

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS  
of the  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT  
OF SMALL TELECOMMUNICATIONS COMPANIES**

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## SUMMARY

Some commenters in this proceeding attempt to trivialize the impact that CETCs are having on the size and growth of the High-Cost program. These assertions are meritless in light of the tremendous growth in projected CETC funding and the number of study areas with CETCs from the second quarter to the third quarter 2003. In addition, there is scant evidence that the high-cost support going to CETCs has enhanced universal service or economic competition in rural service areas.

Numerous commenters agree with OPASTCO that support for CETCs in rural service areas should be based on their own costs. There is no connection between the costs incurred by a rural ILEC and the costs incurred by a CETC. Responsible stewardship of limited public funding, as well as consistency with the principle of competitive neutrality, demands that CETCs be required to document their own actual embedded costs, at the same level of detail required of rural ILECs, in order to qualify for high-cost support.

The Joint Board should reject the proposal to freeze portable per-line support amounts in competitive rural study areas. It fails to recognize that in order to encourage infrastructure investment, rural ILECs need support for their networks, which are a necessary precondition for the existence of a line. If rural ILECs were uncertain that they would be able to recover their network costs, they would be reluctant to invest in infrastructure. As a result, consumers in high-cost areas would find themselves without access to services that are reasonably comparable to those offered in urban areas.

The Joint Board should not seek to adopt a FLEC model for rural study areas. The Rural Task Force has already recognized that discrepancies in a model's cost

calculations could potentially leave a rural ILEC with a serious deficiency in “sufficient” support.

Several commenters assert that rural ILECs are “inefficient.” The fact is, rural ILECs are highly efficient, when taking into consideration the level of service quality and reliability that they provide, their lack of scale economies, and the regulatory obligations imposed on them at both the federal and state level. The only inefficiency that is presently occurring is providing CETCs with windfalls of excessive support at ratepayers’ expense.

Along with OPASTCO, several commenters document potential abuse of the rules for identifying the service location of a mobile wireless customer in a service area. Until such time as the FCC is able to implement a support calculation methodology for CETCs based on their own costs, it is critical that USAC report quarterly CETC line count data by ILEC serving area. This is necessary in order for the public to be able to question any line count reporting discrepancies that may be occurring.

The Joint Board should reject both the use of auctions and the lowest-cost provider’s costs as ways to determine support levels for ETCs in rural service areas. These methodologies were overwhelmingly rejected by commenters. They provide all of the wrong incentives for carriers and pose too many risks to the continued provision of ubiquitous, high-quality, affordable service to rural consumers.

The vast majority of commenters oppose limiting support to a single connection to the end user. The few commenters that advocate such a policy ignore the fact that section 254 of the Act calls for services and rates in high-cost areas that are reasonably comparable to those in urban areas, which would not be achieved under a primary line

restriction. Nor do they recognize that section 254 calls for high-cost support to be used for infrastructure investment, which would be threatened if a primary line restriction did not provide sufficient support to recover a carrier's network costs. The Joint Board must not adopt a measure to control the growth of the High-Cost program that would defeat its fundamental objectives.

The Joint Board should recommend the adoption of the public interest principles and standardized criteria set forth in the OPASTCO white paper, *Universal Service: A Congressional Mandate at Risk*. Like OPASTCO, numerous commenters express great concern that state commissions and the FCC are misinterpreting the intent of Congress when performing their public interest analyses for rural service areas.

OPASTCO strongly concurs with those commenters proposing that as a prerequisite to obtaining ETC status in a rural service area, a carrier must be able and willing to adhere to the same service obligations and regulatory standards imposed on the ILEC. ETC designation connotes an ability to serve as the sole provider throughout the designated area. Therefore, state commissions need to be certain that an ETC applicant can provide the same level of service as the ILEC. Otherwise, rural consumers could potentially be left without service that is reasonably comparable to the service offered in urban areas.

