Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	
Developing a Unified Intercarrier Compensation Regime	))	CC Docket No. 01-92

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

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EXECUTIVE SUMMARY

To provide predictability and avoid a haphazard approach to cost recovery, the Federal Communications Commission (the "Commission") should continue to utilize time-tested and court-tested standards. In examining current rules and considering updates that may preclude recovery of certain expenses via interstate rates and/or universal service fund ("USF") support, it is important to note that the multiple layers of expense caps and the multiple layers of oversight by the National Exchange Carrier Association ("NECA"), the Universal Service Administrative Company ("USAC"), and the Commission already provide substantial incentives for efficient operations. Moreover, because rural local exchange carriers ("RLECs") operate under shared tariffs and fixed USF budgets, their incentives are aligned with the Commission in seeking to ensure that only reasonable expenses are recovered through regulated mechanisms. If anything, the isolated instances with respect to expenses incurred by a few firms that appear to drive some concerns in the Further Notice of Proposed Rulemaking ("*FNPRM*") highlight the effectiveness – rather than any shortcomings – of these multiple layers of mechanisms and oversight.

Greater clarity with respect to recoverable expenses would help carriers, and presumably NECA and USAC as well in their important administrative roles. Although an October 2015 Public Notice identified several categories of costs as unrecoverable, further review reveals a "mixed bag" of clarity with respect to the actual treatment of individual expenses under current rules. While some items listed in the Public Notice are unmistakably unrecoverable, current rules indicate that others – at least in part – are eligible for recovery through interstate rates and/or USF support. Indeed, some of the expenses listed in the Public Notice, depending upon the purpose for which they are incurred, are necessarily related to the provision and maintenance of supported services and clearly identified in current rules as recoverable. The *FNPRM* therefore provides a useful opportunity to provide greater clarity, pursuant to proper notice-and-comment rulemaking, regarding the prospective eligibility of certain kinds of costs for recovery through rates or USF.

The Commission would undermine clarity and predictability, however, to the extent that it broadly extends "affiliate transaction" and other cost allocation rules as suggested by the *FNPRM*. Putting the Commission and/or USAC in the position of second-guessing nearly every transaction undertaken by a RLEC would increase regulatory uncertainty and compel greater reliance on accountants, consultants, and lawyers at a time when the professed hope for reforms is to provide *greater* certainty and *less* reliance on such "expert help." Here again, to the extent that a few isolated instances have given rise to any concern, current rules have actually proven effective in policing such issues, and there is no reason to inject substantial uncertainty into every small company business transaction through burdensome and expansive new rules.

The *FNPRM* further seeks comment with respect to a potential new exception to the "deemed lawful" provision in the Communications Act of 1934. The broad exception suggested in the *FNPRM*, however, is unjustified and inconsistent with judicial precedent (including the 2002 case to which the Commission cites). To the extent that the Commission wishes to examine a narrower exception based upon dicta in that 2002 case that looks specifically at "furtive" misconduct by a carrier, that may be worthy of consideration via a more developed record – but the proposal in the *FNPRM* cannot be adopted in current form as it would effectively and impermissibly write the "deemed lawful" provision out of the statute.

The *FNPRM* also asks how the Commission should address recovery of costs precluded through USF due to competitive overlap policies. This question is a necessary one, but too narrowly posed. In fact, several policies – not just competitive overlap, but also other expense caps and budget controls – *all* pose the concern that regulated costs may be denied USF support and, to avoid a "regulatory black hole," must be recoverable via some other means. To address this issue, the Commission must permit RLECs the opportunity to assess a tariffed, regulated rate element on consumers to recover costs that are no longer eligible for USF due to the operation of one of these policies, or at the RLEC's option, permit recovery of such costs via a detariffed rate.

In doing so, however, the Commission cannot overlook the substantial public policy implications of "pushing more costs to the rural consumer" in fulfilling its universal service mandate. To the extent that new cuts, caps, and controls compel increased cost recovery directly from rural consumers, this could undermine, if not defeat, the ability of consumers to obtain services at "reasonably comparable" rates. Unfortunately, it seems unlikely that the new standalone broadband support mechanism adopted by the Commission – while a welcome and important step – will actually enable consumers to obtain such services at reasonably comparable rates due to the concerns noted above and the very structure of the mechanism. The Commission therefore will ultimately need to consider whether the structure of the new standalone broadband mechanism, combined with the budget level specified for High-Cost support and the effects of all of these caps and controls, can work to enable access to broadband at reasonably comparable rates. If these policies "push too many costs" to the rural consumer by denying sufficient USF support, changes will need to be made to the structure of the mechanism and/or the budget to ensure compliance with the statutory mandate for reasonable comparability.

Finally, the Commission should take action consistent with proposals in the *FNPRM* to streamline reporting burdens associated with Form 481. The Commission has already taken a number of useful steps to reengineer Form 481, and the steps suggested in the *FNPRM* would represent welcome additions to that ongoing evolution while continuing to ensure accountability in the use of USF support to advance voice and broadband services to rural consumers.

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COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these Comments in response to the Further Notice of Proposed Rulemaking released March 30, 2016 in the above-captioned proceedings.[2] The *FNPRM* seeks comment on a variety of issues related to recovery of regulated costs via federal Universal Service Fund ("USF") support and interstate rates, as well as the potential establishment of a supplemental USF support mechanism to target challenges faced by RLECs serving Tribal lands and the streamlining of certain USF-related reporting requirements. By these comments, NTCA respectfully requests that the Federal Communications Commission (the "Commission") proceed with respect to these issues consistent with the recommendations set forth herein.

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[1] NTCA is an industry association composed of nearly 900 rural local exchange carriers ("RLECs"). While these entities were traditional rate-of-return-regulated telecommunications companies and "rural telephone companies" as defined in the Communications Act of 1934, as amended, all of NTCA's members today provide a mix of advanced telecommunications and broadband services, and many also provide video or wireless services to the rural communities they serve.

[2] *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking (rel. March 30, 2016) (alternatively, "*Rate-of-Return Reform Order*" or "*FNPRM*," as applicable).

I. THE COMMUNICATIONS ACT AND SETTLED LAW PERMIT RECOVERY OF REASONABLE BUSINESS EXPENSES THAT ARE "USED AND USEFUL" IN THE PROVISION OF REGULATED SERVICES VIA INTERSTATE RATES AND/OR HIGH-COST USF SUPPORT.

A. Statutory and Long-Standing Legal Principles Provide that Expenses Reasonably Incurred and "Used and Useful" in the Provision of Regulated Services are Recoverable via Interstate Rates and/or High-Cost USF Support.

The Commission recognizes as an initial matter that "most rate-of-return carriers properly record their costs and seek support for the intended purposes."[3] It would follow from such statements that the current system has worked well as a whole to promote responsible and effective use of universal service resources toward the ultimate goal of delivering supported services to consumers at affordable rates, even if consideration of improvements from time to time may be a useful and productive exercise. In initiating a review here of permitted expenses for purposes of such recovery, the Commission acknowledges the need for a consistent standard to be applied to "describe those expenses that a carrier may appropriately include in its interstate rate base, interstate revenue requirement, and cost studies used to calculate high-cost support."[4] The courts and the Commission itself have been consistent in their use and analysis of the "used and useful" and "prudent" standards when evaluating permitted expenses used in ratemaking and for other purposes.[5] To avoid a haphazard approach to examining expenses, the Commission should

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[3] *See id*. at ¶ 330; *see also All Universal Service High-Cost Support Recipients are Reminded that Support Must be Used for its Intended Purpose*, WC Docket Nos. 10-90 and 14-58, Public Notice, 30 FCC Rcd 11821 (2015) (*"Public Notice*") at Joint Statement of Commissioners Mignon Clyburn and Michael O'Rielly ("To be clear, the vast number of providers are good actors and would never take advantage of the system . . . .").

[4] *FNPRM*, at ¶ 339.

[5] As the Commission notes, the "used and useful" standard provides the foundation for decisions evaluating whether particular investments and expenses are reasonable" and points out that these "revenue requirement principles are also relevant to expenses for which carriers should be permitted to recover through high-cost support." *Id*. at ¶¶ 334, 336.

continue to use these court-tested standards in a consistent manner. Accordingly, any expense that the Commission wishes to exclude from regulated cost recovery should be evaluated against a backdrop of long-standing case law and precedent.

The Telecommunications Act of 1996 (the "1996 Act") codified the Commission's historical commitment to universal service, requiring that high-cost support "only be used for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[6] Here, where highly regulated companies that existed prior to the 1996 Act are eligible telecommunications carriers ("ETCs"), the standard of review regarding permitted expenses must be a balance of the "used and useful" standard[7] and the "prudent investment" standard.[8] These "used and useful" and "prudent investment" standards have long been used by the Commission to establish and confirm reasonableness for cost recovery purposes.[9] It is worth noting that a subtext of these standards, when reviewed by the courts, is the avoidance of an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution.[10] As the Commission seems to be indicating in the *FNPRM*,[11] the "used and useful" and "prudent" standards have proven highly

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[6] 47 U.S.C. § 254(e); 47 CFR § 54.7.

[7] *Smyth v. Ames*, 169 U.S. 466, 546, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

[8] *See Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981 (1923) (Brandeis, J., dissenting); *Washington Gas Light Co. v. Baker*, 188 F.2d 11.

