

**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 Inter-carrier Compensation Regime	)	CC Docket No. 01-92

**PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

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## EXECUTIVE SUMMARY

**Sufficiency and Reasonable Comparability.** The significance of the step that the Federal Communications Commission (the “Commission”) has taken to support standalone broadband will be unfortunately undermined by a lack of sufficient universal service fund (“USF”) support, resulting in retail rates for rural consumers that are “unreasonably incomparable” to what urban consumers pay. The record confirms this concern. NTCA’s highlighting of this evidence should not be perceived as an attack upon the Commission’s welcome efforts to provide standalone broadband support; to the contrary, this Petition should instead be seen as seeking a much-needed conversation – what must happen to make sure that the reform *actually works*? To give rural consumers a better chance of accessing standalone broadband at reasonably comparable rates, NTCA respectfully requests that the Commission reconsider the high-cost USF budget as enforced by the new budget control. In the alternative, as a short-term solution, the Commission should suspend the requirement to provide certification that rural local exchange carriers (“RLECs”) are providing standalone broadband services at reasonably comparable rates until the budget and other potential structural changes to support can be considered and/or reconsidered.

**Regulated Cost Recovery “Black Hole.”** To the extent it denies recovery of regulated costs via either an interstate regulated rate element or USF support, the *Rate-of-Return Reform Order* violates the law and the United States Constitution. Although the Commission asks about the creation of some cost recovery vehicle going forward, this inquiry is limited in scope and does not change the fact that cost recovery will be denied in the interim while Commission consideration of that limited scope remains pending. At the same time, echoing the concerns raised in the preceding section, there are only so many “additional rate elements” that can be piled atop rural consumers before reasonable comparability of rates becomes a serious concern.

**Model Election Budget Issues.** The Commission should clarify that each RLEC is responsible for the consequences of its consideration of a potential election of model support, rather than having the risk of any one carrier's decision spread among other carriers. To the extent such clarification is not provided, the Commission should reconsider and adopt an alternative that will enable model elections without the risk of any given RLEC's election choice being subsidized by other providers that did not make such choices.

**Other Issues.** First, the Commission should clarify or reconsider the extent to which voice obligations continue in areas where USF support is no longer provided. Moreover, as part of an evidentiary process to establish the offering of voice and broadband services by an "unsubsidized competitor," more detail is needed regarding where the would-be competitor purports to operate. Where overlap is found, the Commission should permit recovery of disaggregated costs without artificial limits on the support that may result from the defined formulas; the Commission should also confirm that RLECs may choose freely from among those formulas. Furthermore, the Commission should incorporate an inflationary factor within the new operating expense limits, and clarify or reconsider the availability of a "streamlined waiver" of the new Capital Investment Allowance and the application of the per-location limit within that mechanism. The Commission should reconsider the requirement to impute ARCs where a carrier can show that it had a certain number of standalone broadband connections when the CAF-ICC baseline was set. In addition, the Commission should confirm that nothing in the order expands or varies any party's existing rights with respect to access to confidential information reported on Form 481. Finally, even if the Commission deems the model appropriate in current form for voluntary model elections, the model should not and cannot be considered transparent or accurate enough for anything more than such voluntary elections.

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**PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF  
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)<sup>1</sup> hereby petitions the Federal Communications Commission (the “Commission”) for reconsideration and/or clarification, as applicable, of certain aspects of the Report and Order released March 30, 2016 in the above-captioned proceedings.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> *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) (“*Rate-of-Return Reform Order*” or “*FNPRM*,” as applicable).

**I. NTCA APPALUDS THE COMMISSION’S EFFORT TO ESTABLISH A STANDALONE BROADBAND SUPPORT MECHANISM. UNFORTUNATELY, THE UNIVERSAL SERVICE BUDGET IS INSUFFICIENT TO PERMIT MOST RURAL CONSUMERS TO RECEIVE STANDALONE BROADBAND AT REASONABLY COMPARABLE RATES AS THE SUPPORT MECHANISM IS CURRENTLY STRUCTURED.**

In recent comments responding to the *FNPRM*, NTCA raised concerns that the combined effect of: (a) a budget control and other cuts, caps, and constraints on universal service fund (“USF”) cost recovery; (b) a \$42 “consumer broadband loop revenue benchmark” for standalone broadband regulated loop cost recovery; and (c) other costs associated with providing broadband Internet access service to consumers would preclude most carriers from delivering standalone broadband services to rural consumers at reasonably comparable rates.<sup>3</sup> By this Petition, NTCA seeks reconsideration of either: (1) the insufficient USF budget for RLEC high-cost support as enforced pursuant to the new budget control the Commission has adopted in the *Rate-of-Return Reform Order*; or (2) alternatively, the requirement for RLECs to provide certification that they are providing standalone broadband services at reasonably comparable rates until such time as the budget and other structural modifications to the support mechanism can be more fully considered.

To dispel upfront any confusion as to the intended scope of this Petition, NTCA is *not* challenging herein the fundamental notion of USF budgets or seeking to up-end the reforms that the Commission has adopted. Nor should the discussion in this section be perceived as ungrateful for the important, forward-looking step that the Commission took in the *Rate-of-Return Reform Order* to provide for the first time some level of support for standalone broadband. To the contrary, NTCA is concerned that the significance of the step that the Commission has thankfully taken to

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<sup>3</sup> Comments of NTCA, WC Docket Nos. 10-90 and 14-58, CC Docket No. 01-92 (filed May 12, 2016) (“NTCA Comments”), at 31-34.

support standalone broadband will be unfortunately undermined by a lack of sufficient USF support resulting in retail rates that remain unaffordable for rural consumers and “unreasonably incomparable” to what urban consumers pay.