A state commission has every right under the law to impose on CMRS ETCs the same service obligations and regulatory standards that are imposed on rural ILEC ETCs. The preemption from state regulation that CMRS providers are afforded under section 332 of the Act cannot be equated with conditions that apply only to carriers that choose of their own volition to seek ETC designation.

The disaggregation of support does not prevent creamskimming when CETCs are designated for portions of a rural ILEC's study area. Disaggregation does not address the fact that there is a complete lack of correlation between what is a relatively high-cost customer for a wireline carrier and what is a high-cost customer for a CMRS provider. Therefore, the Joint Board should recommend that the FCC and states adopt a presumption that it is in the public interest for a CETC to serve the entirety of a rural ILEC's study area, regardless of whether or not a rural ILEC has disaggregated its support.

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**I. INTRODUCTION**

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these reply comments in response to comments filed on the Federal-State Joint Board on Universal Service's (Joint Board) Public Notice, released February 7, 2003.<sup>1</sup> OPASTCO's reply comments are limited to the rules and policies that apply to the areas served by rural telephone companies. OPASTCO takes no position on the rules that apply to non-rural ILEC service territories.

OPASTCO is a national trade association representing approximately 500 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its

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<sup>1</sup> *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*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (rel. Feb. 7, 2003) (Public Notice).

members, which include both commercial companies and cooperatives, together serve over 2.6 million customers. All of OPASTCO's members are rural telephone companies as defined in 47 U.S.C. §153(37). In addition, they are all eligible telecommunications carriers (ETCs) in their service areas.

**II. STATE OF THE MARKETPLACE AND UNIVERSAL SERVICE FUND: THE HIGH-COST SUPPORT GOING TO CETCS IS SKYROCKETING AND THE RECORD DEMONSTRATES THAT THIS SUPPORT IS PROMOTING NEITHER UNIVERSAL SERVICE NOR ECONOMIC COMPETITION**

In an effort to maintain the status quo for the rules and policies regarding competitive eligible telecommunications carrier (CETC) designations and support portability, commenters representing the wireless industry attempt to trivialize the impact that CETCs are having on the size of the High-Cost program.<sup>2</sup> CTIA goes as far as to say that CETCs will likely have a minimal impact on the growth of the program in the near future.<sup>3</sup> The validity of these claims is completely refuted by the tremendous growth in projected CETC funding and the number of study areas with CETCs from the second quarter to the third quarter 2003.

In the second quarter 2003, CETCs were projected to receive approximately \$36.7 million.<sup>4</sup> In the third quarter 2003, CETCs are projected to receive \$62.7 million.<sup>5</sup> This amounts to an increase of 71 percent over a period of *just three months*.

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<sup>2</sup> See, Western Wireless Corporation (Western Wireless), Attachment A, pp. 5-7, Attachment D; Nextel Communications, Inc. and Nextel Partners, Inc. (Nextel), pp. 8-10; United States Cellular Corporation (US Cellular), p. 6; Cellular Telecommunications & Internet Association (CTIA), p. 4; Sprint, pp. 5-7; WorldCom, Inc., D/B/A MCI (MCI), p. 2.

<sup>3</sup> CTIA, p. 4.

<sup>4</sup> Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2003* (Jan. 31, 2003), Appendix HC01.

<sup>5</sup> Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2003* (May 2, 2003), Appendix HC01.

In the third quarter 2002, CETCs received approximately \$14 million in high-cost support.<sup>6</sup> Thus, over the course of one year, from third quarter 2002 to third quarter 2003, projected funding to CETCs has grown 348 percent.