[9] *American Tel. and Tel. Co.,* Phase II Final Decision and Order, 64 FCC 2d 1, 38 (1977) ("*AT&T Phase II Order*"), at ¶ 111.

[10] *State of Missouri Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 43 S.Ct. 544, 67 L.Ed. 981, 31 A. L. R. 807 (1923).

[11] *See FNPRM*, at ¶ 339.

effective in enabling reasonable cost recovery in furtherance of customer service and universal service objectives, and there is no specific reason to depart from those standards at this time or to use differing standards for cost recovery in one instance as compared to another.

The "used and useful" standard provides the foundation of Commission decisions evaluating whether particular expenses can be included in a carrier's revenue requirement.[12] As examined in the *AT&T Phase II Order*, there are four elements of the Commission's analysis whether an expense is "used and useful" and "prudent." First, the Commission considers the need to compensate the carrier for the use of their property in providing the public service (in this case, universal service).[13] Second, ratepayers should not be forced to pay a return except on expenses that can be shown to benefit them.[14] Third, the Commission considers whether a carrier's investment was prudent,[15] and, fourth, whether the benefit from the investment will be realized in a reasonable period of time.[16] Eliminating an expense that meets the above standards would be considered unlawful, absent a compelling reason. Plant currently used for the provision of

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12 *Sandwich Isles Communications, Inc. Petition for Declaratory Ruling*, WC Docket No. 09-133, Declaratory Ruling, 25 FCC Rcd 13647, 13651-52 (Wireline Competition Bureau 2010) ("*Sandwich Isles Declaratory Ruling*"), at ¶ 12.

13 *AT&T Phase II Order*, at ¶ 111.

14 *Id*. at ¶ 112. The benefit does not have to be immediate and can include, for example, a portion of equipment that is serving as a reserve for future use. *See, e.g.*, *Investigation of Special Access Tariffs of Local Exchange Carriers*, FCC 86-52, 1986 WL 291617, ¶ 41 (1985) (*Phase I Special Access Tariffs Investigation Order*), *remanded on other grounds, MCI Telecom. Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988).

15 *See, e.g., 1990 AT&T Tariff Revisions Order*, 5 FCC Rcd at 5695, at ¶ 17 (citations omitted).

16 *AT&T Phase II Order*, at ¶ 113.

regulated services is generally recognized as "used and useful"[17] and expenses, both direct and indirect, associated with such provision cannot be eliminated in an arbitrary and capricious fashion.

In its review of permitted expenses, the Commission should be careful which expenses it determines are not "used and useful" or "prudent." Just because there may be no immediate direct connection between a particular expense and the provision of voice or broadband services, the Commission has realized repeatedly in the past that indirect expenses may be "used and useful" and "prudent." Given the broad nature of "used and useful" expenses, the Commission must be avoid subjectively eliminating expenses that, under the eyes of the courts and Commission precedent, are in fact "prudent" and useful in furtherance of delivering supported services.

Finally NTCA observes that, even in adopting rules to govern cable rate regulation in 1996, the Commission employed a "used and useful standard together with the prudent investment standard" that was "the same as that which the Commission has applied to telephone companies."[18] No matter what the regulated industry is, courts will view permitted expenses based on "the financial integrity of the company whose rates are being regulated" and have determined that it "is important that there be enough revenue not only for operating expenses but also for the capital costs of the business."[19] The Commission must adhere to these enduring standards as it considers with more specificity which expenses can be recovered through high-cost support and, as discussed

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17 *Sandwich Isles Declaratory Ruling*, 25 FCC Rcd at 13652, ¶ 13.

18 *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 2220, 2235-36 (1996), at ¶ 33.

19 *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345-346 (1892).

below, there are certain expenses the FCC has eliminated or may eliminate that are indeed "used and useful" and "prudent."

B. The Operating Expense Limits Adopted in the Order, Together With the Distinct Corporate Operations Expense Limits that Apply "Within" Those Broader Operating Expense Limits, Already Provide Proper Incentives for Company Conduct and Help to Ensure the Reasonableness of Costs Incurred.

As the Commission considers whether certain categories of operating expenses should be recoverable through High-Cost USF support and/or interstate rates, it is worth noting first that several measures already in place provide proper incentives for company conduct and help to ensure the reasonableness of costs incurred. Much as the Alternative Connect America Model ("A-CAM") distributes support pursuant to formulas that estimate what the Commission deems "an efficient" amount of operating expenses,[20] the Commission has for years employed various formulas to limit the recovery of operating expenses via non-model High-Cost USF mechanisms.

Nearly twenty years ago, the Commission first adopted caps on the recovery of corporate operations expenses via High-Cost Loop Support ("HCLS"),[21] and it updated those limits in 2001 to include an inflationary index.[22] In the Commission's view, such limits were necessary to ensure carriers "use universal service support only to offer better service to their customers through prudent facility investment and maintenance consistent with their obligations under section 254(k)

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20 *See Rate-of-Return Reform Order*, at ¶ 21 ("[C]arriers that choose to take the voluntary path to the model are electing incentive regulation for common line offerings.")

21 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8930 (1997) ("*First USF Order*"), at ¶¶ 283-285.

22 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, and Report and Order, 16 FCC Rcd 11244, 11270-77 (2001), at ¶¶ 60-76.

[of the Communications Act of 1934, as amended ("the Act")]."[23] Ten years later, the Commission updated the corporate operations expense limit formula and extended it to Interstate Common Line Support ("ICLS").[24] The Commission also adopted in that same 2011 order a series of overarching caps on all operating expenses (as well as capital expenses);[25] although those overarching limits were ultimately reconsidered a few years later,[26] they were replaced in the *Rate-of-Return Reform Order* by new operating expense limits modeled to some degree upon the current corporate operations expense formula.[27]

Thus, RLECs have operated under limitations on corporate operations for nearly 20 years and under limitations on other operating expenses for most of the past five years, and a new formula imposing caps on operating expenses will take effect in the near future. As noted above, the A-CAM will also define, for those RLECs that elect USF support from that vehicle, a presumed reasonable level of operating expenses associated with deployment and operation of networks and delivery of services to consumers. These formulas – whether built within the confines of a cost model or "sitting atop" actual cost recovery mechanisms – already set proper incentives for operating activities and thereby help to ensure that USF resources are directed toward the provision, maintenance, and upgrade of supported services and facilities. The Commission

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[23] *First USF Order*, 12 FCC Rcd at 8930, ¶ 283.

[24] *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17748 (2011) ("*2011 Reform Order*"), at ¶ 232.

[25] *Id*. at ¶¶ 205-210 and Appendix H.

[26] *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 7051, 7096-7100 (2014), at ¶¶ 127-136.

[27] *Rate-of-Return Reform Order*, at ¶¶ 95-104.

certainly can evaluate whether specific categories of operating expense warrant recovery via High-Cost USF support and/or interstate rates. But in doing so, it should not lose sight of the fact that existing rules already superimpose several caps that define "efficiency" in operations and deter carriers from incurring excessive operating expenses.

Moreover, at the very least, the Commission should make sure to distinguish between recovery of costs via USF and regulated interstate rates as it considers these matters further. Although the Commission may ultimately find a specific policy justification for precluding recovery of certain kinds of costs from High-Cost USF, it should be noted that such a rationale may not necessarily extend to denying a carrier the ability also to recover costs via regulated rates paid by its customers. As just one example, the Commission should consider the particularly odd results that would follow from precluding recovery of certain categories of expense via interstate rates by those carriers that elect model-based support. A-CAM identifies what it deems to be an efficient level of operating expenses much like the formulas that now apply to non-model mechanisms, but without distinguishing between individual cost categories. It would be strange for A-CAM (or frankly the non-model USF formulas) to represent the Commission's definition of "efficient" recovery of operating expenses for purposes of USF in the first instance without distinguishing among cost categories, but to then deny that carrier the ability to recover specifically certain cost categories through regulated interstate rates. For both model and non-model support therefore, as it considers specific categories of costs, the Commission should be careful to distinguish between policy justifications for denying the recovery of any individual category via High-Cost USF as compared to regulated interstate rates. Particularly as to a number of business expenses, there may be many cases in which a cost that is ultimately deemed unrecoverable through USF for policy reasons is still appropriate (and necessary) for recovery via rates charged to a firm's customers.

Finally, a number of the proposals in the *FNPRM* appear to be motivated by or in response to a few isolated incidents of expenses incurred by a few companies. It is important to note, however, that these are precisely what they are – a few isolated incidents involving a few companies among more than one thousand companies operating in this space. Indeed, this sector is among the most heavily regulated in the communications space, with recovery of regulated costs subject to oversight by state commissions, the Universal Service Administrative Company ("USAC"), the National Exchange Carrier Association ("NECA"), and of course the Commission itself. Thus, if anything, the very instances that appear to motivate the Commission's concerns in the *FNPRM* do not necessarily reflect shortcomings in current rules – rather, they demonstrate *the effectiveness* of the current rules and systems in detecting and addressing isolated concerns when they arise. While the Commission can and should review from time to time whether its rules are still achieving their intended purposes, the fact is that these isolated incidents confirm that current rules are already helping to ensure the integrity of the USF and ratemaking cost recovery processes.

