and terms dictated by a broadcaster, or forgoing access to the broadcaster's signal. Therefore, the Associations support the petition to address these imbalances.

⁶ *Media Bureau Seeks Comment On A Petition For Rulemaking To Amend The Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (rel. Mar. 19, 2010) (Public Notice).

⁷ Public Knowledge, Time Warner Cable Inc., DirecTV Inc., Verizon, Dish Network LLC, Cablevision Systems Corp., Charter Communications Inc., Mediacom Communications Corp., American Cable Association, Bright House Networks LLC, New America Foundation, Insight Communications Company Inc., OPASTCO, and Suddenlink Communications, *Petition to Amend the Commission's Rules Governing Retransmission Consent*, Petition for Rulemaking, MB Docket No. 10-71 (fil. Mar. 9, 2010) (Petition).

⁸ Petition, pp. 6-20.

The petition describes a number of specific cases in which broadcasters have manipulated the outdated retransmission consent regime to the detriment of consumers.⁹ After the petition was submitted, a small MVPD filed a supporting statement, explaining that its customers had gone without broadcast signals for 15 months.¹⁰ While the situations outlined in the petition focused on larger MVPDs, this small provider highlighted the sustained harms that are inflicted upon rural consumers when a small MVPD is denied access to broadcast signals under reasonable terms and conditions.¹¹

Furthermore, the American Cable Association (ACA) has previously provided copious amounts of data showing that prices, terms, and conditions for access to broadcast programming have increased substantially; that small MVPDs face substantial discrimination in prices for access to broadcast programming; that increasing retransmission consent demands of broadcasters result in subscribers of small and medium-sized operators losing access to broadcast signals; and that the rising costs of retransmission consent raise the costs of multi-channel video, harm competition, and hinder the deployment of advanced services.¹² Multiple parties representing a variety of MVPDs have, in separate filings, provided similar demonstrations that the current rules are outdated, harmful to consumers, impede broadband adoption and

⁹ *Id.*, pp. 20-30. *See also, ex parte notice*, letter from John Kuykendall, JSI Inc. on behalf of Ringgold Telephone Company, to Secretary Dortch, MB Docket Nos. 07-29; 07-198 (fil. Oct. 5, 2007).

¹⁰ *See*, BEVCOMM, Inc. and Cannon Valley Cablevision Inc. comments, MB Docket No. 10-71, (rec. Apr. 7, 2010), p. 2.

¹¹ *Id.*

¹² *See*, ACA comments, MB Docket No. 07-269 (fil. May 20, 2009), pp. 4-16 (ACA comments). Previously, the Commission has correctly recognized that there is an intrinsic link between a provider's ability to offer video service and to deploy broadband networks. *See, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶62 (2007). Furthermore, rural carriers that are able to bundle video with broadband services have experienced broadband adoption rates that are nearly 24 percent higher than those rural carriers that offer broadband alone. *See*, National Exchange Carrier Association comments, GN Docket Nos. 09-47, 09-51, 09-137 (fil. Dec. 7, 2009), p. 6.

deployment, and are therefore in need of reform.¹³ The petition shows that the Commission has the authority to update its rules accordingly.¹⁴ Given this clear record, the petition should be granted without delay.

III. THE COMMISSION SHOULD IMPLEMENT NEW MARKET-BASED RULES THAT ALLOW MVPDS TO: (A) PROVIDE CHANNELS FROM OUTSIDE OF THEIR DMA, (B) POOL BARGAIN, AND (C) HAVE ACCESS TO “MOST FAVORED NATION” PRICING FOR PROGRAMMING

The Associations request that the Commission’s proceeding on retransmission consent specifically address the concerns of small and mid-size MVPDs, which face unique challenges not experienced by large MVPDs. In general, the more subscribers an MVPD has, the more leverage it has in negotiations with content providers, which in turn enables an equitable arrangement to be reached for both parties. Broadcasters generate much of their revenue by selling advertising, and the rates that they charge advertisers are based on the number of potential viewers. The more potential viewers there are, the higher the rate that can be charged. It is in the broadcasters’ best interests, then, to take whatever steps are necessary to ensure that their programming is carried by the larger MVPDs. On the other hand, the smaller customer bases of small and mid-size MVPDs generate minimal level of advertising revenue for broadcasters. This leaves small and mid-size MVPDs with no leverage when “negotiating” with the broadcasters.

