Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.

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SUMMARY

While there is indeed need for action on universal service high cost support, the Joint Board *Notice* fails to step back and address ***all*** of the causes of high cost fund growth; not merely competitive ETC entry. The *Notice* misfocuses on those telecommunications providers that account for the smallest percent of the growth in USF demand for support, and who receive only about four percent in total USF support – competitive eligible telecommunications carriers ("ETCs"). As a result, any reform will misdiagnose the malady and fail to achieve stability while also undermining the potential for sustainable competition in rural markets.

Any USF review must consider how to expand the base of contributors. Currently, this base is far too small for the increasing demands that rural ILECs primarily are making on the USF in general and the high cost fund in particular. Bringing broadband service providers into the pool of contributors would go a long way to address current USF funding problems. The *Notice* is equally incomplete without an examination of economic efficiencies of USF assessments on telecommunications carriers. Continued failure by the Joint Board and the Commission to consider the economic effect of uniform assessments on each individual telecommunications industry segment, with its own elasticity of demand for services, will lead to judgments without any fundamental economic basis.

The issues here are far broader than the effect of competitive entry into rural markets. The Joint Board must focus its inquiry on the drain rural ILECs are placing on the fund, including their use of USF funding to rebuild rural circuit switched networks to provide advanced services. The Commission's permissive approach is accelerating the growth in the high cost fund which indirectly discourages competitive entry. By extension, customers in rural

and high cost areas are deprived continually of meaningful competition. Universal service cannot be the justification for keeping efficient facilities-based competitors from entering rural markets and competing with rural ILECs for rural customers.

Legally, there is no justification for the continued "protection" of rural ILECs through the USF. ***As both the Commission and the courts have recognized, the rural ILECs do not have any legal right to continue to collect embedded network costs through the universal service assessments that are imposed on other carriers.*** A failure to reexamine the "embedded cost" USF regime would be contrary to the Commission's commitment to ensure that universal service subsidies are explicit and *portable*, as well as the Commission's efforts to encourage competitive entry in all markets. Rural incumbent carriers, like all other providers, should be required to adapt to the Commission's long term solution for USF – one that is based on forward-looking costs and that is competitively neutral among alternative ETCs.

In crafting universal service policies, the Commission must strike a fair and reasonable balance among the goals and principles of the Act, and consider both the adequacy of support and the burden on contributors. Fundamentally, the Joint Board must recommend the steps necessary to reform the rural and high cost support mechanism without deterring the real potential in many rural areas for competition and consumer choice. One way to do so is to shift the Joint Board's analysis towards how to constrain costs without limiting valuable service options. Based on the numbers, the Joint Board has its greatest opportunity for savings without compromising service by starting with rural ILEC USF reform. This approach would address excessive funding concerns and further the overarching goal of the Telecommunications Act, *i.e.*, to encourage competition in ***all*** markets.

TABLE OF CONTENTS

Page

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	)	
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Nextel Communications, Inc. and Nextel Partners, Inc. (collectively "Nextel"), by their attorneys, hereby jointly respond to the Public Notice released by the Federal-State Joint Board on Universal Service ("Joint Board") that seeks comment on certain Federal Communications Commission's ("Commission") rules relating to high cost universal service support and the designation process for eligible telecommunications carriers ("ETCs").[1]

I. INTRODUCTION

Last fall the Commission requested the Joint Board to review certain universal service fund ("USF") high cost rules "to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled."[2] In particular, the Commission directed review

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[1] *See* Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High cost Universal Service Support and the ETC Designation Process, *Public Notice*, CC Docket No. 96-45, FCC 03J-1 (rel. Feb. 7, 2003) ("*Notice*").

[2] Federal-State Joint Board on Universal Service, *Order*, 17 FCC Rcd 22642, ¶ 1 (2002) ("*Referral Order*").

of the rules relating to support in study areas where there is competition, and USF support for second lines.[3]

Nextel Communications, Inc. and Nextel Partners, Inc. are Commercial Mobile Radio Service ("CMRS") providers offering mobile wireless service in 197 of the top 200 U.S. metropolitan areas. Each pays a significant and increasing mandatory contribution to the federal USF pool. Because of this, and the continuing expansion of Nextel service territories to markets that include rural and high cost areas, each company has a keen interest in seeing that the rules and policies governing support for the rural and high cost fund, as well as for ETC eligibility, are equitable as applied to all telecommunications carriers and promote competition and economically efficient investment. It also is critical to USF sustainability that any reexamination of rural and high cost support mechanisms include a focus on even-handed measures to curb USF growth by identifying areas where funding is unnecessary or excessive.