Put another way, NTCA is challenging in the first instance the narrow premise that the specific budget, as ratified by the Commission in the form of a budget control under the *Rate-of-Return Reform Order*, will in fact be “sufficient” as required by law. Section 254(e) of the Communications Act of 1934 (the “Act”), as amended, mandates, among other things, that support must be “sufficient to achieve the purposes of this section.”<sup>4</sup> Section 254(b)(3) in turn establishes the public policy principle that high-cost support is intended to ensure consumer access to supported services “that are reasonably comparable to those services provided in urban areas . . . at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>5</sup> Thus, where it is clear the rates that rural consumers can expect to pay for a supported service (such as standalone broadband) will *not* be reasonably comparable contrary to section 254(b)(3), support is by definition insufficient contrary to section 254(e). By this Petition, NTCA therefore requests the Commission’s help in ensuring that the standalone broadband reform it adopted will have its intended effect of enabling greater consumer adoption of broadband consistent with the Act’s universal service mandates.

Although the United States Court of Appeals for the Tenth Circuit rejected certain arguments raised about the sufficiency of the budget target established by the Commission in 2011, data-driven concerns about the actual rates consumers would pay for supported services were *not*

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<sup>4</sup> 47 U.S.C. § 254(e); *see also id.* at § 254(b)(5).

<sup>5</sup> *Id.* at § 254 (b)(3).

among those considered by the court in its 2014 decision. Rather, the court rejected broad arguments that “sufficiency” under the statute was somehow equivalent to “complete” or “full” funding of carriers to fulfill universal service obligations.<sup>6</sup> Moreover, claims about the effects of the 2011 reforms on consumer rates were at the time speculative, and the court found that the Commission’s commitment to monitor urban and rural rates would allow it to determine whether its USF reforms would in fact enable or undermine “reasonable comparability.”<sup>7</sup>

In contrast to the broad arguments and notional 2011 record presented to the Tenth Circuit, there is plain and unrefuted evidence on the record here that the budget now ensconced formally via a control in the *Rate-of-Return Reform Order*,<sup>8</sup> when combined with: (i) the \$42 broadband loop benchmark adopted as part of the new standalone broadband support mechanism; (ii) other cuts, caps, and constraints on support; and (iii) other costs associated with delivering retail broadband Internet access service to rural consumers, is highly likely to result in “unreasonably incomparable” standalone broadband rates that will not satisfy sections 254(b)(3) or (e) of the Act. This will in turn preclude most carriers from being able to provide a certification that their consumers can obtain access to standalone broadband services at reasonably comparable rates.

The Commission asserted in the *Rate-of-Return Reform Order* that a \$42 consumer broadband loop benchmark for standalone broadband support would be reasonable based upon a comparison to the support threshold used in the price cap model, the then-current urban rate for standalone broadband of \$77.81, and a median non-loop cost of \$34.95 for 10/1 broadband in the

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<sup>6</sup> *In Re: FCC 11-161*, 753 F.3d 1015, 1055-60 (10<sup>th</sup> Cir. 2014).

<sup>7</sup> *Id.* at 1061-62.

<sup>8</sup> *Rate-of-Return Reform Order*, at ¶¶ 146-155.

NECA voice-data tariff.<sup>9</sup> But this reference to various fragmented cost recovery elements does not constitute (nor does it substitute for) a complete analysis of the impacts of this \$42 benchmark (especially as combined with other reforms adopted in the order, such as per-line budget control “haircuts” that could tack on several dollars or more per connection) on actual retail consumer broadband rates and the ability of RLECs to certify as to the “reasonable comparability” of standalone broadband rates. Indeed, the limited discussion in the order failed to address much more detailed and specific evidence placed into the record as to consumer rate impacts.

This detailed and specific evidence as to the “unreasonable incomparability” of rates that consumers can actually expect to pay for standalone broadband – even post-reform – comes in the form of a series of charts submitted into the record over a several-week period late last year at the direction of the Wireline Competition Bureau (the “Bureau”). Specifically, over the course of two months, the National Exchange Carrier Association (“NECA”) was instructed to file multiple iterations of “price-outs” of a potential reform package under which standalone broadband support would be subject to a variety of broadband loop benchmarks set at \$42 and \$45.<sup>10</sup> It is readily apparent from those filings that nearly all rural consumers face the likely prospect of paying retail

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<sup>9</sup> *Id.* at ¶ 92 (citing FCC Reasonable Comparability Benchmark Calculator, located at: <https://www.fcc.gov/encyclopedia/reasonablecomparability-benchmark-calculator>, and Letter from Regina McNeil, Vice President of Legal, NECA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 19, 2015), at Attach. 1, Exh. 1).