Compounding the problem, retransmission agreements are typically subject to mandatory non-disclosure provisions. These provisions have the effect of preventing MVPDs from gauging

¹³ See, e.g., ACA comments, pp. 5-7; NTCA comments, MB Docket No. 07-269 (fil. May 19, 2009), pp. 7-10. See also ACA comments, MB 07-198 (fil. Jan. 3, 2008), pp. 5-20; NTCA comments, MB 07-198 (fil. Jan. 4, 2008), pp. 16-32; OPASTCO, ITTA, RICA, WTA comments, MB 07-198 (fil. Jan. 4, 2008), pp. 8-12; Small Cable System Operators for Change comments, MB 07-198 (fil. Jan. 4, 2008), pp. 2-5; Broadband Service Providers Association comments, MB 07-198 (fil. Jan. 4, 2008), pp. 18-2.

¹⁴ Petition, pp. 31-35.

the market value of the content they are negotiating to obtain. MVPDs are required to agree to these provisions as a condition of gaining access to programming. Hence, small and mid-size MVPDs have no way of knowing whether the price they are paying for programming is “fair” or in line with what their larger counterparts are paying.

Therefore, the Associations urge the Commission to propose rules to address the inequities that small and mid-size MVPDs face in negotiations with broadcasters.

A. MVPDs should be permitted to seek local programming from outside their DMA

Section 76.56(b) of the Commission’s rules provide that MVPDs located in a Designated Market Area (DMA) may only carry the local commercial broadcast television stations located in that DMA. This forces an MVPD to pay whatever retransmission rates are required by the broadcast station in the DMA. The MVPD is not permitted to purchase programming from an alternative broadcast station in a neighboring DMA, even if offered at a lower rate. This prohibition against “shopping” for content in nearby DMAs prevents competition for broadcast programming. The Commission can and should address this situation by permitting MVPDs to acquire programming in neighboring DMAs.

The Associations, therefore, urge the Commission to rule on, and make part of this proceeding, the *ACA Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission and Consent, Non-Duplication, and Syndicated Exclusivity*, RM-11203. It should also adopt the following amendments to the Commission’s rules, as proposed by NTCA, so that rural MVPDs, which serve 7.7 million households, may consider and receive lower programming rates from alternative broadcast stations in neighboring DMAs.¹⁵

¹⁵ See, NTCA comments, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No, 06-189 (fil. Nov. 29, 2006).

Rural Commercial Broadcast Video Programming Reform:

New Section 47 CFR §76.64 (n):

(n) Where a commercial broadcast station seeks consideration for retransmission consent from a small CATV or IPTV provider beyond carriage and channel placement, neither such commercial broadcast station nor any other party shall take any action which has the purpose or effect of hindering or preventing the small CATV or IPTV provider from retransmitting the signal of any other local or non-local commercial broadcast station. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a “small cable company” as defined by the Communications Act of 1934, as amended. A party shall be deemed to be preventing or hindering a small CATV or IPTV provider where such local commercial broadcast station or any other party does the following:

- (1) Asserts network non-duplication or syndicated exclusivity under Sections 76.92 and 76.101 of this Part with respect to such small cable company.
- (2) Influences or controls by contract or otherwise a commercial broadcast station’s decision or ability to grant retransmission or influences or controls by contract or otherwise the terms and conditions of such station’s retransmission consent for retransmission of its signal by a small CATV or IPTV company.

Addition of text to the following sections.

47 CFR § 76.93. Parties entitled to network non-duplication protection. Subject to 47 CFR §76.64(n), television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to 47 CFR §76.92 in accordance with the contractual provisions of the network-affiliate agreement that are consistent with the Federal Communications Commission’s rules.