As the Commission identified in its *Referral Order*, much of the recent growth in the high cost fund can be attributed to the establishment of new USF cost pools that resulted from the Commission's adoption of the CALLS and MAG access charge reform compromise plans.[4]

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[3] *Id*.

[4] The "CALLS plan" refers to the integrated access charge reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service, as revised by the CALLS Order. In May 2000, the Commission adopted the CALLS Order, which represents an integrated interstate access charge reform and universal service proposal for price cap LECs. *See* Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962 (2000). The "MAG Plan" refers to a corresponding proposal put forth by the Multi-Association Group for rate-of-return carriers. The Commission modified its rules pursuant to the MAG Plan to

There is also little doubt that the framework for rural and high cost funding recommended by the Rural Task Force, particularly as amended by the Commission, failed to place any effective caps on High Cost Fund growth.[5] The Rural Task Force framework, with its "no-barriers" policy, has allowed rural ILECs to entirely rebuild existing networks to provide advanced services. These rebuilds are financed by telecommunications carriers, such as CMRS providers, that compete intensively with one another on a nationwide basis. While incumbent local exchange carriers ("ILECs") currently contribute to USF, they do so on a limited basis, and many other entities that benefit either from the availability of, or an actual connection to the public switched telephone network, do not contribute to USF at all, due to exemptions the Commission created in 1997.[6] Each decision by the Commission to set a contribution factor, to add new pools to the fund, to exempt broadband revenues from mandatory contribution to USF, or to reset parameters on the ability to draw-out USF funding is a factor in the continuing growth of funding demand.

(..continued)
reform the interstate access charge and universal service support system for ILECs subject to rate-of-return regulation. Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *et al.*, *Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166*, 16 FCC Rcd 19613 (2001).

[5] As the Commission and Joint Board each note, all ILEC lines, whether primary or second lines, are funded. And, as discussed herein, the Commission did not freeze available funding upon the entry of new ETCs into existing rural high cost markets.

[6] For example, the Commission does not impose USF assessments on broadband service providers. As the Commission's own staff estimated, if cable modem, dedicated Internet access lines (aDSL) and IP toll telephone service were assessed, the total USF contribution base would increase by 16% from $76.7 billion to $88.7 billion by 2007. As a result, the projected USF contribution factor would be 9.7 percent versus 11.4 percent. *See* Wireline Competition Bureau Staff Study of Alternative Contribution Methodologies.

Notwithstanding these interrelated and complex challenges, the Joint Board's *Notice* centers on a fairly narrow aspect of the overall high cost funding picture: how to "reign in" excesses that the present program created, but with a particular focus only on the "problems" with competitive ETCs. Critically, the Joint Board discussion does not identify or quantify the sources of high cost fund demand expansion. If the Joint Board had done this analysis, it would have been apparent that the Joint Board was focusing its inquiry far too narrowly.

The *Notice* is ILEC-centric in its approach, particularly in its discussion of ways to curb funding to "competitive" ETCs without any demonstration that curbing funding of competitive ETCs will effectively address the fund's problems. This is only a very small part of the reason USF costs are rising. Fundamentally, if rural ILEC embedded cost and network rebuild issues are not examined and addressed, any reforms that may be adopted will fail to achieve much in the way of USF program cost containment. ***Rather than recommending policies that discourage competitive entry into rural and high cost areas – at best only a temporary "fix" to the long-term stability of the fund – the Joint Board should focus its efforts on understanding all of the factors that are contributing to overall fund growth and how, in the long-term, this growth can be contained while not compromising the delivery of affordable service or artificially constraining the potential for competition.***

II. THE JOINT BOARD SHOULD IDENTIFY AND EXAMINE ALL CAUSES OF HIGH COST FUND GROWTH.

The *Notice* gives no indication that the Joint Board intends to address the real issue of how to curb the actual current drains on the fund. The root causes of high cost fund growth must be identified and analyzed to reduce the rate of growth in the USF high cost fund.