A review of the high-cost support that CETCs are projected to receive in individual states presents numbers that are even more staggering. For instance, nearly one out of every three high-cost support dollars going to Iowa in the third quarter will be received by CETCs.<sup>7</sup> In both North Dakota and South Dakota, approximately 24 percent of high-cost funding will go to CETCs.<sup>8</sup> In Minnesota, it is 21 percent and in Mississippi it is 19 percent.<sup>9</sup>

Also noteworthy is the growth in the number of study areas served by CETCs. In the second quarter 2003, the Universal Service Administrative Company (USAC) accounted for 91 study areas with CETCs.<sup>10</sup> In its third quarter 2003 report, USAC now lists 218 study areas with CETCs<sup>11</sup> – an increase of 140 percent, again in *just three months*.

Perhaps what is most disconcerting about the rapid growth in funding being received by CETCs, and to commercial mobile radio service (CMRS) providers in particular, is that “there is little or no evidence that high-cost support to CETCs has enhanced economic competition or universal service in rural areas.”<sup>12</sup> To start with, high-cost funding has generally been unnecessary to encourage CMRS providers to serve

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<sup>6</sup> Public Notice, para. 10.

<sup>7</sup> Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2003* (May 2, 2003), Appendix HC01.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2003* (Jan. 31, 2003), Appendix HC01.

<sup>11</sup> Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2003* (May 2, 2003), Appendix HC01.

rural markets. Several commenters correctly note that CMRS providers have been successfully serving rural markets for years without any high-cost support.<sup>13</sup> Moreover, because the support CETCs presently receive is not based on their own costs, there is no administratively feasible way of verifying that the support is being used for its intended purposes, such as building out infrastructure or improving service.

CMRS competition in rural areas is robust, with slightly more than three CMRS providers on average in each rural market.<sup>14</sup> As US Cellular acknowledges, competition is not always positive for carrier bottom lines or stock prices and CMRS carriers not infrequently fail in the marketplace.<sup>15</sup> Thus, it is logical that when one CMRS provider in a given service area is designated as an ETC and becomes eligible for high-cost support, the remaining wireless carriers serving the same area will be compelled to seek ETC status in order to stay price competitive and remain in business.<sup>16</sup> Indeed, it appears that more and more national wireless carriers have been requesting ETC designation as a way to subsidize their pricing plans and enhance their appeal to the investment community as opposed to making additional network investments.<sup>17</sup>

High-cost support was never intended to subsidize uneconomic competition or to prop up the stock prices of struggling companies, yet that is precisely what some CMRS providers are using it for today. OPASTCO agrees with NASUCA that “[u]nder current

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<sup>12</sup> National Association of State Utility Consumer Advocates (NASUCA), p. 14.

<sup>13</sup> See, Fred Williamson and Associates, Inc. (FW&A), pp. 3-4; Montana Universal Service Task Force (MUST), p. 24; Montana Telecommunications Association (MTA), p. 3; Alaska Telephone Association (ATA), pp. 6-7; Idaho Telephone Association (ITA), p. 3; Texas Statewide Telephone Cooperative, Inc. (TSTCI), pp. 4, 14.

<sup>14</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Rcd 12985, 13023 (2002) (Seventh CMRS Competition Report).

<sup>15</sup> US Cellular, p. 8.

<sup>16</sup> See, CenturyTel, Inc. (CenturyTel), p. 14; ATA, p. 12; Western Alliance, p. 10; Interstate Telecom Consulting, Inc. (ITCI), p. 5.

<sup>17</sup> See, TSTCI, p. 4.

rules, millions of dollars of public support are provided to CETCs without any assurance that any public benefits are accruing.”<sup>18</sup> This is an irresponsible and wasteful use of limited national resources.

The most recent USAC Fund size projections leave no doubt that unless there is a change in the methodology for calculating CETC support and the process for designating CETCs, the size of the High-Cost program will quickly reach a point that is unsustainable. In turn, this will jeopardize the provision of true universal service to Americans living in rural and high-cost areas, thereby defeating the very purpose of the program. The Joint Board must not permit this to happen.