47 CFR §76.103(a). Parties entitled to syndicated exclusivity. Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to §76.101 in accordance with the contractual provisions of their syndicated program license agreements that are consistent with the Federal Communications Commission’s rules, and with §76.109 and subject to §§76.64(n), (o), and (p) in particular.¹⁶

B. Small and mid-size MVPDs should have the ability to pool bargain

Small and mid-size MVPDs could greatly enhance their ability to negotiate with broadcasters if they were permitted to pool their resources, appoint an agent, and negotiate as a group. Small and mid-size MVPDs could then offer the broadcasters a larger number of

¹⁶ The proposed language in new section 47 CFR §76.64 (n) was originally authored by the American Cable Association (ACA) and can be found in the ACA Petition for Rulemaking to Amend 47 CFR

subscribers, thereby providing them with some bargaining power in the negotiation process.¹⁷

This would ultimately result in more equitable outcomes that would benefit consumers.

The Associations suggest the following:

New Section 47 CFR §76.64 (o):

(o) IN GENERAL.— In addition to New Section 47 CFR §76.64 (n), any small CATV or IPTV provider that meets the Commission’s definition of a small cable company may combine with any other small CATV or IPTV provider meeting such definition and appoint a bargaining agent(s) to bargain collectively on their behalf in negotiating carriage with a local or non-local commercial broadcast station(s) in any designated market area (DMA) throughout the United States. Any CATV or IPTV provider with 400,000 subscribers or less meets the definition of a “small cable company” as defined by the Communications Act of 1934, as amended. The designated bargaining entity shall have the option of exercising the same rights and responsibilities in the procedures set forth by the Federal Communications Commission in Part IV of Appendix F in *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, Memorandum Opinion and Order*, 19 FCC Rcd 473 (2004). Any small CATV or IPTV provider may also negotiate directly with any local or non-local commercial broadcast station(s) in any DMA throughout the United States. If any small CATV or IPTV provider decides to negotiate on its own behalf in carriage negotiations with a local or non-local commercial broadcast station(s) in any DMA throughout the United States, the small CATV or IPTV provider shall have the option of exercising the same rights and responsibilities in the procedures set forth by the Federal Communications Commission in Part IV of Appendix F in *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, Memorandum Opinion and Order*, 19 FCC Rcd 473 (2004). Small cable companies may enter into agreements with in-DMA and out-of-DMA commercial broadcast stations simultaneously and broadcast in-DMA and out-of-DMA commercial broadcast station programming simultaneously to their consumers.

New Section 47 CFR §76.64 (p):

(p) IN GENERAL.— In addition to New Sections 47 CFR §76.64 (n) and (o), contracts or other influences between commercial broadcast stations and their network/parent company, affiliated company, or non-affiliated company, entity or person shall not prohibit any commercial broadcast station from negotiating and entering into agreements to provide in-DMA or out-of-DMA commercial broadcast programming to small CATV, IPTV providers, or their bargaining agent(s). No commercial broadcast station can refuse to negotiate with a small cable company.

§§ 76.64, 76.93 and 76.103, filed with the Commission on March 2, 2005.

¹⁷ The Commission has previously recognized that small MVPDs are “particularly vulnerable” to being subject to choosing between high rates or loss of signal because they lack leverage due to their small subscriber bases. *See*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) (Program Access NPRM), ¶¶119-120.

C. Small and mid-size MVPDs should have access to “most favored nation” pricing for programming, which allows them to request the same prices and conditions from any other existing retransmission agreements a broadcaster has entered into with other MVPDs

Small and mid-size MVPDs suspect that the prices they pay for broadcast programming per subscriber is much higher than that paid by large MVPDs.¹⁸ As discussed previously, large MVPDs are able to negotiate a favorable rate because they provide broadcasters with a large number of potential viewers that generate additional advertising revenue. In contrast, a broadcaster can extract higher rates from small and mid-size MVPDs because it loses little by denying them access to programming. However, as noted above, small and mid-size MVPDs are prevented from learning the market value of the programming they attempt to acquire due to mandatory non-disclosure provisions required by broadcasters as a condition of access.

Though small and mid-size MVPDs often provide service to rural areas not served by large MVPDs, they often compete for subscribers in lower-cost towns and suburban markets. A small or mid-size MVPD cannot effectively compete for customers with a large MVPD if the large company is receiving lower rates for programming. In some cases, this situation has led small MVPDs to exit the video marketplace, diminishing rural consumers’ choice of video service providers.