A. The Growing Size of the USF Funding Requirement Must be Addressed in its Totality.

Late last year the Commission referred several issues to the Joint Board for consideration.[7] In its *Referral Order*, the Commission recognized that that "there have been many changes to the telecommunications marketplace since the Commission's rules were first adopted in 1997, and that competitive ETCs are increasingly qualifying for high cost universal service support."[8] It also noted the five-year plan recommended by the Rural Task Force and implemented by the Commission to promote investment by both incumbents and competitive carriers in rural areas was nearly two years old.[9] In light of this, the Commission asked the Joint Board to review the rules relating to high cost universal service support in study areas in

[7] *See generally the Referral Order.*

[8] *Id*. at ¶ 4.

[9] The Rural Task Force was constituted by the Joint Board in 1998 and was assigned the task of developing a forward-looking high cost universal service support mechanism for rural carriers. After over two years of deliberations, the Rural Task Force submitted recommendations to the Joint Board. *See* Letter from William R. Gillis, Chair, Rural Task Force, to Magalie Roman Salas, Federal Communications Commission, dated September 29, 2000 ("*Rural Task Force Recommendation*"). The Joint Board then submitted its recommendations to the Commission, and in May 2001, after considering these recommendations, the Commission modified its rules for the receipt of high cost loop support by ETCs in rural carrier study areas for a period of five years. *See* Federal-State Joint Board on Universal Service, and Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, 16 FCC Rcd 11244 (2001) ("*Rural Task Force Order"*), *recon. pending*; *see also* Federal-State Joint Board on Universal Service, *Recommended Decision*, 16 FCC Rcd at 6153 (2000). The Commission's action was essentially based on the initial proposals of the Rural Task Force.

which a competitive ETC is providing services, and the rules regarding support for second lines. The Commission also asked the Joint Board to examine the process for designating ETCs.

Any logical and well-reasoned review of the rules relating to high cost universal service support must look at more than just the state of competitive ETC entry to determine the cause of inflation in the high cost fund and to recommend changes that effectively address the stated concern. Nextel is on record as having grave concerns about the increasing funding demand USF places on competitive carriers operating in intensely competitive markets.[10] Like other costly regulatory mandates, the USF assessment skews customer decisions to use or cancel services such as CMRS services. As a matter of basic economic efficiency, and enhancement of consumer welfare, the Commission and Joint Board have to be sensitive about continuing USF demand growth because, among other things, USF and other taxes, fees and assessments distort competitive markets.

One of the obvious problems with the current USF program, particularly the high cost fund, is that the base of contributors is too small for the expanding demands that rural ILECs are making on the fund. The Commission can tackle this by requiring that all providers of telecommunications, including broadband service providers, contribute to USF. In addition, as beneficial as USF is to the public as a whole, higher USF assessments on telecommunications carriers offering services with a high elasticity of demand dampens the demand for customer use of these services.

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[10] *See, e.g.*, Comments of Nextel Communications, Inc., and Nextel Partners, Inc., CC Docket No. 96-45, at 2 (filed on April 14, 2003) (noting that "[e]ach Nextel entity, like many other telecommunications providers, shares the concern over the growing demands placed upon the federal universal service fund, particularly demands on the High Cost portion of USF.").

As Nextel has shown, continual increases in USF assessments on all telecommunications providers on the same basis are not equitable or competitively neutral.[11] They create market distortions that ultimately lead to further USF funding problems. In the case of CMRS providers, for example, economic literature confirms that as taxes, fees and assessments on CMRS service rise, consumers respond by demanding less of the service or even canceling service, creating deadweight loss on the economy as a whole. In contrast, similar increases in local telephone rates do not trigger substantially less demand for service. The demand characteristics of each service must be examined, and USF assessments should reflect these characteristics of demand for different telecommunications services. The USF assessment on a particular service should take into account those services that have a higher elasticity of demand in the final consumer market.