C. Although Some Categories of Expense Identified in the *FNPRM* Have Been Clearly Excluded from Recovery via Interstate Rates and/or High-Cost USF Support for Some Time, Others Have Not Been Categorically Excluded by Rule. The October 2015 *Public Notice* Did Not Change That as a Matter of Administrative Procedure, and this *FNPRM* is the Proper Administrative Vehicle by Which to Undertake a Detailed Analysis of Recoverable Cost Categories, to Provide Greater Clarity for Business Operations, and to Make Decisions With Respect to Cost Recovery on a Prospective Basis.

In an October 2015 *Public Notice*, the Commission reminded carriers that High-Cost USF support must be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[28] The *Public Notice* included a further "reminder" that a "non-exhaustive" list of expenditures were purportedly not necessary for such purposes and thus were not recoverable through USF support.[29]

A careful review of the list in the *Public Notice*, however, reveals a "mixed bag" of clarity with respect to the actual treatment of individual expenses under current rules. For some of the items, Commission rules are already quite clear that they may not be recovered through High-Cost USF. But for other categories of expense identified as "not necessary" by the *Public Notice*, the category listed is either overly broad (including more granular kinds of expense that may be recoverable even as others are not) or there is simply no clear rule indicating the current categorical exclusion of such expenses from recovery via USF. For this reason, while the *Public Notice* might have been intended as a helpful "reminder" of what kinds of operating expenses were and were not recoverable through USF, the Commission needs to undertake a more detailed analysis of specific categories of cost and must follow proper notice-and-comment rulemaking processes (as it has proposed to do through the *FNPRM*) before those cost categories for which there was not a clear rule previously in place can in fact be deemed unrecoverable as a legal matter.[30] Put another

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[28] *Public Notice* at 1 (quoting 47 USC § 254(e)).

[29] *Public Notice* at 2.

[30] The Administrative Procedure Act ("APA") requires agencies to provide notice of proposed rulemaking that contains "either the terms or substance of the proposed rule or description of the subjects and issues involved." 5 U.S.C. § 553(b). Following notice, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id*. at § 553(c). The Commission has had specific rules overturned in the past when its comment process becomes "irregular." *Project v. Fed. Communications Comm'n*, 652 F.3d 431, 53 Communications Reg. (P&F) 533 (3rd Cir., 2011); *see also U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), citing *Sprint Corp. v. FCC*, 315 F.3rd 369, 374 (D.C. Circuit 2003) at 34 (holding that "new rules *that work substantive changes* to prior regulations are subject to the APA's procedures") (emphasis in original). Thus, while the Commission can of course make prospective alterations to

way, NTCA believes it would be very helpful for its small business members (as well as USAC and NECA) to obtain more objective, bright-line clarity with respect to which categories of operating expenses may or may not be recoverable on a prospective basis – but the *Public Notice* did not represent proper action for doing so where no clear prior rule existed, and this FNRPM thus provides a more appropriate and useful forum as a legal and practical matter for the detailed analysis required to provide such clarity on a prospective basis.

As an initial matter, Commission rules already were quite clear that a number of categories of cost identified in the *Public Notice* cannot be recovered via High-Cost USF. For example, there is no reasonable basis for any carrier to expect or argue that the following expense categories are recoverable through USF: (1) personal travel; (2) penalties or fines for statutory or regulatory violations; (3) political contributions; (4) penalties or fines for late payments on debt, loans, or other payments; or (5) personal expenses of employees, board members, family members of employee and board members, contractors, or any other individuals affiliated with an ETC.[31] Indeed, the interests of NTCA members and ratepayers align in ensuring that such costs – and others not reasonably related to and reasonably incurred in the operation of a business delivering supported services – are ineligible for USF recovery. If anything, under a fixed USF budget and in an environment where costs are often pooled for purposes of recovery through interstate rates, NTCA members have a *greater* incentive than other stakeholders to ensure that any one company does not receive USF support for such costs to the detriment of other carriers. Thus, it was

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rules with respect to cost recovery, the proper vehicle for considering whether to do so is not a Public Notice, but rather a rulemaking proceeding such as this that permits development of a meaningful record.

31 *Public Notice* at 2; *see also FNPRM* at ¶ 340.

appropriate for the Commission to identify such costs as unrecoverable through USF in the *Public Notice*.

Current rules are not so straightforward, however, with respect to other categories of expense in the *Public Notice* – and for other categories still, the *Public Notice* listing was overly broad and a more detailed analysis and greater clarity are needed through this *FNPRM* to establish on a prospective basis precisely what is and is not recoverable. For example, there is a conflict within the Commission's current rules, as one section could be read to indicate that charitable contributions might be excluded from USF cost recovery and rates[32] while another indicates that the costs of such contributions may be included in the regulated rate base and within USF data submissions.[33] Indeed, the Commission specifically looked at the inclusion of charitable contributions in establishing rules governing regulated accounts several decades ago, and expressly *denied* arguments that such contributions should *not* be included in regulated accounts that are ultimately used to establish rates and USF cost recovery.[34] Likewise, while the *Public Notice* listed "food" as an unrecoverable category of cost, current rules appear to permit recovery of costs via USF and interstate rates for "general administrative activities" that include "food services (*e.g.*, cafeterias, lunch rooms and vending facilities)."[35]

To be clear, this is not to say that the Commission cannot not change its rules with respect to recovery of certain categories of costs if it deems such changes necessary and appropriate. There

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32 47 C.F.R. § 32.7300(h).

33 *Id*. at § 65.450(d).

34 *Rate Base Order*, 3 FCC Rcd at 280, ¶ 77. ("We consider reasonable charitable contributions part of the cost of doing business and there is nothing in the record to suggest that they have become unreasonable or excessive.")

35 47 C.F.R. § 32.6720(j).

may be sound public policy reasons as markets and expectations have evolved to make certain surgical changes, and carriers themselves and other stakeholders (including USAC and NECA) would benefit from prospective clarity with respect to rules first adopted nearly thirty years ago. Rather, the discussion here is simply intended to note that the *Public Notice* could not and did not change underlying rules that either expressly permit recovery of certain items listed therein or are, at the very least, unclear with respect to their eligibility for recovery though High-Cost USF or interstate rates.

Turning then to the question of what the Commission should do prospectively via the *FNPRM* as a proper administrative process vehicle, there are certain operating expense categories listed in the *Public Notice* where all would indeed benefit from clearer, brighter lines rather than overly broad sweeping declarations as to eligibility for cost recovery. As the Commission turns to this exercise, it is worth recalling here again that: (1) there are numerous layers of limits – a corporate operations cap, an overall operating expense cap, and a budget control – that sit atop any preclusion of specific operating expense category cost recovery and help to ensure the reasonableness of such costs as included for recovery; and (2) *eligibility* for cost recovery does not translate *automatically* into recovery where it is shown that specific costs incurred, even if eligible, were neither reasonable nor used and useful.[36]

[36] More specifically, as the Commission considers providing prospective clarity with respect to categories of expense, it should also take stock of the reasonableness and materiality of such expenses. If a business expense for a supported firm is of a level that would be expected of a non-supported firm of comparable size and coverage area, then it should be considered reasonable for purposes of cost recovery here. It is important, however, that such a standard be objective, rather than subjective, for fear of injecting uncertainty into the conduct of business, audits, and enforcement that would defeat, rather than promote, the desired benefits of the reforms adopted in the *Rate-of-Return Reform Order*. Similarly, if a permitted expense is of such an immaterial level that it might cost more for a company to exclude from cost studies and USAC to examine, it would be contrary to the public interest to mandate removal of such an expenditure – especially once

As just one example, with respect to recovery of items such as food and entertainment, the question should be whether those are expenses reasonably incurred in the course of conducting the carrier's business. If a carrier operating in a high-cost area must send a technician several hours out (and then several more hours back) to a customer premises, it is not unreasonable at all for the company to incur the cost of feeding that employee; the same is true in disaster situations, where the costs of feeding and housing contractors are necessary and legitimate expenses in an effort to restore services. Similarly, in a high-cost area where there are few if any dining options present (and even in many urban locations where there may be a plethora of dining options), it is not at all uncommon for employers to utilize some form of cafeteria or vending service or onsite kitchen facility to increase the productivity of employees. Finally, it is a common and accepted practice for firms of all kinds to reimburse reasonable food and entertainment expenses associated with the conduct of company business, including client or vendor meetings or attendance at board meetings.[37] The Commission should therefore confirm that business expenses associated with food and entertainment may continue to be included in regulated accounts and are eligible for recovery, subject of course to their being reasonably incurred and subject to the individual firm's corporate operations and overall operating expense caps.

Another area in which more detailed parsing of the list in the *Public Notice* is needed comes with respect to membership fees and dues. There is no reasonable argument to allow recovery of the costs of membership in country clubs and social clubs through regulated accounts. To the

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again given the existence of two additional layers in the form of the cap on corporate operations specifically and a cap on operating expenses as a whole.