<sup>10</sup> *See* Letters from Regina McNeil, Vice President of Legal, NECA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 16, 2015; Dec. 15, 2015; Dec. 11, 2015; Dec. 2, 2015; Nov. 19, 2015; Nov. 17, 2015; Nov. 13, 2015; Nov. 6, 2015; Sept. 11, 2015). Although the Bureau initially directed the “price outs” to reflect a \$45 benchmark, later iterations depicted consumer rate impacts based upon a \$42 threshold. While the impetus for the shift to a lower threshold is not entirely clear, it would seem that one objective (and the clear effect) was to reduce slightly the rate that the rural consumer would need to pay for standalone broadband. *See, e.g., Ex Parte* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Nov. 24, 2015) at 3, 5-6.

rates for standalone broadband in excess of the current “reasonable comparability” rate benchmark (\$75.20) that was set pursuant to the most recent urban rate survey.<sup>11</sup> For example, the last filing of this kind in the docket<sup>12</sup> demonstrates that once the effects of a \$42 threshold, budget controls, other cuts, caps, and constraints on support, and other broadband-related costs are all taken into account:

- Consumers served by some of the lowest-cost RLECs (those in the 25<sup>th</sup> percentile of NECA rate bands) are estimated to pay on average at least \$89.66 per month for retail standalone broadband – or **\$14.46 per month higher** than what the Commission has identified as a “reasonably comparable” rate.
- Consumers served by an “average cost” RLEC (in the 50<sup>th</sup> (median) percentile of NECA rate bands) are estimated to pay on average at least \$104.86 per month for retail standalone broadband – or **\$29.66 per month higher** than what the Commission has identified as a “reasonably comparable” rate.
- Consumers served by some of the highest-cost RLECs (those in the 75<sup>th</sup> percentile of NECA rate bands) are estimated to pay on average at least \$123.35 per month for retail standalone broadband – or **\$48.15 per month higher** than what the Commission has identified as a “reasonably comparable” rate.

Although one might attempt to quibble with or question some of the assumptions that went into developing the rate estimates in this filing, these filings were made at the direction of the Bureau and the Commission actually endorsed many of these same assumptions in subsequently directing the preparation of forecasts for other purposes in the *Rate-of-Return Reform Order*.<sup>13</sup>

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<sup>11</sup> *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. It is also worth noting that this \$75.20 figure is actually two standard deviations higher than the rates paid by the average urban consumer.

<sup>12</sup> Letter from Regina McNeil, Vice President of Legal, NECA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 16, 2015), at 5.

<sup>13</sup> *Rate-of-Return Reform Order*, at n. 373.

Moreover, while these estimates were prepared initially presuming a “bifurcated” approach to standalone broadband support that was ultimately not adopted, few, if any, of the cost elements identified in the chart would differ based upon the use of “bifurcation” as compared to the structure of the reforms ultimately adopted in the order.<sup>14</sup> Finally, even if one presumed for the sake of argument that: (1) the Federal Universal Service Charge identified in the chart did not apply; and (2) the budget control impact for some reason turned out to be only half of the estimate in the chart, the retail prices for most RLECs would *still* remain tens of dollars per month above the reasonable comparability benchmark of \$75.20.<sup>15</sup>

In short, the only detailed evidence on the record regarding estimated consumer rate impacts confirms that there is insufficient support to enable the delivery of standalone retail broadband Internet access services to RLEC consumers at reasonably comparable rates. NTCA’s highlighting of this evidence in the record should not be perceived as an attack upon – nor a lack of gratitude for – the Commission’s efforts to work with stakeholders to develop and implement a standalone broadband support mechanism. To the contrary, NTCA and other stakeholders appreciate the Commission’s effort to establish such a mechanism, and the help it provides will, to be sure, represent an incremental improvement over the prior regime where standalone

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<sup>14</sup> For example, the NECA wholesale transmission tariff rate, the costs of transport from the retail customer through the Broadband Access Service Connection Point, and the costs of connections to Internet backbones are “fixed” costs in the sense that they would not differ based upon whether the Commission decided to use one approach or another to support standalone broadband loop costs. Indeed, an important aspect of the broader “IP transition” is how interconnection arrangements – particularly costs of transporting increasing amounts of data to and from distant Internet gateways – affect the mission of universal service in a broadband world.

<sup>15</sup> The chart of course does not reflect all operating costs or even other potential cuts in support adopted, such as reductions due to operating expense limits or competitive overlap. As the Commission acknowledged in the *FNPRM* (at ¶¶ 364-368), these may require additional cost recovery from consumers – thereby pushing the retail prices that must be charged *even higher*.

broadband went entirely without support. This Petition should instead be seen as seeking a much-needed further conversation – what must happen to make sure that the reform the Commission adopted *actually works* for rural consumers? Unfortunately, in its current form and with the current support budget enforced by the new budget control, the standalone broadband mechanism adopted by the Commission will fall short in serving its intended purpose and will ultimately fail to satisfy section 254’s mandate to ensure “reasonably comparable” rates for a supported service.

With the focus of universal service policy rightly on the consumer, the evidence is clear that – in its current form and with its current budget – many rural consumers will not receive the benefits anticipated by this reform. Further action is needed to address this concern and to ensure that the updated mechanism, in now supporting standalone broadband, operates in accordance with the mandates for sufficiency and reasonable comparability.<sup>16</sup> To give rural consumers a better chance of accessing reasonably comparable standalone broadband at reasonably comparable rates, NTCA therefore respectfully requests that the Commission reconsider the USF budget for RLEC high-cost support as enforced by the new budget control the Commission has adopted.<sup>17</sup> In the

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<sup>16</sup> Beyond “reasonable comparability” of rates, there is also a question as to whether a 10/1 standard for universal service represents “reasonably comparable” broadband. To the extent that the decision to adopt a 10/1 standard was budget-driven, this provides another example of how the program’s budget is insufficient and should be adjusted to ensure reasonable comparability of speeds too. *Cf. Ex Parte* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Dec. 16, 2015).