The instant *Notice* is deficient in considering these factors. The focus of the *Notice* is on how to deter competitive ETCs from increasing the current demands on the fund. Fundamentally, this focus is irrational because it is not grounded in fact, and it is inconsistent with the overarching goals of the Telecommunications Act to promote local service competition throughout the United States, including in rural and high cost areas.[12] The Joint Board was given a broader charter by the Commission than merely the examination of the competitive ETC

[11] *See, e.g.*, Nextel Reply Comments, CC Docket No. 96-45, *et al*, at 12-13 (filed April 18, 2003). In these replies, Nextel provided the Commission with the results of its analysis concerning the relative elasticity of demand for various telecommunications services. Demand for interexchange and CMRS services are far more elastic (consumers will cut back on usage if the price increases) than is traditional landline local exchange service.

[12] *See* Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. No. 458, 104th Cong., 2d Sess. at 113.

issue – the Joint Board must engage in a reasoned analysis of the root causes of high cost fund growth and make balanced recommendations consonant with Commission principles of competitive neutrality.

B. Excessive USF Fund Growth Is Not Tied to the Growth of Competition in High Cost Areas.

While rural incumbents and their trade associations argue vigorously that wireless competitive ETCs are the source of the tremendous growth in the USF, the facts demonstrate otherwise. From 2000 to 2003, universal service high cost support to the ILECs soared from $2.1 billion to almost $3.2 billion. In 2000, CMRS carriers with ETC status received $2 million in USF high cost support and are expected to receive only $102 million in high-cost support in 2003 – only about 3 percent of the nearly $3 billion to be distributed by the high cost portion of the fund in 2003.[13]

The skewed perspective of the "competitive ETC is the problem" permeates the entire *Notice*. For example, the *Notice* ignores the fact that the drain on the USF is related to apparent rural ILEC decisions to use USF funding to rebuild rural circuit switched networks to provide advanced services. There is a demonstrable uptick in the per line funding a number of rural ILECs are taking out of the fund on a year-to-year basis.[14] The logical conclusion is that some

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[13] These figures are based on the quarterly filings of the Universal Service Administrative Company with the Federal Communications Commission. *See also* Press Release, Cellular Telecommunications and Internet Association, While Wireless USF Rates Rise, ILECs Reap Benefits (Mar. 7, 2003).

[14] A review of rural ILEC filings with the Universal Service Administrative Company illustrates the tremendous increases in high-cost USF funding that several rural ILECs have experienced. The Tularosa Basin Telephone Company in New Mexico, for example, received approximately $148,704 in high-cost support in 1999 and approximately $984,492 in high-cost support in 2003,

rural ILECs are taking the open opportunity to rebuild their networks using USF funds. This is at the very least ironic, as the Joint Board itself recently recommended to the Commission that advanced services not be added to the list of supported services.[15] At the same time, the ILECs would like to see competitive ETCs, and CMRS carriers in particular, continue to foot the bill for their own network build-outs without access to the same subsidies that are allowing rural ILECs to not only fund their build-out, but to add advance broadband capabilities, as well.

The problem with all this is that carriers, such as Nextel, Nextel Partners and other CMRS providers, and, by extension, their customers, pay into the high cost fund that, up until now, has not been disciplined in any meaningful way, to control funding over-dependence by rural ILECs. If anything, the overdependence on federal USF funding among rural ILECs appears to have sharply increased. While on some level it is understandable that if high cost funding is available, rural ILECs will take it, this does not excuse the Joint Board or the Commission, however, from a duty to ensure funding to rural ILECs is truly necessary.[16]

The Joint Board appears to have a different view of the desirability of wireless in providing additional service choices to consumers in high cost areas. Indeed, while the Joint

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an increase of 185%. Elsie Communications, Inc, in Nebraska, received no high-cost USF support in 1999 and almost $400,000 in high-cost USF support in 2003, an increase of over 1000% in just four years.

[15] Federal-State Board on Universal Service, *Recommended Decision*, 18 FCC Rcd 2943, ¶ 11 (2002) ("the Joint Board does not recommend that the Commission expand the definition of supported services to include advanced or high-speed services at this time.").

[16] Indeed, rural ILECs have other ways of defraying capital and operating expenses. One obvious way would be to seek increases in basic service rates that have been artificially depressed for many years.