[37] *See* https://www.irs.gov/publications/p535/ch11.html#en_US_2015_publink1000209148 (describing accounting of reimbursement of travel, meals, and entertainment expenses for purposes of tax reporting) (last visited May 5, 2016).

extent that the rules are unclear today with respect to such costs, they should be made clearer. But as the Commission has previously found there are a number of legitimate business expenses that arise associated with the broad category of "membership fees and dues."[38] For example, if a company pays for its employed attorney to be a member of the state bar association or professional affiliations or certifications for other specialized employees, those are reasonable and necessary business expenses that should not be excluded from regulated cost recovery. Likewise, costs associated with membership in state and national organizations that provide education, training, and industry updates are legitimate business expenses that enable better company planning and use of resources in furtherance of service operations. Such costs should continue to be eligible for recovery via regulated accounts.

One other category of expenses broadly named in the *Public Notice* that would benefit from a relatively straightforward clarification is gifts to employees. Quite simply, it would seem reasonable to exclude actual gifts from recovery via regulated rates or mechanisms. But to the extent that costs are incurred in connection with cash or in-kind bonuses that a company treats as

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[38] *See Rate Base Order*, at ¶ 88 (finding that membership fees or dues in "social, service, recreational or athletic clubs and organizations" are not ordinarily included in regulated accounts, but that fees and dues for professional and trade organizations are "correctly charged" to such accounts); *see also Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5374 (1998), at ¶ 92 (explaining that part of the Commission's rationale for establishing a corporate operations expenses cap in the first instance was to ensure the reasonableness of expenses that may include "travel, lodging and other expenses associated with attending industry conventions and corporate meetings").

taxable compensation, such expenses are legitimately associated with the operation of the business and should remain eligible for recovery.[39]

The *FNPRM* also asks about the treatment of several categories of cost beyond those initially identified in the October 2015 *Public Notice*.[40] With respect to executive compensation and board member benefits as cited in the *FNPRM*, a one-size-fits-all rule is difficult, if not impossible, to design and would be ill-fitting in practice. Instead, as noted earlier in these comments,[41] the Commission should only look to disallow expenses, as it already does, if they are objectively unreasonable based upon factors such as revenues, number of employees, nature of the serving area, and/or capital investment budgets and thus could not be considered "used and useful" at their present levels.

Then, in terms of the Commission's inquiry regarding limits on the costs of buildings purchased or rented,[42] the *FNPRM* neglects to note that there is *already* a limit on the procurement of "excessive" space – specifically, current rules already enforce a two-year limitation on the

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[39] The same should be true of several other categories of cost listed in the proposed rules set forth in Appendix A of the *FNPRM*. For example, to the extent that childcare is provided as part of an employee's taxable compensation and benefits, there is no reason that such costs should be excluded from the normal operating costs of a business. Particularly in sparsely populated high-cost areas where competitive choices for childcare may be limited, it would make *more* sense for a RLEC to be able to offer such a benefit to attract and retain employees than in an urban area where numerous choices for childcare typically abound. Likewise, when the proposed rule in Appendix A refers to "housing," it should be made clear that excluded costs are those related to personal use – from time to time, especially in far-flung rural areas, a company may need to house contractors or employees for a period of time in certain locations and pay for housing and lodging in furtherance of company obligations and business such as construction of networks or restoration of services.

[40] *FNPRM*, at ¶¶ 345-46

[41] *See* footnote 36, *supra.*

[42] *FNPRM*, at ¶ 347.

inclusion of costs associated with "Property Held for Future Use."[43] There is no showing (or even discussion) in the *FNPRM* regarding why this existing limitation is insufficient to protect against concerns arising out of "excessive" floor space held for prolonged periods of time beyond near-term company needs, and in the absence of any evidence that this limitation is ineffective in controlling recoverable costs, the current rule should be maintained as a way of ensuring only reasonable costs are included in regulated accounts.

Finally, with respect to the procurement of network plant (as opposed to buildings and structures) for future use, the Commission cites to a case involving a single carrier as the basis for a potential rule change in the *FNPRM*.[44] The fact, however, that this concern arises in only one instance despite there being over 1,000 RLECs engaging in numerous plant transactions each year speaks volumes; a rule change here would be a solution in need of a problem. To the contrary, the single instance cited in the *FNPRM* actually demonstrates that *the current rule and current process work.* Specifically, acting in its role as administrator of access tariffs and pools, NECA disallowed most of the expenses associated with submarine cable capacity because those were deemed to be in excess of what was permitted by the existing rule.[45] The carrier in question then exercised its right to file for a declaratory ruling that the denied costs were in fact recoverable through regulated accounts. The Wireline Competition Bureau in turn, acting on delegated authority, determined that a larger portion of the expenses than NECA denied should in fact be considered recoverable

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[43] 47 C.F.R. § 32.2002.

[44] *FNPRM*, at ¶ 348.

[45] *Sandwich Isles Declaratory Ruling*, 25 FCC Rcd at 13649-50, ¶¶ 6-8; *see also Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Process*, CC Docket No. 93-6, Report and Order and Order to Show Cause, 10 FCC Rcd 6243 (1995), at ¶ 40; 47 C.F.R. § 32.2002.

by the carrier, even as a significant portion of the costs remained unrecoverable.[46] Thus, even as this process continues before the Commission in the form of challenges and petitions from multiple parties, this procedural history confirms that the current rule works – once again hearkening back to a standard of "reasonableness," the existing rule has served to exclude costs from regulated accounts where those costs are in excess of what the Commission believes the carrier reasonably requires in the near future.

Given the operations of shared tariffs and pooling and the limited availability of High-Cost USF resources under a fixed budget, NTCA members and other RLECs share the Commission's interest in ensuring that costs included in regulated accounts are reasonable, used and useful, and in furtherance of the mission of universal service. NTCA members (and NECA and USAC in their administrative roles) would also benefit from much greater clarity with respect to which business expenses are eligible for recovery via USF and/or interstate rates. But the broad pronouncements made in the October 2015 *Public Notice*, while intended as a "reminder" of what might be deemed not recoverable, could not operate to modify existing rules and, in a number of cases, unfortunately did not provide the clarity actually needed with respect to the recoverability of individual categories of costs. The Commission therefore can use the instant *FNPRM* as the appropriate procedural vehicle to re-examine any existing rules with respect to the inclusion of certain categories of costs in regulated accounts for purposes of recovery via High-Cost USF or interstate rates. The Commission should also note once more that the overlay of multiple caps on operating expenses "atop" specific categories (in the form of A-CAM or the corporate operations/overall operating expense limits) create substantial incentives for every supported firm to conduct business

46 *Sandwich Isles Declaratory Ruling*, 25 FCC Rcd at 13650, ¶ 9.

efficiently, and that even if a cost is *eligible* for cost recovery, the process of review by NECA and enforcement by USAC provide additional backstops to ensure the reasonableness of costs and their "used and useful" nature. The recommendations provided above with respect to the questions posed in the *FNPRM* would help to apply objective standards and provide much-needed clarity on a prospective basis for all stakeholders with respect to the recovery of costs through regulated mechanisms, and NTCA respectfully requests that the Commission take action in accordance with the specific recommendations identified herein.

II. THERE IS NO EVIDENTIARY BASIS FOR ANY FINDING THAT CURRENT AFFILIATE TRANSACTION AND COST ALLOCATION RULES ARE INEFFECTIVE IN PROTECTING RATEPAYERS AND ALL STAKEHOLDERS IN THE HIGH-COST USF MECHANISMS.

As noted above, working under a fixed USF budget and in the context of shared tariffs and pooling of costs for purposes of regulated recovery, NTCA members' and other RLECs' interests are fully aligned with the Commission and other stakeholders (including those that contribute to the USF and ratepayers) in ensuring that only business expenses reasonably incurred in the provision of regulated services are recoverable through USF or regulated interstate rates. This aligned interest extends not only to what costs might be recoverable, but also to the process by which review of those costs will occur. Reasonable, efficient procedures that employ objective, bright-line rules would help to provide greater business certainty and avoid needless confusion, disputes, and even litigation as to what is a recoverable expense. By contrast, as discussed in the preceding section, broad and general declarations with respect to categories of costs that may be recoverable are likely only to exacerbate uncertainty – and as discussed in this section, expansion and/or extension of affiliate transaction and cost allocation rules in the absence of any clear showing that such extension or expansion is warranted will only create costly, needless, and inefficient administrative processes that foster regulatory uncertainty and undermine, rather than further, the objective of universal service.

For example, the *FNPRM* asks whether the Commission should extend long-standing affiliate transaction review rules to transactions between non-affiliated parties, *including but not limited to* where there is a close family relationship or cross-participation on boards.[47] The *FNPRM* cites no cases of broad concern or need giving rise to such an inquiry, however, and it is not clear why the Commission believes current rules are insufficient to protect against potential abuse. Indeed, it would be particularly troubling – and remarkably inefficient as a matter of process – to apply the affiliate transaction standard broadly "to goods and services acquired from non-affiliated entities."[48] This would put USAC and/or the Commission in the "Monday Morning Quarterback" position of potentially reviewing (or second-guessing) *every* transaction involving a RLEC to confirm compliance with the standard. Such a regulatory outcome would ironically and unfortunately increase both uncertainty and regulated company reliance on experts at a time when the Commission has professed its express belief that its reforms will provide *greater* regulatory certainty and require *fewer* accountants, consultants, and lawyers.