### **III. METHODOLOGY FOR CALCULATING SUPPORT IN COMPETITIVE STUDY AREAS: THERE IS AMPLE SUPPORT IN THE RECORD FOR CALCULATING SUPPORT FOR CETCS IN RURAL SERVICE AREAS ON THE BASIS OF THEIR OWN EMBEDDED COSTS**

#### **A. The current rules which base a CETC’s support on the rural ILEC’s costs create windfall opportunities and provide no accountability for how the support is being used**

Numerous commenters advocate calculating support for CETCs on the basis of their own costs.<sup>19</sup> Commenters point out that there is absolutely no correlation between the costs incurred by a rural ILEC and the costs incurred by a CETC, particularly a CMRS provider.<sup>20</sup> Even Western Wireless admits that wireless service is often not as costly to deploy as landline service in rural areas.<sup>21</sup>

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<sup>18</sup> NASUCA, p. 12.

<sup>19</sup> See, TSTCI, pp. 5-8; ITA, p. 7; Rural Independent Competitive Alliance (RICA), pp. 20-21; MTA, pp. 6-7; MUST, p. 32; ICORE, Inc. (ICORE), pp. 14-15; CenturyTel, pp. 5, 32-40; Moultrie Independent Telephone Company (Moultrie), pp. 5-6; ACS of Fairbanks, Inc. (ACS-F), p. 7.

<sup>20</sup> See, for example, NASUCA, p. 11 (“There is no necessary connection between the embedded costs of an ILEC and the amount of support required to stimulate new investment by a CETC, especially where the CETC employs a non-wireline technology to provide service.”); RICA, p. 18 (“Per line ‘portability’ leads to particularly invalid support payments when the CETC is a wireless carrier. The result is to equate wireless subscribers with LEC loops...”); The Nebraska Independent Companies (Nebraska Companies),

Section 254(e) of the Telecommunications Act of 1996 (1996 Act, the Act) calls for carrier support to be “sufficient” to achieve the purposes for which it is intended. It does not say that support may be excessive. If a CETC is receiving support that exceeds its own costs, that support is irrefutably excessive and does not comply with section 254(e). It also “...increases universal service funding obligations more than is necessary. And, it results in ‘inefficient’ competition.”<sup>22</sup>

In addition, state and CETC certifications notwithstanding, it is impossible to know with any degree of certainty whether the ILEC cost-based support received by CETCs is being used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” as required by section 254(e).<sup>23</sup> Western Wireless states that as a result of CETC designations “more and more consumers are able to receive the benefits of competition in some of the most rural areas of the United States.”<sup>24</sup> But, how would anyone know whether a CETC’s ability to serve these areas would not have occurred but for federal high-cost funding, when CETCs have no obligation to demonstrate that the funds they receive are used to build out their networks, improve their services, or for any other legitimate use?<sup>25</sup> Moreover, many commenters correctly point out that basing a CETC’s support on the entirely unrelated costs incurred

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p. 7 (“Most of the cost of a wireless network, however, is in the towers and associated radio equipment, and not on the basis of ‘lines’.”). *See also*, ITA, p. 7.

<sup>21</sup> Western Wireless, Attachment B, p. 1; Attachment G, p. 2.

<sup>22</sup> Townes Telecommunications, Inc., Golden West Telecommunications Cooperative, Inc., Penasco Valley Telephone Cooperative, Inc., Santel Communications Cooperative, Inc., and Venture Communications Cooperative (the Companies), p. 2.

<sup>23</sup> *See, for example*, NASUCA, p. 11 (“Providing support for competitors who have not demonstrated any need for support does not enhance the public interest and fails to ensure that public funds are being used for any purpose consistent with 47 U.S.C. 254.”); National Telecommunications Cooperative Association (NTCA), p. 23 (“Currently there is no way to ensure that CETCs receiving support on the basis of the ILECs cost are receiving ‘sufficient’ universal service support, or whether that support is being used for the purposes for which it is intended.”).