Board is reopening the portability and growth of fund issues, it is doing so in a way that mislabels and seriously under-represents the causes of the fund growth problem. This disregard of facts is dangerous; it could lead ultimately to policies that deter competitive entry by wireless carriers and further limit consumer choices in rural and high cost areas, despite the fact that in rural and high-cost areas wireless service is often the only competition to the local ILEC monopoly. The interest of more CMRS carriers in becoming ETCs, among other initiatives, shows that more wireless carriers are poised to expand their service areas and enter rural and high cost territories – a positive result and precisely what Congress intended.[17]

While universal service is critical to consumers in rural and high cost areas, it is not obvious that rural ILECs are the only nor necessarily the best parties to provide it. Congress' underlying purpose in the Telecommunications Act of 1996 was to facilitate local competition. The purpose of the 1996 Act is "to provide for a pro-competitive de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening *all* telecommunications markets to competition. . . ."[18]

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[17] *See, e.g.,* Petition of NPCR, Inc., d/b/a. Nextel Partners, for Designation as an Eligible Telecommunications Carrier in the State of West Virginia, filed with the Public Service Commission of West Virginia (April 8, 2003); Petition of NPCR, Inc., d/b/a Nextel Partners, for Designation as an Eligible Telecommunications Carrier in the State of Alabama, filed with the Federal Communications Commission (April 4, 2003); Petition of NPCR, Inc., d/b/a Nextel Partners, for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania, filed with the Federal Communications Commission (April 3, 2003); Petition of NPCR, Inc., d/b/a Nextel Partners, for Designation as an Eligible Telecommunications Carrier in the State of New York, filed with the Federal Communications Commission (April 4, 2003).

[18] Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. No. 458, 104th Cong., 2d Sess. at 113 (emphasis added). *See also* Preamble, Telecommunications Act of 1996,

With this goal in mind, universal service should not be used as an excuse to keep efficient facilities-based competitors from competing with rural ILECs for rural customers. Rather, the focus of this proceeding should be on recommending a ***competitively neutral*** funding methodology for rural and high cost support that creates sufficient discipline on fund growth.[19]

C. The Joint Board Must Address ILEC Arguments of "Entitlement" to Embedded Cost and Other Forms of Cost Recovery Through the High Cost Fund.

Rural ILECs continue to assert that they have a legal right to collect their embedded network costs through the USF. The Commission itself has recognized that no such legal right exists. In May 1997, for instance, the Commission determined that universal service needs should be based on forward-looking economic cost.[20] Acknowledging that "rural carriers generally have higher operating and equipment costs, which are attributable to lower subscriber density, small exchanges, and a lack of economies of scale," typical of non-rural ILECs, the Commission determined *at that time* that additional effort would be needed to develop a forward-looking mechanism appropriate for rural carriers. ***These practical concerns expressed by the***

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Pub. L. No. 104-404, 110 Stat. 56 (1996) (stating that the 1996 Act was designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[19] *Referral Order*, 17 FCC Rcd at ¶ 7 ("We ask the Joint Board to review the methodology for calculating support for ETCs in competitive study areas, taking into consideration the universal service principles outlined in section 254 of the Act and the principle of *competitive neutrality*.") (emphasis added).

[20] *See* Federal-State Board on Universal Service, *First Report and Order*, 12 FCC Rcd 8776, ¶ 203 (1997) ("*Universal Service Order*").

Commission in 1997 do not translate into any legal right on the part of rural ILECs to collect embedded network costs through universal service assessments imposed on other carriers.

The Commission and the Joint Board are committed to transforming the rural high cost program to a forward-looking cost model. To assist in this process, the Joint Board established the Rural Task Force, which in 2000, proposed limited modifications to the current embedded cost system for a five-year period.[21] In May 2001, consistent with the Joint Board's recommendation, the Commission modified its rules for providing high-cost universal service support to rural telephone companies for a period of five years based upon the proposals made by the Rural Task Force. According to the Commission, this five-year modified plan would provide adequate time for the continued development of ***a long-term solution*** for rural carriers based on forward-looking costs.[22]

Critically, the Commission also has rejected rural ILEC arguments that universal service support for rural ILECs must be based on embedded costs to be consistent with Section 254's sufficiency requirement.[23] According to the Commission, the ILECs failed to "proffer[] specific

[21] *See supra* note 9.

[22] *Rural Task Force Order*, 16 FCC Rcd at ¶ 30 ("we will continue to refine our rules as we develop a long-term universal service support mechanism for rural carriers. During the duration of the plan, which we are adopting for the interim, we will continue to consider a forward-looking methodology for rural carriers.").