To the extent these proposals are motivated by one isolated instance of intercompany arrangements referenced a few paragraphs in another context earlier in the *FNPRM*, it would represent poor public policy to create entirely new and burdensome transaction review processes across an entire industry of hundreds of companies based upon a single anecdote.[49] (In fact, it is

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[47] *FNPRM*, at ¶¶ 350-351.

[48] *Id*. at ¶ 351.

[49] *See, e.g., Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004); *Alliance for Community Media v. F.C.C.*, 10 F.3d 812 (C.A.D.C., 1993) (questioning over-reliance on anecdotal evidence in agency determinations).

noteworthy that the single case in which one party might have allegedly sidestepped affiliate transaction review was actually detected in any event and has since been the subject of a still-ongoing proceeding as described earlier herein.) In short, there is no record support for the proposition of, and thus no need to place, burdensome "new rules on the books" by extending affiliate transaction reviews to non-affiliated transactions. Rather, enforcement of existing rules with respect to ensuring commercially reasonable recoverable costs has been and remains both sufficient and efficient to protect the interests of other RLECs and other ratepayers and the integrity of the USF program, particularly when combined with the several layers of individual company operating expense caps that are now imposed upon RLECs as a result of the *Rate-of-Return Reform Order*.[50]

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[50] It is also worth noting that one of the proposals in the *FNPRM* – to apply affiliate transaction review in cases of "cross-participation on boards of directors" – *already applies* to some degree under current rules. Specifically, Part 32 defines "affiliated companies" as "companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the accounting company." The rules in turn define "control" as "possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means." 47 C.F.R. § 32.9000. Unless the Commission is aware of some substantial need that is neither present nor explained in the current record that would warrant extending the affiliate transaction rules to instances where there literally is no indication of shared control (in the sweeping sense of current Part 32 rules) among and between firms merely because of *some presence* of even just one common director on two boards, it should be abundantly clear based upon the record (or lack thereof, really) that the current rules provide more than sufficient assurance of the arm's length nature of transactions involving regulated companies.

The *FNPRM* also raises questions regarding about the process for allocating costs among regulated and non-regulated services and between affiliates, but here too fails to provide any explanation or justification for the notion that current rules are ineffective or incomplete in ensuring proper allocation.[51] There is no indication that current fully-distributed cost allocation procedures have proven ineffective in ensuring that the operations of a regulated affiliate bear no more than a reasonable share of applicable joint costs. As an initial matter, the Commission's allocation rules require direct assignment of costs wherever possible, with common costs attributed to the extent possible based upon a direct analysis of the origins of those costs. Only those common costs that cannot be directly attributed are then assigned based upon general allocators.[52] These rules reasonably recognize that no two situations are precisely the same, and that reasonable flexibility is needed – subject to very clear rules and rigorous oversight – to accommodate the unique nature of cost recovery faced by different kinds of companies serving different kinds of areas at different points of their respective investment cycles. Indeed, the allocations in question are clearly identified in cost filings each year and subject to review every year through multiple layers of preparation, oversight, testing, and audit. Here again, there is little, if any, indication that current rules and monitoring and enforcement procedures are failing to capture misallocation of costs in any material manner (if at all); to the contrary, all indications are that current procedures are effective in ensuring that costs are properly allocated, whether initially in the filing of cost

[51] *FNPRM*, at ¶¶ 355-356.

[52] *See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Notice of Proposed Rulemaking, 11 FCC Rcd 9054, 9068-69 (1996), at ¶30.

studies or as a result of the multiple layers of regulatory oversight, testing, and audit with respect to such studies.

III. THERE IS NO JUSTIFICATION OR LEGAL BASIS FOR A WIDE-RANGING EXCEPTION TO THE "DEEMED LAWFUL" PROVISION OF SECTION 204; THE COMMISSION SHOULD INSTEAD FOCUS ON THE KINDS OF WILLFUL MISCONDUCT SPECIFICALLY CALLED OUT BY THE D.C. CIRCUIT COURT ON THIS ISSUE.

The Commission asks in the *FNPRM* whether it should create "an exception" to the "deemed lawful" provision of section 204 of the Act where a carrier is found to have violated investment, expense, or cost allocation rules.[53] The *FNPRM* specifically cites to a 2002 decision from the United States Court of Appeals for the District of Columbia Circuit, in which the Commission claims that the court found that there may be "extenuating circumstances (such as using improper techniques or willfully misrepresenting expenses) that warrant an exception to the deemed lawful language."[54] Although the dicta cited by the Commission from the *ACS* case may be instructive in considering how to proceed with respect to policing compliance with cost recovery rules, the specific proposal in the *FNPRM* – to create a "deemed lawful" exception for *any* instance in which a carrier is found to violate those rules – is overly broad and inconsistent with both the statute and the actual holding of the D.C. Circuit in the *ACS* case.

53 *FNPRM*, at ¶¶ 361-362.

54 *Id*. at ¶ 362 (citing *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002)).

As an initial matter, section 204(a)(3) requires that any tariff filing by a local exchange carrier "*shall be* deemed lawful . . . unless the Commission takes action" to reject or suspend the tariff within a specified period of time.[55] There is no room for ambiguity or obvious exception in this mandatory language; once the Commission has allowed a tariff filing to take effect, the relevant tariff provisions are "deemed lawful." Even in the event of a subsequent finding that the rates or terms in question were in fact unlawful, the remedy provided is prospective revision of the tariff rather than refunds or some other retroactive form of relief.

The Commission first came to this conclusion nearly 20 years ago in implementing then-new section 204(a)(3) following passage of the Telecommunications Act of 1996. At the time, two competing interpretations were proffered – one consistent with the preceding paragraph, and another that treated "deemed lawful" as merely a rebuttable presumption that could lead to damages or other retroactive relief in the event of a subsequent finding that the tariff provision(s) violated some other provision of law.[56] The Commission ultimately adopted the first interpretation (the one discussed in the preceding paragraph), finding that "this interpretation is compelled by the language of the statute viewed in light of recent appellate decisions, and that [the second interpretation] is not a permissible reading of this statutory provision."[57] In particular, the Commission observed that courts "have consistently found that the term 'deemed,' in this context

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55 47 U.S.C. § 204(a)(3) (emphasis added).

56 *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2175-2181 (1997) ("*Streamlined Tariffing Order*"), at ¶¶ 8-17.

57 *Id*. at 2181, ¶ 18.

is not ambiguous."[58] The Commission further noted that this interpretation of section 204(a)(3) "is the balance between consumers and carriers that Congress struck" in adding a new statutory provision that for the first time introduced the "deemed lawful" concept to telecommunications tariffs where previously claims for damages had been permitted.[59]

Although the instant *FNPRM* cites to the *ACS* case for the proposition that some kind of exception to the "deemed lawful" provision of section 204 might be created, the D.C. Circuit's decision offers up no such notion. To the contrary, in *ACS*, the D.C. Circuit reaffirmed the very interpretation described above, finding that this addition to the statute in 1996 "effected a considerable change in the regulatory regime" that precluded the Commission from "impos[ing] refund liability for covered rates."[60] Although the Commission attempted to argue for a kind of exception in that case – claiming that ACS had violated its prescribed rate of return, which was a different feature than its rates – the D.C. Circuit rejected such hair-splitting, concluding that the "deemed lawful" provision was absolute and captured all elements of ratemaking, including the rate of return.[61]

The Commission then tried for a different exception to the "deemed lawful" provision, arguing that the cost allocation practices that led to the allegedly unlawful tariff term were not

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58 *Id*. at 2181-82, ¶ 19 (citing *Municipal Resale Service Customers v. Federal Energy Regulatory Commission (FERC)*, 43 F.3d 1046, 1052 (6th Cir. 1995); *Ohio Power Company v. FERC*, 954 F.2d 779, 782 (D.C. Cir. 1992), *citing Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1968); *Forrester v. Jerman*, 90 F.2d 412 (D.C. Cir. 1937); H.*P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer. Ct. of App. 1954)).

59 *Streamlined Tariffing Order*, 12 FCC Rcd at 2182-83, ¶ 20.

60 *ACS*, 290 F.3d at 410.

61 *Id*. at 411.

actually included in the actual tariff filed by ACS, such that they were not eligible for "deemed lawful" protection. The D.C. Circuit found this argument "somewhat mystifying," and concluded that there was "no basis for understanding section 204(a)(3)'s word 'practice' to include internal computations underlying a rate."[62] In the dicta now cited in the *FNPRM*, however, the *ACS* court went on to observe that its ruling did not "address the case of a carrier that *furtively* employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[63]

The *FNPRM* picks up on this last comment with respect to furtive concealment of rule violations to suggest a potential exception to the "deemed lawful" status of tariffs – but then draws no distinction of the kind actually suggested by the *ACS* court's dicta in proposing a rule to create an exception to "deemed lawful" treatment "when a carrier incorrectly certifies that its revenue requirements are compliant with the applicable standards."[64] Missing specifically from this proposed rule is any reference to the type of conduct expressly noted as of concern by the D.C. Circuit in its *ACS* dicta; instead the proposed rule as structured would do precisely what the D.C. Circuit said the Commission could *not* do in *ACS*. That is, the proposed rule breezes past any "furtive" misconduct or willful attempts to conceal improper accounting techniques and would instead penalize *any* error or violation, "furtive" or otherwise, of accounting or cost allocation rules. As the *ACS* court put it in rejecting the Commission's argument for such a broad exception to this effect, "The Commission may have been confused by its pre-section 204(a)(3) habit of

62 *Id*. at 412.