<sup>24</sup> Western Wireless, Attachment E, p. 11.

by an ILEC provides the CETC with an unfair competitive advantage that is not at all competitively neutral.<sup>26</sup>

There is nothing inappropriately “regulatory” about requiring a CETC to document its own actual embedded costs, at the same level of detail required of rural ILECs, in order to qualify for funds collected from the nation’s ratepayers.<sup>27</sup> Responsible stewardship of limited public funding, as well as consistency with the Federal Communications Commission’s (FCC, the Commission) principle of competitive neutrality, demands such an approach. “If competitive ETCs do not want to provide and support their costs and be held accountable for the use of publicly provided funds, they would have the option of not seeking support.”<sup>28</sup>

**B. Freezing per-line support in competitive study areas fails to recognize that a rural ILEC’s support reflects its legitimate network costs and that without such support, rural subscribers would no longer have “reasonably comparable” services and rates**

Several commenters recommend freezing or capping portable per-line support amounts in rural service areas where a CETC has begun to provide service.<sup>29</sup> Most of these commenters contend that rural ILECs should not be permitted to receive increased

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<sup>25</sup> See, NASUCA, p. 11 (“...there is no basis to conclude that support for wireless ETCs will actually result in incremental investment in facilities.”).

<sup>26</sup> See, for example, CenturyTel, pp. 38-39 (“...funding of CETCs at the level of the ILEC, without requiring CETCs to justify the receipt of funds, violates the principle of competitive neutrality.”); MUST, p. 31 (“...the current portability rules do not promote competitive neutrality because the wireless ETCs are unfairly advantaged when their support bears no rational relationship to their costs of providing service.”); TSTCI, p. 6 (“Receiving support based upon an ILEC’s costs creates a competitive advantage for CETCs with lower costs.”). See also, the Companies, p. 2; Telecom Consulting Associates (TCA), p.2; GVNW Consulting, Inc. (GVNW), p. 9.

<sup>27</sup> As OPASTCO suggested in its initial comments, the FCC may wish to consider developing an average schedule-like option for CETCs. This would provide CETCs with a choice between submitting their own annual cost study or relying on formulas that would simulate the embedded costs of similarly situated carriers using the same technology.

<sup>28</sup> ITA, p. 8. See also, RICA p. 21 (“Because ETC status is voluntary...carriers which are not willing to demonstrate that support is necessary to achieve the goals of the act, cannot claim any entitlement.”).

<sup>29</sup> See, Sprint, pp. 13-14; General Communications, Inc. (GCI), pp. 41-43; AT&T, pp. 17, 23-24; Nextel, p. 16; Dobson Communications Corporation (Dobson), p. 12; Western Wireless, Attachment J, pp. 7-8; Verizon, pp. 3-4.

per-line support to compensate them for lines that they no longer serve.<sup>30</sup> In addition to perpetuating the error of basing CETCs' support on the unrelated costs of the ILEC, this proposal makes matters worse by highlighting the fundamental problem of any per-line support calculation methodology:

...it ignores the fact that to achieve the Act's objectives, carriers need support for networks, which are a necessary precondition for the existence of a line.<sup>31</sup>

The Joint Board must remember that a rural ILEC's support has always been based on the actual embedded costs of constructing and maintaining its network. Dividing that network-based support amount by the number of ILEC lines has only been done to determine the amount of support a CETC will receive under the current rules. In the Rural Task Force (RTF) Order, the Commission recognized that rural ILECs have high fixed costs and that a loss of subscriber lines to a CETC would unlikely be offset by a corresponding reduction in its total embedded network costs.<sup>32</sup> The Commission correctly found that "freezing support in competitive study areas may have the unintended consequence of discouraging investment in rural infrastructure, contrary to the fundamental goals of the Rural Task Force plan."<sup>33</sup> There has been no change in the way in which rural ILECs incur costs that would justify a reversal of the Commission's determination.