[23] 47 U.S.C. § 254(e) provides that "[a]fter the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and *sufficient* to achieve the purposes of this section."

evidence supporting their positions."[24] Further, the Commission noted that "[d]etermining whether support is 'sufficient' for purposes of the Act is not a precise exercise: there is a range of funding levels that may be deemed sufficient."[25]

The Fifth Circuit Court of Appeals supports this view, and has observed that the rural ILECs' sufficiency challenge

> fundamentally misses the goal of the Act. The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.[26]

Thus, in crafting universal service policies and programs, the Commission must strike a fair and reasonable balance among the goals and principles of the Act, and consider both the adequacy of support and the burden on contributors.[27]

Despite what the Commission and the courts have said, the rural ILECs continue to position themselves as having the right to recover their embedded costs through the high cost

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[24] *Rural Task Force Order*, 16 FCC Rcd at ¶ 26.

[25] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425-26 (5th Cir. 1999); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000). The Fifth Circuit has provided guidance on this issue. Rejecting challenges by rural telephone companies that, among other things, the continued imposition of the overall cap on high-cost loop support and the corporate operations expenses limitation violated the Act, the court stated that "so long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone company." *Alenco*, 201 F.3d at 619. The court also cautioned that "excessive funding may itself violate the sufficiency requirements of the Act." *Id.*

[26] *Alenco*, 201 F.3d at 620.

[27] *Id*.

fund. They plainly view portability of funding as contrary to that "right" of guaranteed support. No such legal right exists, however, either pursuant to the Act or under the Commission's rules. And, fundamentally, such a legal right could not exist because, as the Fifth Circuit stated, it would be contrary to the Commission's commitment to ensure continually that universal service subsidies are explicit and *portable*, which in turn has the important public policy advantage of continuing to encourage new entrants to compete more vigorously by undermining the advantage ILECs have traditionally enjoyed by virtue of their exclusive access to implicit universal service subsidies and guaranteed recovery of their investments.[28]

III. SUPPORT FOR ETCS IN HIGH COST AREAS MUST BE COMPETITIVELY AND TECHNOLOGICALLY NEUTRAL.

The Joint Board requests comment on the current methodology for calculating support in competitive study areas, and whether modifications should be made. Among other things, the Joint Board seeks comment on the policy goals of portable support.[29] Portability of funding is essential to consumer choice and competitive growth in rural and high cost areas. It cannot be discounted or disregarded to make rural ILECs more comfortable. The Joint Board and the Commission have no choice under the law and must recognize, as the Fifth Circuit Court of Appeals did, ***that universal service is not meant to subsidize particular carriers, but rather to support customers.***

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[28] *Universal Service Order*, 12 FCC Rcd at ¶ 311 ("We conclude that paying support to a competitive eligible telecommunications carrier that wins the customer or adds a new subscriber would aid the entry of competition in rural study areas.").

[29] *Notice* at ¶ 16.

A. The Only Way to Ensure that Competitors Are Able to Serve High Cost Areas is to Ensure that Support is Competitively Neutral.

The ongoing efforts by the Commission as well as the Joint Board to reform the USF high cost program are critically important to all carriers and all users of telecommunications services nationwide. All efforts that might lead to competitively neutral results should be welcomed. Proposals that merely reinforce the entrenched service provider should be seen for what they are – attempts to eliminate the critical competitive neutrality of the program.

One proposal under consideration by the Joint Board, for instance, includes limiting support to a single primary connection to a residence or business.[30] While defining the benefit of universal service to be a single primary connection could have benefits, as applied to rural ILECs, there are many ways that such a limit could be drawn to make it extremely difficult for any carrier other than the incumbent to get universal service support. Indeed, a "primary line" could be defined to eliminate wireless as a possible service alternative altogether. The Joint Board offers no guidance that would indicate that anything but a traditional landline connection is meant by the proposed limitation. Any line limitation has to be extremely sensitive towards its broad potential anti-competitive effects.[31]

Pursuant to the Act, all carriers are required to contribute to the USF on an equitable and nondiscriminatory basis.[32] Once a carrier achieves ETC status, eligibility for such USF support

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[30] *Id.* at ¶ 28.