63 *Id*. at 413 (emphasis added)

64 *FNPRM*, at ¶ 362.

retroactively assessing the lawfulness of a rate long after it had taken effect without advance suspension of initiation of hearing. . . . But that is not the world of section 204(a)(3), where the rate itself, if filed and not suspended, is 'deemed lawful.'"[65]

If adopted as expressly proposed in the *FNPRM*, an exception to the "deemed lawful" provision rule would contradict decades of jurisprudence surrounding the meaning of such provisions, overturn decades of Commission precedent consistent with that caselaw as to what this addition to the Telecommunications Act of 1996 meant, and ultimately eviscerate the significance of the "deemed lawful" language in the statute by effectively treating *any* violation once detected as exempt from that provision. Indeed, under the rule as strictly proposed in the *FNPRM*, it is unclear what purpose the "deemed lawful" language of the statute would ever serve; the provision would all but have been written out of the statute if the proposed rule is adopted in current form. To the extent that the Commission believes that "furtive" and "concealing" (*i.e.*, fraudulent) conduct of the kind suggested by the *ACS* court's dicta should give rise to an exception to the "deemed lawful" rule, that may be a proposition worthy of consideration via a more developed proposal and record. But given that the rule as specifically proposed in the *FNPRM* would gut the very meaning of "deemed lawful" by revoking such treatment upon *any* subsequently determined violation ("furtive" or otherwise), this proposal must be rejected as flatly contrary to the statute and judicial and administrative precedent.

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[65] *ACS*, 290 F.3d at 413.

IV. WHERE BUDGET CONTROLS, COMPETITIVE OVERLAP, OR OTHER CAPS RESULT IN THE REDUCTION OR ELIMINATION OF USF SUPPORT, THE COMMISSION MUST BY LAW PROVIDE AN ALTERNATIVE VEHICLE FOR RECOVERY OF REGULATED COSTS. AS A BROADER MATTER, HOWEVER, THE COMMISSION MUST CONSIDER THE DEGREE TO WHICH CURRENT MECHANISMS WILL ULTIMATELY HELP OR HINDER THE REASONABLE COMPARABILITY OF RATES PAID BY RURAL CONSUMERS.

The *FNPRM* seeks comment on how carriers should be permitted to recover regulated costs that are disallowed from USF recovery due to the presence of "competitive overlap" in a specific geography (even after disaggregation of costs). As the *FNPRM* notes, current rules prohibit carriers from increasing subscriber line charges ("SLC") to recover those costs from consumers. Suggestions in the *FNPRM* to address this potential denial of required cost recovery include allowing carriers to recovery such costs through deaveraged, detariffed rates in the competitive area or raising the SLC caps for a particular study area (either only in the competitive portion or throughout the study area) to enable recovery of the non-USF-supported costs.[66]

Although posited as an issue arising narrowly out of disallowance of cost recovery via USF due to competitive overlap, this issue actually has much broader and important implications that must be addressed comprehensively. Competitive overlap USF reductions are but one of several caps or controls that could lead to costs being "kicked out" of recovery via USF without any prospect for recovery from customers or otherwise. Among other things, the new budget control adopted in the *Rate-of-Return Reform Order*,[67] the corporate operations expense caps as revised in 2011 to apply to ICLS,[68] and the newly adopted operating expense limits[69] all could have the

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66 *FNPRM*, at ¶¶ 364-368.

67 *Rate-of-Return Reform Order*, at ¶¶ 146-155.

68 *2011 Reform Order*, 26 FCC Rcd at 17747-48, ¶¶ 227-233.

69 *Rate-of-Return Reform Order*, at ¶¶ 95-104.

same adverse effect as the competitive overlap rules in terms of denying a carrier the opportunity to recover some portion of its interstate revenue requirements via USF while failing to provide any alternative whatsoever for recovery of such costs via consumer rates or some other mechanism. Each of these measures effectively creates a "regulatory black hole," in which carriers are required by Commission rules to assign costs to certain regulated accounts only to then be denied any ability at all to recover those costs.

Policies that would create and perpetuate such a "black hole" of cost recovery are contrary to both the Act and the United States Constitution. To be clear, this is not to argue that carriers are guaranteed recovery of all costs. But a system that directs assignment of costs to certain accounts while then foreclosing recovery of some of the costs in those accounts is arbitrary and capricious is contrary to law, and may rise to the level of an unconstitutional taking. Taking a step back, regardless of the precise means for recovery, the Commission has long made clear its understanding that regulated costs subject to its separations and accounting rules "will be included in some revenue requirement."[70] Current, long-standing rules require RLECs to record revenues, expenses and investments in specific accounts (Part 32); to remove amounts associated with non-regulated activities from regulated accounts (Part 64); to assign the remaining revenues, expenses and investments between the interstate and intrastate jurisdictions (Part 36); to calculate an interstate revenue requirement (Part 65); and, to allocate these amounts to specific rate elements for recovery from end users and other carriers via access charges (Part 69). Once costs are allocated, state and federal regulators must provide carriers with a reasonable opportunity to

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70 *MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80286, 1 FCC Rcd 615 (1986), at ¶ 12.

recover those costs, including a fair return on investments.[71] A fair opportunity to recover all costs is mandated because carriers are required to serve customers "upon reasonable request."[72]

The questions posed in this portion of the *FNPRM* are an effective admission that regulated interstate expenses will be denied recovery and that further regulatory action is required to enable recovery of those costs.[73] As noted above, however, this concern is true not only of the "competitive overlap" policy, but also several other policies imposed by the Commission – one of which is in place today (the corporate operations expense cap) and several others (the new operating expense limits and the budget control) that will be implemented in the future as a result of the *Rate-of-Return Reform Order*. It is therefore important that the Commission address this "black hole" immediately by allowing RLECs a reasonable opportunity to recover such costs via other means. Specifically, in the absence of more sufficient USF support, the Commission must allow RLECs to assess a tariffed, regulated rate element on consumers to recover those costs that are no longer eligible for USF due to the operation of one of these policies, or at the RLEC's option, permit recovery of such regulated but non-USF-supported costs via a detariffed rate.

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71 *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U. S. 591, 603 (1944); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd*., 665 F.3d 309 (1st Cir. 2011); *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n of Missouri,* 356 S.W.3d 293 (Mo. App. 2011).

72 47 U.S.C. §201(a). *See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, at ¶36 (1981). The Supreme Court has held that "the Constitution protects utilities from being limited to a charge for their property service the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Id*. at 308. Needless to say, this constitutional limit applies to the Commission as well.

73 *FNPRM*, at ¶ 364.

Even in doing so, however, the significant adverse public policy implications of simply "pushing more cost recovery to the rural consumer" by denying USF cost recovery cannot be ignored. In particular, the new USF cuts and caps and controls (and the resulting increase in consumer rates) could have a significant negative effect on adoption of broadband, even rising to the level of undermining or precluding altogether the ability for a RLEC to offer voice and broadband at "reasonably comparable" rates as required by the Act.[74] In this instance, while it is necessary as a matter of law to allow RLECs to assess new regulated rates on either a tariffed or detariffed basis upon consumers to make up for the "black hole" of USF cost recovery caused by the budget control, competitive overlap reductions, and other new caps and constraints, the Commission must also by law assess what denying such cost recovery via USF actually means for rural consumers. Although the *Rate-of-Return-Order* contains a cursory assertion that a $42 threshold for standalone broadband will not result in unaffordable rates for rural consumers,[75] there is no actual analysis or evidence provided in the order to support such a conclusion.

In fact, once that $42 threshold is combined with other operating costs *and* a necessary rate element to recover costs denied USF support due to budget controls, there is a substantial

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[74] Although the primary focus here is interstate cost recovery, the budget controls and other new cuts and caps that apply to HCLS could affect the affordability of voice services too. Such a dynamic is particularly problematic in states with laws that limit or preclude voice rate increases. This could put RLECs in a position of losing HCLS years before those costs can be passed onto consumers – and it is worth noting again that these costs ultimately end up being recovered in the form of higher rates paid by rural consumers.