<sup>17</sup> One simple near-term step that might help to mitigate such concerns pending a more comprehensive budget review would be to place the components of the High-Cost USF program similar footing to 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 (adopting an inflationary factor for the E-Rate program based upon the one used for High-Cost Loop Support); *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 (summarily

alternative, and at a minimum as a short-term solution only, the Commission should reconsider and suspend the requirement for RLECs to provide certification that they are providing standalone broadband services at reasonably comparable rates until the budget and other potential structural changes to the mechanism can be considered and/or reconsidered, as necessary and appropriate.<sup>18</sup>

## **II. THE ORDER VIOLATES THE LAW AND THE UNITED STATES CONSTITUTION TO THE EXTENT IT DENIES AN OPPORTUNITY TO RECOVER REGULATED COSTS VIA EITHER RATES OR USF SUPPORT.**

To the extent it denies recovery of regulated costs via *either* an interstate regulated rate element *or* USF support, the *Rate-of-Return Reform Order* violates the law and the United States Constitution. Although the accompanying *FNPRM* seeks comment on how carriers should be permitted going forward to recover regulated costs that are disallowed from USF recovery,<sup>19</sup> this inquiry focuses only upon a subset of those costs – those disallowed by competitive overlap – and leaves unaddressed the larger regulatory “black hole” created when any number of caps or controls

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concluding that the Lifeline budget target should “be indexed to inflation in accordance with the Consumer Price Index for all items from the Department of Labor, Bureau of Labor Statistics”). NTCA has previously advocated for an inflationary adjustment to USF budgets. *Ex Parte* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Feb. 10, 2014), at 2.

<sup>18</sup> The Commission may also wish to reconsider the “estimation” approach for identifying broadband-only loop investments and expenses, as specified in sections 69.311 and 69.416 of the new rules. Rather than determine the amount of consumer broadband-only loop investments and expenses by estimating an average cost per line, the Commission could revise section 69.311(b) to specify that broadband-only investment shall equal the amounts of broadband-only loop investment included in CWF Category 2 Wideband and COE Category 4.11 Wideband Exchange Line Circuit Equipment, and related reserves and other investment, assigned to interstate special access pursuant to Parts 36 and 69 of the Commission’s rules. Broadband-only loop expenses in section 69.416(b) could then be determined by reference to such investments. Doing so would specifically identify actual broadband-only costs to be shifted, which by definition improves accuracy as compared to the surrogate approach adopted.

<sup>19</sup> *FNPRM*, at ¶¶ 364-368.

leads to regulated costs being denied recovery through USF without a corresponding opportunity to recover them through regulated rates. Indeed, as NTCA noted, the new budget control adopted in the *Rate-of-Return Reform Order*,<sup>20</sup> the corporate operations expense caps as revised in 2011 to apply to ICLS,<sup>21</sup> and the newly adopted operating expense limits<sup>22</sup> all could have the same adverse effect as the competitive overlap rules in denying a carrier the opportunity to recover some portion of its interstate revenue requirements via USF while also failing to provide any clear alternative for recovery of such costs via consumer rates or some other mechanism.

Policies that would create and perpetuate a “black hole” of cost recovery are contrary to both the Act and the United States Constitution. Once costs are allocated, state and federal regulators must provide carriers with a reasonable opportunity to recover those costs, including a fair return on investments.<sup>23</sup> A fair opportunity to recover all costs is mandated because carriers are required to serve customers “upon reasonable request.”<sup>24</sup> To be clear, this is not to argue that

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<sup>20</sup> *Rate-of-Return Reform Order*, at ¶¶ 146-155. The order permits the effects of the budget control to be recovered, in some cases, via consumer broadband-only loop rates that would increase above \$42. *Id.* at n. 333. But this “flexibility” would only, at best, help address the effects of the budget control where standalone broadband is provided by a RLEC, and would not help where other constraints create a cost recovery shortfall. And, of course, a “solution” that expressly contemplates increasing consumer broadband-only loop rates due to budget controls raises concerns again about sufficiency and is likely only to exacerbate the concern noted in the preceding section about consumers lacking access to standalone broadband at reasonably comparable rates.

<sup>21</sup> *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, 17747-48 (2011), at ¶¶ 227-233.

<sup>22</sup> *Rate-of-Return Reform Order*, at ¶¶ 95-104.

<sup>23</sup> *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 (1<sup>st</sup> Cir. 2011); *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n of Missouri*, 356 S.W.3d 293 (Mo. App. 2011).

<sup>24</sup> 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); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) (holding

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.

NTCA specifically highlighted this concern about a “black hole” of cost recovery prior to adoption of the *Rate-of-Return Reform Order*.<sup>25</sup> Although the inquiry in the *FNPRM* to permit the creation of a new rate element or some other cost recovery vehicle going forward could help, it is limited in scope (posed as to only competitive overlap, rather than all potential kinds of support reduction) – and it does not change the fact that cost recovery will be denied in the interim while Commission consideration of that discrete issue remains pending. Moreover, as noted in NTCA’s recent comments on the *FNPRM*, and echoing the concerns raised in the preceding section, there are only so many “additional rate elements” that can be piled atop consumers before reasonable comparability of rates becomes a serious concern.<sup>26</sup> Thus, the Commission must consider carefully how to balance on the one hand the need for additional rate elements upon denial of USF support for regulated costs, with the need on the other hand to avoid imposing so many cost burdens on rural consumers that their service rates become “unreasonably incomparable” to those in urban areas as a result.

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that if a 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”).

<sup>25</sup> *Ex Parte* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Feb. 4, 2016).

<sup>26</sup> NTCA Comments, at 31-34.