[31] The NTCA Petition, which is part of the record in the *Notice* demonstrates that rural ILECs would seek to use any primary line limitation as a "winner take all" measure.

[32] 47 U.S.C. § 254(b)(4).

must be accorded the same equitable treatment. Skewing the availability of support to favor incumbents will do nothing but deter wireless entry and innovation in rural and high cost markets. While that appears to be the goal of rural ILECs, it cannot be the focus of the Joint Board in formulating responsible recommendations to the Commission.[33]

B. The Joint Board Has a Number of Possible Options to Consider.

Rather than seek to limit wireless carrier incentives to expand their networks and coverage areas into rural and high cost areas, the Joint Board should recommend reasonable measures to adjust the funding mechanism to maintain high cost fund sustainability. One possible way to do so is to freeze per-line high cost loop support upon competitive entry into a rural carrier study area. As mentioned previously, this approach was recommended by the Rural Task Force, but was ultimately rejected by the Commission, apparently because it would sever the link between rural ILEC embedded costs and their direct recovery through USF and the rural ILECs vigorously opposed it.[34]

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[33] By the same token, the rural ILECs' efforts to add equal access to the list of USF core services would impose a new burden uniquely on wireless providers who would have to offer equal access as a condition of becoming an ETC, and further deter wireless entry in rural markets. *See* Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, CC Docket No. 96-45 (rel. Feb. 25, 2003).

[34] *Rural Task Force Order*, 16 FCC Rcd at ¶ 126 ("the purpose of this [freeze] proposal is to prevent excessive fund growth following competitive entry. Due to the nature of telecommunications as an industry with high fixed costs, an incumbent carrier's loss of subscriber lines to a competitive eligible telecommunications carrier is unlikely to be offset by a corresponding reduction in its total embedded cost of service. If the incumbent's lines decreased while its fixed costs remained roughly the same, its per-line costs would increase. Consequently, the incumbent would be entitled to higher support per line.").

Under a "freeze" mechanism, the Commission could adopt a threshold percentage of lines lost for triggering the freeze. Such a "freeze" or similar limitation of the amount of funding available would allow competitors to enter the market where it made economic sense to do so, *i.e.,* where funding was available. A measure of this kind would undoubtedly encourage competitive build-out in rural and high cost areas, while ensuring the USF high cost program does not grow out of control.

The Commission alternatively could begin to explore moving away from support based on rural ILEC embedded costs towards basing USF support for rural ILECs on forward-looking costs. This is what the Commission stated it would do previously in the Rural Task Force proceeding.[35] And, as explained previously, rural ILECs have no legal entitlement to "earnings" on universal service. The high cost fund is not and cannot become a rural ILEC revenue replacement fund.

These options, among others, must be considered as part of the Joint Board's and ultimately the Commission's overall effort to reform the USF high cost support mechanism. Critically, the Joint Board must recommend the steps necessary to reform the rural and high cost support mechanism without deterring the real potential in many rural areas for competition and consumer choice.

There is no reason at this time to impose a requirement that competitive ETCs prove their costs in order to get support.[36] The Commission has maintained (since its partial adoption of the

[35] *Id.* at ¶ 30.

[36] *See Notice* at ¶ 18.

Rural Task Force recommendation) that rural ILECs and competitive ETCs should continue receiving the same amount of per-line high cost loop support when serving customers in the same study area, based on the embedded costs of the rural incumbent LECs. It is not only administratively the simplest approach, it has the benefit of not discouraging competitive ETCs from entering markets due to a concern about unpredictable or changing support. The focus of the Joint Board and Commission should be to address ways to move rural ILECs away from embedded costs. This would have a far greater effect in addressing excessive funding concerns than would the exercise of divining the "embedded" costs of carriers that are not rate regulated.

IV. CONCLUSION

The Joint Board must take a broader view of the root causes of high cost support inflation. The cause is not the entry of competitive ETCs; it is a range of other Commission actions and inactions that have moved old interstate access "revenue requirements" into the USF pool and old compromises that have allowed rural ILECs to rebuild their networks using funds assessed on other carriers and their customers.

The Joint Board should take this opportunity to recommend that the Commission move away from an embedded cost method of calculating support; reaffirm the critical need for competitive neutrality in formulating USF support policy and begin the process of building consensus for real change.

Respectfully submitted,

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