[75] *Rate-of-Return Reform Order*, at ¶ 92 (looking at only certain non-loop costs, based only upon a comparison to the budget-driven revenue-per-user figure employed in the price cap model, in concluding that a $42 threshold would result in a reasonable end user standalone broadband rate). In addition to using the price cap model that the Commission by definition deemed inapplicable to RLECs, as described further below, this discussion in the order also expressly failed to take into account the effects of the budget control and other caps and costs that will be necessary and unavoidable components of delivering standalone broadband services to consumers, even under – and in some cases, precisely because of – the reforms adopted by the Commission in this order.

likelihood that: (1) the rates many rural consumers will pay for broadband will be "unreasonably incomparable" to those paid by urban consumers; and (2) many RLECs will be foreclosed as a practical matter from certifying that standalone broadband rates will be "reasonably comparable." Indeed, the *only* evidence in the record regarding the effect of a $42 standalone broadband support threshold – once taken together with other costs, controls, cuts, caps, and constraints – indicates that most RLEC consumers, even post-reform, will still pay well in excess of the "reasonable comparability" threshold identified for standalone broadband. Specifically, while submitted in connection with a different standalone broadband support structure, "illustrative runs" previously filed by NECA at the explicit direction of the Commission are instructive in assessing the potential impacts on consumer rates of a $42 broadband support threshold and budget controls. These "priceouts" indicate that, under even the most conservative growth assumptions, after the $42 threshold and various cuts and controls are taken into account, the retail rate for standalone broadband could approach $90 per month for many of the *lowest-cost* RLEC consumers, could be nearly $105 per month for a rural consumer served by an "average cost" RLEC, and could exceed $120 per month for consumers in the highest-cost areas.[76] By contrast, the current "reasonable comparability" benchmark for standalone broadband is $75.20 for 10/1 unlimited service.[77]

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[76] *Ex Parte* Letter from Regina McNeil, Vice President of Legal, NECA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 15, 2015), at 5. The Commission acknowledged in the *Rate-of-Return Reform Order* that RLECs would need to charge a consumer more for standalone broadband due to the budget control reducing a carrier's CAF-BLS, "even if that results in a carrier charging a broadband loop amount greater than $42 per loop per month." *Rate-of-Return Reform Order*, at ¶ 88.

[77] *Wireline Competition Bureau Announces Results Of 2016 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for ETCs Subject to Broadband Public Interest Obligations*, WC Docket No. 10-90, Public Notice (rel. Apr. 5, 2016), at 2.

If this evidence is at all indicative of the rates anticipated under the final reforms – and there is no reason to believe the rates would be materially different under the final support structure adopted by the Commission – this presents a real and unfortunate problem for all involved: for the Commission, for RLECs, and ultimately and most importantly, for the rural Americans who will continue to be denied the actual intended benefits of the standalone broadband support mechanism that the Commission thankfully took the initiative to create. Thus, while as a legal matter the Commission must permit RLECs to recover via some new consumer rate element those regulated costs that are denied support via USF due to budget controls, competitive overlap, or other new caps, the denial of sufficient USF support for regulated costs in the first instance will unfortunately exacerbate the pricing pressure faced by rural consumers and undermine the Commission's very good work in first setting up a standalone broadband support mechanism.

While many tend all too often to overlook this, it is important to understand that the High-Cost USF mechanism does not just work to solve *availability*; it is also essential to ensure *affordability*. The focus under the statute must be not only upon what it takes to *get* broadband to rural America, but also what it takes to *keep* broadband in rural America – and what it takes to make sure that broadband is reasonably comparable in price and quality to what is available elsewhere in America. Thus, while in the near term carriers must be given a reasonable opportunity to recover their regulated costs via some new regulated rate element (tariffed or detariffed) where those costs are denied USF support, this creates a conundrum as it may only exacerbate a situation in which it appears that the USF support provided for standalone broadband will be insufficient to ensure reasonable comparability for rural Americans. The only solution for this broader and more-far-reaching dilemma is to monitor closely the effects of the structural aspects of standalone broadband support (including the $42 threshold) on consumers, and to ensure starting with the budget review that is slated to be completed by next year, that there are more sufficient and predictable High-Cost USF funding levels to truly enable consumers in rural America to pay "reasonably comparable" rates for both voice and broadband services. [78]

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[78] *See Rate-of-Return Reform Order,* at ¶ 148 (noting that the decision of the United States Court of Appeals for the Tenth Circuit with respect to the Commission's USF budget for RLECs was premised in significant part upon the Commission "conducting a budget review by the end of six years") (quoting *In Re: FCC 11-161*, 753 F.3d 1015, 1055-1060 (10th Cir. 2014)).

Of course, one simple, common-sense near-term step the Commission could take to mitigate budget concerns pending such a comprehensive budget review would be to place the components of the High-Cost USF program on the same regulatory footing as the budget structure for E-Rate and the budget target structure for the Low-Income program by including an inflationary factor to accommodate reasonably anticipated increases in costs over time. *See Schools and Libraries Universal Service Support Mechanism,* CC Docket No. 02-6, *A National Broadband Plan for our Future,* GN Docket No. 09-51, Order, 25 FCC Rcd 18762,18780-83 (2010), at ¶¶ 35-40 (applying the same inflationary factor to the E-Rate program that is "used in other contexts to estimate carrier costs," including "for classifying carrier categories for various accounting and reporting purposes and to calculate adjustments to the annual funding cap for the high-cost loop support mechanism"); *Lifeline and Link Up Reform and Modernization, et al.,* WC Docket Nos. 11-42, 09-197, and 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration (rel. April 27, 2016), at ¶¶ 402-403 (concluding without any further explanation, after increasing the Lifeline program budget target to provide "ample room for new households to enroll in the program," that the Lifeline budget target should also "be indexed to inflation in accordance with the Consumer Price Index for all items from the Department of Labor, Bureau of Labor Statistics").

There is no logical basis whatsoever for the Commission to deny an inflationary factor to one USF program (especially one like the High-Cost USF program that is so driven by network construction labor costs), while other USF programs receive the benefit of such a factor. It is particularly ironic and unjust that the High-Cost USF program lacks such a factor when the basis for the inflationary adjustment provided to one of these other USF programs (E-Rate) was *expressly premised and based upon inflationary factors reflective of "carrier costs" within in the High-Cost program itself!*

Another measure the Commission can and should consider in the near-term is use of remaining Connect America Fund ("CAF") reserves and even underutilized Rural Health Care reserves to help alleviate the negative effects of any budget controls on the rates that consumers pay for standalone broadband under the Commission's reformed CAF-BLS mechanism. Although it is doubtful that such reserves would be sufficient to overcome the impacts of the budget control over a ten-year period on consumer rates, such funding could help pending more careful, in-depth consideration of the sufficiency of the budget as a whole.

V. THE COMMISSION SHOULD USE A PORTION OF CONNECT AMERICA FUND RESERVES TO ENABLE SUPPLEMENTAL SUPPORT FOR ALL RLECs SERVING CONSUMERS ON TRIBAL LANDS.

NTCA members have had a long-standing focus on serving *all* consumers in rural America, and they are intimately familiar with the special challenges and unique demands associated with delivering services on Tribal lands. NTCA specifically established a Tribal Affairs committee within the purview of its Industry & Regulatory Policy Committee a few years ago precisely because it recognized the need for a greater focus and a forum for more deliberation on how to tackle the challenges presented and respond to consumer needs. NTCA therefore applauds the Commission for taking a closer look specifically at these issues and devoting careful attention to how proposals put forward to enhance support for investment and operations on Tribal lands can be incorporated and reconciled with the High-Cost USF reforms just adopted.

As a general matter, NTCA supports use of up to $25 million per year of outstanding CAF reserves to enable a supplemental support mechanism that would boost investments and sustain operations on all Tribal lands. The National Tribal Telecommunications Association ("NTTA") is correct when it notes that Tribal lands are often more costly to serve and require additional resources to achieve national goals of universal service.[79] The Commission itself has recognized this proposition on multiple occasions.[80] NTTA's proposal for a "Tribal Broadband Factor" would appear to represent a reasonable way of "superimposing" a relatively straightforward solution to

79 *Ex Parte* Letter from Godfrey Enjady, President, NTTA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed June 19. 2015), at 2.

80 *See Ex Parte* Letter from Godfrey Enjady, President, NTTA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed June 5. 2015), at Attachment, pp. 1-3 (citing various Commission reports and decisions relating to challenges of deployment and operation on Tribal lands).

this problem atop now-reformed USF mechanisms, and given that the focus of reform should be on the consumer, NTCA believes that support from such a mechanism should be equally available, on an optional basis, to *all* companies that serve Tribal lands. NTCA looks forward to reviewing and replying to NTTA's upcoming comments with respect to how the original proposed structure of the Tribal Broadband Factor might be revised and reconciled with the reforms adopted in the *Rate-of-Return Reform Order*, including revised buildout obligations that take account of the deployment duties already imposed by that order.

VI. THE NATIONAL EXCHANGE CARRIER ASSOCIATION PERFORMS SEVERAL IMPORTANT AND NECESSARY FUNCTIONS IN ADMINISTERING AND POLICING COST RECOVERY.

RLECs are small businesses operating in a capital-intensive business. They serve sparsely populated rural markets where returns on investment are measured in decades and often dependent in large part upon the availability of sufficient and predictable regulated cost recovery mechanisms, including both interstate rates and USF support. For small companies, the ability to justify investments and sustain operations depends upon the ability in turn to "share" costs; lacking scope and scale, if many these companies were to attempt to undertake on their own the construction and ongoing operation of networks, the rates they would need to charge consumers would be astronomically far in excess of any "reasonable comparability" target and would result ultimately in an utter failure in the mission of universal service. Put another way, small companies of the kind in NTCA membership must have both sufficient and predictable USF support as well as other regulatory ratemaking vehicles available to them to simulate the benefits of scope and scale, or else they would be unable to fulfill their objectives as ETCs and pillars of the community in which they live and serve.