**III. THE COMMISSION SHOULD CLARIFY OR ALTERNATIVELY RECONSIDER ITS STATEMENT WITH RESPECT TO THE TREATMENT OF CERTAIN USF BUDGET RESOURCES IN THE CASE OF MODEL ELECTIONS.**

As part of its discussion regarding the treatment of USF budget resources in the case of model elections, the Commission states:

If we proceed to the second step of the election process, those carriers that initially accepted but subsequently decline to accept the revised offer will continue to receive support through the legacy mechanisms, as otherwise modified by this Order. If the carrier received more support from the legacy mechanisms in 2015 than it was offered by the final model run, the overall budget for all carriers that receive support through the rate-of-return mechanisms (HCLS and reformed ICLS) will be reduced by the difference between the carrier's 2015 legacy support amount and the final amount of model support offered to that carrier.<sup>27</sup>

This statement could be interpreted in two ways. First, it could be read to say that if a RLEC that would receive less under the model than current support expresses initial interest in the model but then backs out upon the "second model run": (1) that carrier must leave "the delta" between its current support and model support "behind" to help fund the model, with that RLEC's own support reduced by that amount; and (2) the overall budget for all non-model carriers' support would be accordingly reduced to reflect the reduction in this single RLEC's support. More specifically, the RLEC in question would bear the full immediate consequence (in terms of support loss) of its own decision to explore but ultimately decline the model.

Alternatively, this statement could be read to say that if a RLEC that would receive less under the model than current support expresses initial interest in the model but then back out upon the "second model run": (1) that carrier must still leave "the delta" between its current support and its model support "behind" to help fund the model; but (2) all other non-model RLECs would share

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<sup>27</sup> *Rate-of-Return Reform Order*, at ¶ 69; *see also id.* at n. 141.

in the “pain” by subsidizing that single RLEC’s loss of support in furtherance of funding the model. Under this reading, the RLEC in question would not bear the full consequence of its own decision to explore but then decline the model. Instead, every other non-model RLEC would be compelled to “back the gamble” of that single RLEC and finance the impacts of that carrier’s decisions.

NTCA has already filed a “baseline proposal” that suggests the first interpretation should be considered the correct one,<sup>28</sup> and the association encourages the Commission to confirm that reading promptly so that the implications of the model election process are well-defined in advance. To the extent, however, that the Commission believes the alternative interpretation set forth above to be the intent of that statement in the order, the Commission should reconsider this decision. This alternative interpretation above would create substantial “moral hazard” concerns, tantamount to a blackjack player losing a hand and turning to those who happened to simply be standing around the table watching the game for help in covering his gambling losses. Such a reading also presents the risk of dramatically reducing the non-model budget to the extent that too many RLECs “jump in and out” of the model election process, to the detriment of those consumers served by non-model carriers and creating even greater risk that the “budget control” will undermine the ability to offer such consumers voice or broadband services at reasonably comparable rates. Thus, if the alternative interpretation stated above were the original intent of the statement in the order, NTCA would urge the Commission to reconsider and adopt a different approach to “budget management,” such as either of the options suggested by NTCA in a recent filing or another comparable measure.<sup>29</sup> Either of these options would work within the existing

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<sup>28</sup> *Ex Parte* Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed May 12, 2016).

<sup>29</sup> *See id.* at Attachment (Model Election Procedures).

process and timeframes and neither would create any deterrents to RLECs considering elections of model-based support, but some action or clarification – whether one of these options or some other measure – is necessary to ensure that non-model carriers and their consumers will not be harmed by the decisions of RLECs that choose to “jump in and out” of the model election process.

#### **IV. GREATER CLARITY OR RECONSIDERATION IS NEEDED WITH RESPECT TO CONTINUING VOICE DUTIES AND OTHER OBLIGATIONS IN CENSUS BLOCKS WHERE SUPPORT IS NOT PROVIDED.**

In the *Rate-of-Return Reform Order*, the Commission suggests that a carrier may choose to put forward for future auction census blocks in which it does not anticipate the ability to extend broadband upon reasonable request.<sup>30</sup> The order further indicates that, if another entity is selected to receive support for those census blocks, “the incumbent will not be subject to the reasonable request standard and no longer will receive support for those areas.”<sup>31</sup>

The “reasonable request” standard specifically contemplates that a carrier will make available a certain level of broadband service where the anticipated combination of customer revenues and USF support will enable recovery of the costs required to deploy and maintain service to a given location.<sup>32</sup> The “reasonable request” standard does not relate to the offering of voice service. Thus, when the Commission indicates that “the incumbent will not be subject to the reasonable request standard” in putting certain census blocks up for auction, it is unclear whether the incumbent would *also* be excused from obligations to offer any voice services or serve as an

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<sup>30</sup> *Rate-of-Return Reform Order*, at ¶¶ 29, 33, 174, and 179.

<sup>31</sup> *Id.* at ¶ 180.

<sup>32</sup> *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, 7073 (2014) (“*Seventh Reconsideration Order*”), at ¶¶ 65-66.

eligible telecommunications carrier (“ETC”) or carrier of last resort (“COLR”) with respect to any areas where USF support is no longer provided to a RLEC. To the extent that a RLEC is relieved of the “reasonable request” obligations and all USF support is eliminated for certain census block(s), that is of little comfort, help, or use if the RLEC remains subject to ETC or COLR duties with respect to those areas and/or remains obligated to deliver voice to consumers in those areas. Clarification or reconsideration is thus needed regarding the precise degree of regulatory relief for provision of voice services that a RLEC will receive with respect to any census blocks where USF support is no longer available for whatever reason.

**V. THE COMMISSION SHOULD ENSURE A BETTER UNDERSTANDING OF WHERE AN “UNSUBSIDIZED COMPETITOR” ACTUALLY PURPORTS TO SERVE BEFORE ELIMINATING SUPPORT IN A CENSUS BLOCK.**

In the *Rate-of-Return Reform Order*, the Commission adopted a fairly robust evidentiary process whereby an “unsubsidized competitor” must establish its ability to deliver voice and broadband services in a given census block.<sup>33</sup> This being said, at least one aspect of the process warrants reconsideration – the means by which it will be determined that a would-be competitor in fact can serve 85 percent or more of the locations in a census block.