A “most favored nation” provision would rectify the inequities faced by small and mid-size MVPDs in the negotiating process by allowing them to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs. This would reduce a barrier to video competition that is imposed by discriminatory pricing. Enabling small and mid-size MVPDs to compete more vigorously in the video marketplace would provide more choice to consumers, as well as

enhance small and mid-size MVPDs' ability and incentive to expand their offerings of video and broadband services.

IV. IN ORDER TO PROTECT CONSUMERS AND ENCOURAGE MARKET-BASED NEGOTIATIONS, THE COMMISSION SHOULD IMPLEMENT RULES THAT PROVIDE FOR INTERIM CARRIAGE OF SIGNALS AND A DISPUTE RESOLUTION PROCESS IN THE EVENT OF AN IMPASSE

The petition observes that under current rules, a broadcaster can pull its signal from the customers of an MVPD as soon as a retransmission consent agreement expires.¹⁹ This imbalance leaves MVPDs with only two options, both of which harm consumers: incur higher costs by acceding to the broadcaster's demands, or forgo access to programming that consumers reasonably demand and expect. The petition suggests instituting an interim carriage (or "standstill") rule that would preserve consumers' access to a broadcast signal while negotiations and/or dispute resolution proceedings are underway. The Associations support this measure.

In addition to the immediate impact the loss of a signal has on consumers, the Commission should also consider that an MVPD's resulting loss of revenue will harm its ability to make further investments in video and broadband infrastructure. When customers cannot view programming due to a contract dispute between a video provider and a broadcaster, that provider will likely lose customers, impeding its ability to expand and improve access to video and broadband services.

A standstill provision would help inject market forces into the negotiation process. Once an agreement expires, the current rules permit broadcasters to withhold, with impunity, signals that are available over the public airwaves. MVPDs have no practical recourse to this stranglehold. Even if an MVPD files a complaint in response to a rule violation, the

¹⁸ See, ACA comments, pp. 5-7.

¹⁹ Petition, p. 35.

Commission has observed that “...the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints.”²⁰ A standstill provision would help to provide an environment in which good faith negotiations between parties could occur.

The petition also suggests that the Commission consider the establishment of one or more dispute resolution mechanisms.²¹ These mechanisms would help to minimize the impacts of a dispute upon consumers (such as an excessive increase in rates or the threat of signal loss), while establishing a more level playing field in which negotiations can take place. This, in turn, would increase the likelihood that mutually acceptable agreements would be reached in the vast majority of cases. However, in order for this to come to pass, one or more workable, effective dispute resolution mechanisms must be available in the event of an impasse.²²

The petition mentions arbitration or expert tribunals as examples.²³ The Associations support exploring these and other options, keeping in mind that dispute resolution mechanisms which may be appropriate for large MVPDs might not prove practical for small or mid-size providers with very limited resources. In any event, without the implementation of effective dispute resolution mechanisms, broadcasters will retain the incentive to offer “take-it-or-leave-it” arrangements rather than reach an agreement through even-handed negotiations.

V. CONCLUSION

²⁰ Program Access NPRM, ¶137.

²¹ Petition, pp. 31-32.

²² The Commission should also examine what dispute resolution procedures would be appropriate when there is no pre-existing contract, specifically in the case of new entrants to the video market. New entrants tend to have the least market power and negotiating leverage, although they are critical to providing consumer choice.

²³ Petition, p. 32.

The record clearly indicates that the current retransmission consent regime is outdated and insulates broadcasters from market forces during negotiations for access to broadcast signals. This leads to consumer harms in the form of higher rates, instances of the loss of broadcast signals, and decreased broadband adoption and deployment. These harms are especially acute for the customers of small and mid-size MVPDs, which lack the market power to obtain access to broadcast signals under the more favorable terms enjoyed by larger MVPDs. Therefore, the Commission should grant the petition and implement new market-based rules that allow small and mid-size MVPDs to: (a) provide channels from outside of their DMA, (b) pool bargain, and (c) receive most favored nation pricing for programming. In order to protect consumers and further encourage market-based negotiations, the Commission should also implement an interim carriage, or “standstill” provision, and provide for dispute resolution mechanisms in the event of an impasse.

Respectfully submitted,

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May 18, 2010

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance in MB Docket No. 10-71, DA 10-474, were served on this 18th day of May 2010 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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