Pooling and settlement of regulated interstate costs are important components of this structure. As AT&T stated recently in another context:

> The NECA pools allow its members not only to pool their costs and revenues, but also effectively to pool their risks. Since the capital assets underlying NECA's cost pools currently amount to almost $3 billion, this risk-sharing mechanism shields individual rate-of-return carriers from the risks that might be associated with smaller firms.[81]

While AT&T may have overstated the risk-mitigating benefits of pooling for purposes of advocacy on represcription, the upshot of its statement is true – the pools are essential in enabling small companies to manage the "lumpiness" of capital investments and to spread recovery of those costs across interstate rates charged by hundreds of other companies. To the extent that the Commission considers any changes in the administration of cost recovery, it must take care to retain and not to disrupt the essential functional ability to pool costs in furthering small companies' ability to achieve the mission of universal service. It is also important to ensure that a knowledgeable resource such as NECA is present and actively empowered and engaged to monitor and provide guidance with respect to cost recovery via such ratemaking vehicles, so that the integrity of the pools is maintained, so that carriers understand how to participate in them most effectively and efficiently if they desire, and so that the actions of any one firm do not adversely affect the interests of others participating in those vehicles or the consumers those other companies serve.

NECA and USAC also play important roles in administering and policing cost recovery via USF. Coordination between recovery of costs via interstate rates (*e.g.*, special access) and USF mechanisms is at once necessary and complex even in a "cost model world," and as the

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81 Reply Comments of AT&T, WC Docket No. 10-90 (filed Aug. 26, 2013), at n. 14.

Commission considers any reforms of such programs, it must not lose sight of the important and necessary functions required to administer and police cost recovery through them. Those functions must once again be vested in an entity with the capability, experience, and expertise to assist smaller carriers and the Commission in coordinating the various means of cost recovery. Thus, even as the Commission considers any potential procedural changes with respect to the administration of interstate ratemaking and/or USF cost recovery, it must not overlook the functional importance of existing cost recovery vehicles in fulfilling the mission of universal service, and it must be careful not to disrupt the effective workings of systems that operate in coordinated fashion and have, at least thus far, been the most successful to date in enabling sustainable deployment of broadband in rural America.

VII. THE COMMISSION SHOULD FURTHER STREAMLINE FORM 481 TO LIMIT UNNECESSARY REPORTING BURDENS ON ETCS.

The *FNPRM* seeks comment on streamlining the reporting requirements applicable to ETC recipients of high-cost USF support, and specifically inquires as to particular reporting requirements included on ETCs' annual Form 481 filings made pursuant to Section 54.313 of the Commission's rules.[82] NTCA applauds the Commission's proposals and its focus on balancing accountability with limiting the reporting burdens applicable to small businesses.

Although NTCA is sensitive to the reporting burdens imposed on ETCs of all sizes, it cannot be forgotten that RLECs are small businesses operating in some of the most difficult to serve rural areas of the nation. Thus, NTCA urges the Commission to focus with a keen eye on any opportunity to streamline reporting requirements applicable to these carriers, as any reporting requirement has a greater proportional impact on these small businesses as compared to others.

[82] *FNPRM*, at ¶¶ 387-393.

As context, the average NTCA RLEC member has fewer than 25 total employees. This includes every type of employee one can expect to work for a rural broadband provider, from customer service representatives to plant engineers to technicians installing and maintaining network facilities throughout large, sparsely populated rural areas. This also includes office personnel with the responsibility of compliance with the numerous reporting requirements applicable to RLECs and their affiliated entities. Many of these employees by necessity "wear multiple hats" in terms of both local, state and federal compliance and reporting functions as well as performing the other functions discussed above for companies with operations that span hundreds or even thousands of square miles.

That being said, NTCA recognizes the importance of accountability (both in reporting *and* in the quality of services to be delivered) and the need to ensure that USF resources are utilized to further the goals of section 254. Data are also essential for the Commission and stakeholders alike to monitor the impacts, good and bad, of the reforms recently enacted. However, these objectives and the goal of streamlining reporting need not be in tension: the Commission can consider how to collect only that which is absolutely necessary while avoiding diversion of RLECs' resources unnecessarily away from the mission of advancing universal service. The proposals in the Further Notice are a good start in this regard.

Thus, as proposed in the *FNPRM*, the Commission should eliminate the outage reporting provisions of Form 481.[83] The Further Notice correctly recognizes that the Commission's part 4 rules already contain a separate, duplicative outage reporting requirement.[84] Indeed, the

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[83] 47 C.F.R. §§ 54.313(a)(2) and 54.422(b)(1).

[84] *FNPRM*, at ¶ 388.

requirements of section 54.313(a)(2) are based on Part 4 of the Commission's rules and specifically reference section 4.5. Thus, the section 54.313(a)(2) requirement, while perhaps providing valuable information, is redundant because the Commission already has access to that same data via outage reports filed by RLECs. It is important to note here that, while the outage reporting information provided on pursuant to section 54.313(a)(2) and pursuant to Part 4 may indeed be similar information, this does not mean that it imposes no burden on RLECs in terms of staff time to include this information on Form 481. Each reporting form is different, and even reporting the same information on a different form at a different time consumes scarce staff resources.

The Commission should also eliminate the requirement that RLEC High-Cost support recipients report, on Form 481, the number of unfulfilled customer requests for service because this provision's purpose will now be fulfilled by new buildout obligations. More specifically, the "underlying purpose"[85] of this provision – a purpose that the *FNPRM* acknowledges the requirement is not "adequately advancing"[86] – is to enable the Commission to measure progress in deploying broadband service. However, the new buildout obligations imposed by the *Rate-of-Return-Reform Order* (for both model and non-model RLECs) establish a "specific methodology to determine *each carrier's deployment obligation* over a defined five-year period, which will be used to monitor carrier performance."[87] In other words, each RLEC will have a unique, tailored deployment obligation to reach a certain number of locations. The new order further establishes a requirement that non-model RLECs report to USAC the geocoded locations to which broadband

85 *Id*. at ¶ 390.

86 *Id*.

87 *Rate-of-Return Reform Order*, at ¶ 165 (emphasis added).

is newly deployed,[88] and that model electors report on the geocoded locations of both existing services *and* subsequent locations added.[89] Additionally, the order maintains the existing "reasonable request" standard, and specifically states that RLECs must have a process in place to document the reasons why a particular request was not fulfilled.[90] In short, the new rules have "every base covered" in terms of the Commission's ability to monitor progress in broadband deployment, and the section 54.313(a)(3) requirement therefore is no longer necessary.

With respect to the section 54.313(a)(4) and (a)(5) consumer complaint and service quality provisions contained on Form 481, the discussion in the *FNPRM* highlights the need for a modified approach. The *FNPRM* notes that, with respect to certifying compliance with service quality standards and consumer protection rules, "ETCs may not know what standards and rules are 'applicable.'"[91] With respect to consumer complaints, there is a lack of clarity in the rule as to what constitutes a "complaint" as compared to a mere "trouble report" – that is, a customer contacting the provider and stating that their service may not be performing as expected. These specific examples highlight how, for carriers of all sizes, the burden of reporting requirements are compounded by a lack of "bright-line" rules. While NTCA appreciates the *FNPRM*'s recognition that clarity might be needed here in the form of "more specific standardized instructions regarding the reporting of complaints,"[92] the Commission should clarify that it is indeed looking specifically

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88 *Id*. at ¶ 210.

89 *Id*. at ¶¶ 79, 213.

90 *Id*. at ¶ 178.

91 *FNPRM*, at ¶ 391.

92 *Id*. at ¶ 390.

for "complaints" and not just any trouble report, and should further consider leaving the receipt of any such actual complaints to the states as the governmental entities closest to the "conditions on the ground," the agencies to which consumers are most likely to turn when they have complaints, and the entities most familiar (and experienced) in working with providers and individual consumers. States could then report to the Commission from time to time on the number of complaints they received regarding the carrier, for example as part of periodic ETC recertification processes.

In terms of the section 54.313(a)(7) requirement that RLECs report their "price offerings" to the Wireline Competition Bureau, the Commission should modify this requirement such that carriers report only that which is needed to show compliance with the "reasonable comparability" benchmark.[93] The Commission's primary interest in pricing information is to ensure that consumers in RLEC service areas have access to broadband meeting the relevant performance requirements at a "reasonably comparable" rate; as long as one price offering does so, compelled reporting of the full range of price offerings that an individual company might make available is irrelevant to the statutory goal and imposes an additional unnecessary requirement on RLECs.

Finally, the Commission should also eliminate the requirement that RLECs submit duplicate Form 481 filings to state commissions and tribal authorities. The creation of an online USAC portal through which a single filing can be made, and through which the Commission and other authorized governmental entities can access filed Form 481 data, should eliminate the need for duplicative filings. Adoption of this proposal will not only benefit reporting RLECs, but it

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[93] As noted in Section IV, *supra*, however, it may be difficult, if not impossible, for many RLECs to deliver standalone broadband at the "reasonable comparability" benchmark given the $42 threshold included within the structure of the mechanism and the effects of the budget controls and other caps.

will, as the *FNPRM* acknowledges, streamline the process of accessing Form 481 data for regulators.[94]

VIII. CONCLUSION

For the foregoing reasons, NTCA respectfully requests that the Commission act consistent with the recommendations set forth herein.

Respectfully submitted,

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[94] *FNPRM*, at ¶ 392. As NTCA intends to address and explain in subsequent filings, however, there is a significant need to ensure and better protect the confidentiality of data submitted via such a portal, given the competitively sensitive nature of the financial and network deployment information now included on Form 481.