The Commission determined that a competitor’s certification of whether it holds itself out to at least 85 percent of the locations in a census block would be based upon the most recently available United States Census data regarding the number of housing units in that block.<sup>34</sup> In other words, the “numerator” in the equation is the number of locations the competitor purports to serve in a block, while the “denominator” is the number of housing units identified by the Census Bureau

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<sup>33</sup> *Rate-of-Return Reform Order*, at ¶¶ 122-137.

<sup>34</sup> *Id.* at ¶ 131 and n. 284.

in that block. Although the “denominator” is quite clear – even if it fails to take into account many business locations that are likewise dependent upon the availability of affordable services in high-cost areas – the “numerator” lacks clarity and may lead to needless disputes over the actual extent of coverage in the absence of better definition.

When NTCA and USTelecom suggested ways in which the Commission could structure a process for identifying unsubsidized competition, they were expressly concerned about this ambiguity and the prospect for unnecessary delay and disputes – in particular, they expressed concern as to how the “numerator” would be established and proven by the would-be competitor. For this reason, in a filing made in February 2016, they suggested that if the Commission desired to identify competition on a sub-study area/census block basis, it should require the competitor to “clearly identify the customer locations that it claims constitute 85% or more of the service locations in a census block by providing information sufficient to demonstrate coverage such as street address, geocoded information or a map with detailed geographic coverage.”<sup>35</sup> Although the Commission dismissed requiring geocoded locations from competitors as being overly burdensome,<sup>36</sup> it did not provide very clear direction on what the would-be competitor *should* then provide instead to establish the “numerator” of the 85 percent equation. Instead, the order simply asks “competitors to submit as much information as possible, including neighborhoods served and, for cable companies, boundaries of their franchising agreements.”<sup>37</sup>

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<sup>35</sup> *Ex Parte* Letter from B. Lynn Follansbee, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Feb. 5, 2016), at 2.

<sup>36</sup> *Rate-of-Return Reform Order*, at ¶ 131.

<sup>37</sup> *Id.*

Although NTCA appreciates the spirit behind a call to “submit as much information as possible,” the actual examples provided by the Commission are unlikely to prove effective in addressing the “numerator” concern that NTCA specifically and expressly raised before the order. For example, it will be difficult, if not impossible, to translate “neighborhoods” (imagine “Foggy Bottom” or “Georgetown”) into a specific number of census block-defined locations, and the same may be true of franchise boundaries (unless they happen to correspond to census block boundaries). Moreover, claimed service to a “neighborhood” or “franchise boundary” may not (and likely does not) translate to the actual availability of service to *every* location in that area. It was for this very reason that NTCA was insistent during the final days prior to the order that more specific information on the “numerator” was needed – if the burden of geocoded locations were too great, then at least specific street addresses served or maps with detailed geographic coverage. In the absence of more substantive detailed information to define the “numerator,” the Commission risks engendering substantial disputes and creating uncertainty surrounding competitive coverage determinations.<sup>38</sup> To reach the conclusion that it can certify under penalty of perjury regarding the ability to serve at least 85 percent of a given census block, the competitor presumably must perform some analysis and undertake a mathematical equation to arrive at the “numerator” that would be placed atop the “denominator” of total census housing units. The Commission should therefore reconsider its indications with respect to how a qualifying competitor must demonstrate achievement of 85 percent or greater coverage, and should instead compel the party in the best

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<sup>38</sup> As just one example, to the extent that a competitor were to include business units in its “numerator,” this would yield an inaccurate coverage depiction given the “denominator” includes *only* housing units. Indeed, this could conceivably result in errors whereby a competitor calculates *greater than 100 percent coverage* by placing served housing and business units over total housing units – or, more likely, a competitor might use business units served to achieve 85 percent coverage when in fact its penetration of housing units is much less. Thus, obtaining greater visibility into *how* the competitor determined its coverage and *which* locations are claimed is essential.

possession of such information – the competitor – to come forward with the *specific means and math* by which it determined that it could certify under penalty of perjury that it was capable of achieving such coverage in a given census block.

**VI. THE COMMISSION SHOULD RECONSIDER CERTAIN ASPECTS OF ITS NEW DISAGGREGATION RULES.**

In the *Rate-of-Return Reform Order*, the Commission adopted several options to disaggregate costs for purposes of recalculating support following a finding of unsubsidized competition in particular census blocks. NTCA is grateful that the Commission, consistent with precedent and good policy, recognized that it is often the case that competitors serve more densely populated, lower-cost portions of study areas and afforded RLECs the chance to disaggregate their costs pursuant to several different options. Two aspects of the holdings with respect to disaggregation, however, require further discussion and reconsideration.

First, the order caps USF support after disaggregation at the level of support available in the study area prior to disaggregation.<sup>39</sup> This measure runs the risk of once again unlawfully denying recovery of certain regulated costs altogether,<sup>40</sup> and also adopts an illogical “heads-I-win, tails-you-lose” approach to calculating USF support. In fact, if anything the need for this cap underscores the benefits of study area averaging – for consumers and the system as a whole – that competitive overlap policies threaten to eliminate. Specifically, by looking at costs on a study area-wide basis, the USF system offers the benefits of averaging of costs, with rates charged to locations that are lower cost in effect subsidizing (or reducing the amount of support available to) locations that are higher cost. But having made the policy determination to cast aside study area-

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<sup>39</sup> *Rate-of-Return Reform Order*, at ¶ 139.

<sup>40</sup> *See* Section II, *supra*.

wide views of cost recovery in certain cases where competition is present, the Commission should not attempt to “re-invoke” the benefits of that approach for other reasons. Rather, the Commission should permit recovery of disaggregated costs without super-imposing artificial limits – or, if it maintains such artificial limits, it still needs to address how it will solve for the shortfall in recovery of regulated costs as noted in Section II of this Petition.

Second, the order appears to reserve the right for the Commission to override any disaggregation option selected by a RLEC. The order defends this measure by suggesting the prior disaggregation rule worked the same way – but that prior rule was very different than that adopted in the *Rate-of-Return Reform Order*. Specifically, the prior rule enabled an open-ended capability for carriers to perform their own disaggregation calculations.<sup>41</sup> An opportunity for subsequent examination made sense in that context, since only broad methodologies were prescribed. By contrast, each of the disaggregation options adopted here is a very specific, detailed formula,<sup>42</sup> with no discretion to be had in the calculations. Thus, there is no need or justification to “second-guess” the choice of a specific formula, particularly when the vague standard for such second-guessing is whether a specific formula chosen – each of which was prescribed by the Commission itself – “fulfills the Commission’s intended objectives.”<sup>43</sup> NTCA therefore urges the Commission to confirm that RLECs may choose freely from among the three pre-defined formulas, and that there will be no “second-guessing” or veto of a given RLEC’s choice from among the three specific options carefully defined by the Commission.

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<sup>41</sup> 47 C.F.R. § 54.315 (2011).

<sup>42</sup> *Rate-of-Return Reform Order*, at ¶¶ 138, 140-144.

<sup>43</sup> *Id.* at ¶ 139.

**VII. AS CURRENTLY STRUCTURED, THE OPERATING EXPENSE CAP ADOPTED IN THE ORDER IS INCONSISTENT WITH PRECEDENT AND WILL UNDERMINE PREDICTABILITY IN THE USF PROGRAM.**

In the *Rate-of-Return Reform Order*, the Commission adopted new operating expense limits, based in part upon proposals put forward by rural stakeholders to help ensure the reasonableness of recovery of expenses under fixed USF budgets.<sup>44</sup> Although the final version of the limits adopted by the Commission departs in several respects from the proposals in the record, at least one departure in particular is of material concern and should be reconsidered.

Unlike either the proposals on the record or comparable limits previously imposed on expenses,<sup>45</sup> the operating expense cap adopted does not include an inflationary factor. There was no notice that such a factor would be excluded from the new limit, nor is there any discussion in the order regarding why such a factor was omitted. The practical effect of such an omission, however, is of serious concern that will only increase over time. Specifically, even as reasonable operating expenses would logically be expected to keep pace with inflation, the rigidity of the cap in lacking an inflationary factor will result in an increasing amount of carriers “falling into” the cap in subsequent years through no fault of their own. Moreover, the notion that this issue could be addressed by “re-running” the cap every few years introduces its own concerns – recalculating the formula every few years effectively translates into the creation of a new cap every few years, reintroducing the kind of unpredictability of capping mechanisms that the Commission itself has acknowledged in the past is problematic.<sup>46</sup> To address such concerns and to ensure consistency

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<sup>44</sup> *Ex Parte* Letter from Gerard J. Duffy, Regulatory Counsel, WTA-Advocates for Rural Broadband, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed May 29, 2015), at 2.

<sup>45</sup> See 47 C.F.R. § 54.1308(a)(4).

<sup>46</sup> *Seventh Reconsideration Order*, 29 FCC Rcd at 7098, ¶¶ 131-132.

across capping mechanisms, the Commission should incorporate an inflationary factor within the formula from which the new operating expense limits are derived.<sup>47</sup>

**VIII. THE COMMISSION SHOULD CLARIFY, OR RECONSIDER TO THE EXTENT NECESSARY, ASPECTS OF ITS NEW CAPITAL INVESTMENT LIMIT.**

The Commission should clarify or reconsider, to the extent necessary, the structure of the “streamlined waiver” of the Capital Investment Allowance (“CIA”) adopted in the *Rate-of-Return Reform Order*. As NTCA explained in the record, such a waiver was important “to ensure that certain areas are not ‘cut off’ for purposes of potential broadband advancement by virtue of a rule that does not reflect the realities of serving such areas.”<sup>48</sup> In particular, NTCA recommended that the Commission permit the submission of certified professional engineering documents demonstrating the actual costs of construction, and that such costs then be used in lieu of what the CIA would generate as an investment “budget.” NTCA noted that this waiver process would have no negative effect on USF budgets (because of the budget control), but was important to properly reflect the levels of investment needed over time to serve unique rural areas.<sup>49</sup>

The Commission thankfully provided for a “streamlined waiver” in the order, but its scope and utility may be too narrow. In particular, the waiver described in the order seems focused upon

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<sup>47</sup> On a related note, the Commission should ensure that all limits, including the new operating expense limits and prior limits such as the corporate operations expense cap, include standalone broadband connections in their calculations. To the extent that such connections are not included in the calculations, carriers would be penalized unfairly by the caps and limits as consumers convert from voice access lines to standalone broadband connections.

<sup>48</sup> *Ex Parte* Letter from Michael R. Romano, Senior Vice President-Policy, NTCA, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90 (filed Feb. 18, 2016), at 1.

<sup>49</sup> *Id.* at 2.

the specific situation in which a carrier cannot meet its buildout obligation.<sup>50</sup> But as NTCA’s prior filings highlighted, there will be other instances where a waiver is needed. For example, a RLEC may be unable to obtain financing to perform *any* buildout – whether tied to a specific obligation or otherwise intended to advance broadband – unless it can obtain such a waiver. Or, timing considerations with respect to buildout and hiring of contractors, especially in certain locales where build seasons are shorter, may drive the need for a waiver. The Commission should therefore clarify (or to the extent necessary, reconsider) its statement so that the “streamlined waiver,” whereby an engineer-certified estimate of construction costs will be substituted for the CIA-estimated investment allowance, will be available for circumstances beyond the narrow instance of compliance with defined buildout obligations.

The Commission should also reconsider the manner in which the per-location limit within the CIA applies to construction projects. The rule currently would disqualify *any* support of capital expenses for an entire project where that project’s average per-location capital expenditure exceeds a certain dollar figure, rather than just limiting support by reference to the per-location cap.<sup>51</sup> This will have the perverse effect of causing carriers to “carve off” relatively higher-cost locations that might otherwise logically be included within a build project on a cost-efficient basis, making it even harder to reach those locations in the future. If a RLEC is willing and able to develop a construction plan that delivers broadband to more locations and that RLEC is willing to accept a capped per-location amount of capital expenses to do so, the Commission should encourage such efficient planning rather than sustaining the current rule, which encourages carriers to strand

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<sup>50</sup> *Rate-of-Return Reform Order*, at ns. 235 and 387.

<sup>51</sup> *See* 47 C.F.R. § 54.303(f).

locations that might otherwise logically be included in a construction project in a cost-effective way just to avoid disqualifying the capital expenses for the entire project from support.

**IX. THE COMMISSION SHOULD GRANDFATHER STANDALONE BROADBAND CONNECTIONS IN PLACE AS OF SEPTEMBER 30, 2011 FROM IMPUTATION OF ACCESS RECOVERY CHARGES.**

To avoid upsetting “the careful balancing of burdens as between end-user [Access Recovery Charges (“ARCs”)] and universal service support, *i.e.*, [Connect America Fund-Intercarrier Compensation (“CAF-ICC”) support],” the Commission determined that ARCs should be imputed on standalone broadband connections.<sup>52</sup> NTCA understands this rationale and does not oppose this requirement, but seeks reconsideration in one discrete respect: those standalone broadband connections that were in place when the CAF-ICC baseline for eligible recovery was first established should not be subject to ARC imputation. A standalone broadband connection in place as of September 30, 2011 was never included within the CAF-ICC baseline and thus was not part of the “careful balancing” that went into establishing the mechanism. NTCA understands why an ARC imputation may be necessary with respect to lines that were (or still are) voice or voice/data lines and subsequently become standalone broadband connections, but there is no need or basis to apply the ARC imputation to connections that were never part of the “careful balancing” to start. The Commission should reconsider the requirement to impute ARCs to the extent that a carrier can show that it had a certain number of standalone broadband connections in place as of September 30, 2011 – the relevant date for purposes of establishing the CAF-ICC baseline.

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<sup>52</sup> *Rate-of-Return Reform Order*, at ¶ 203.

**X. THE COMMISSION SHOULD CLARIFY THAT NOTHING IN ITS ORDER PERMITS THIRD PARTIES – INCLUDING STATES OR TRIBES – TO ACCESS CONFIDENTIAL INFORMATION FILED ON OR WITH FORM 481.**

The Commission took several steps in the *Rate-of-Return Reform Order* to “improv[e] access to high-cost program data,” including the electronic publication of non-confidential data in an open, standardized format; the order further directs the Bureau to work “to put appropriate protections into place for ETCs to seek confidential treatment of [a] limited subset of the information.” Finally, the Commission indicates that states and Tribal governments may continue to access confidentially filed information to the extent they already have rights regarding such access today.<sup>53</sup> The Commission should clarify, however, that nothing in the order *expands* the rights of third-party access, including by states and Tribal governments, to confidential data where they do not already have jurisdiction to obtain such information and sufficient procedures in place to protect the confidentiality of information where they *do* possess jurisdiction. Certain information, including financial data and plans for operations in areas beyond the jurisdiction of the state or Tribe, should not be publicly available for the same reasons it is qualified for confidential treatment in Commission filings, and the Commission should make clear that, while the order was intended to expand online access to public information, nothing in the order expands or varies any party’s existing rights with respect to access to confidential information.

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<sup>53</sup> *Id.* at ¶¶ 221-222.

**XI. THE ORDER’S DISPENSATION OF THE RECORD SURROUNDING THE ACCURACY OF THE COST MODEL DOES NOT REPRESENT THE KIND OF THOROUGH ANALYSIS NEEDED TO VET THE MODEL FOR ANYTHING OTHER THAN VOLUNTARY ELECTION.**

The Commission devotes several paragraphs to responding to technical concerns raised by NTCA and other parties regarding the development of a cost model for USF distribution.<sup>54</sup> Although NTCA supported and continues to support voluntary adoption of a model by those interested in such election (which was the only proposal in the record), the Commission’s responses to the technical points raised by these stakeholders do not represent a full and thorough consideration of the specific concerns raised regarding accuracy and transparency of the model. Even if the Commission deems the model adequate in current form for those interested in electing such support, the model should not and cannot be considered transparent or accurate enough for anything other than voluntary elections and an opportunity to advance voice- and broadband-capable networks in unserved areas by those that find such support more effective for them than pre-existing mechanisms.

**XII. 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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<sup>54</sup> *Id.* at ¶¶ 58-59.