The primary purpose of the High-Cost program is to encourage infrastructure investment in high-cost rural areas. If rural ILECs were uncertain that they would be able

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<sup>30</sup> See, Sprint, p. 14; GCI, pp. 38-41; AT&T, pp. 3, 17-25; Nextel, pp. 13-14; Dobson, p. 11.

<sup>31</sup> RICA, p. 18.

<sup>32</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers*, CC Docket No. 00-256, Report and Order, 16 FCC Rcd 11244, 11294, para. 125 (2001) (RTF Order).

to recover their network costs, they would be reluctant to invest in infrastructure. Moreover, as the Rural Telephone Finance Cooperative (RTFC) points out, “if the capital markets believe rural telcos will not be able to recover their costs ... funds for rural telecommunications will quickly dry up.”<sup>34</sup> As a result, Congressional universal service policy objectives would not be achieved, as consumers in high-cost rural areas would soon find themselves without access to services that are reasonably comparable to those offered in urban areas.

In addition, most rural ILECs are rate-of-return regulated, which permits them to fully recover their interstate-allocated costs of providing service as the carrier of last resort in their service areas.<sup>35</sup> For these carriers, all of the revenues that they receive from high-cost support are a part of their legitimate interstate revenue requirement. Rate-of-return regulation, in concert with high-cost support, has been highly successful in promoting infrastructure investment in rural service areas and ensuring that even the most remotely located consumers receive high-quality, affordable and “reasonably comparable” services and rates.

AT&T and GCI recommend that any revenues a rural ILEC loses as a result of lines lost to a competitor should be recovered through increases in the cap on the subscriber line charge (SLC).<sup>36</sup> This proposal should be promptly rejected as it runs

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<sup>33</sup> RTF Order, 16 FCC Rcd 11296, para. 129.

<sup>34</sup> RTFC, p. 4

<sup>35</sup> See, GVNW, p. 11-12 (“...rate-of-return carriers are entitled, as a matter of law, to a **FULL** recovery of their costs in providing interstate services. One of key components of this cost recovery is the revenue received from federal universal service fund (USF) support.”); Beacon Telecommunications Advisors, Inc. (Beacon), p. 5 (“...for rate of return ILECs, the costs associated with all of the current federal USFs were a part of their legitimate interstate revenue requirements before being moved to these USFs and these costs are still a part of their legitimate interstate revenue requirement today.”); United States Telecom Association (USTA), p. 7, fn. 17 (“If an ETC loses a line but is still expected to maintain the lost line as readily available to provide service because of a carrier of last resort obligation, then USF support must continue to the entire support of the ETC’s network.”)

<sup>36</sup> AT&T, pp. 24-27; GCI, pp. 43-45.

completely counter to two of the most fundamental objectives of universal service policy – affordable and “reasonably comparable” rates for consumers living in rural and high-cost areas. In fact, the very reason the Commission established caps on SLCs is “due to affordability and universal service concerns.”<sup>37</sup> Were rural ILECs forced to raise their SLC rates in order to compensate for lost revenue, those rates may no longer be reasonably comparable to the actual SLC rates assessed on customers of non-rural carriers.<sup>38</sup> It makes no sense to adopt a policy to contain the growth of the High-Cost program in a manner that would adversely affect the end-user rates of the very consumers the program was designed to benefit.

Therefore, in order to encourage rural infrastructure investment and achieve the goals of section 254 of the Act, “[h]igh-cost support should be calculated and distributed to telecommunications carriers on the same basis that telecommunications facilities are constructed and that telecommunications services are provided – namely as networks.”<sup>39</sup> In other words, all ETCs serving rural service areas should receive support based on their own embedded costs of providing service. Furthermore, OPASTCO agrees with TSTCI when they state:

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<sup>37</sup> *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifteenth Report and Order, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, Report and Order, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613, 19635, para. 44 (MAG Plan Second Report and Order).

<sup>38</sup> Because of their lower costs, most price cap carriers are able to assess residential and single-line business SLCs that are below the \$6.50 cap. The FCC acknowledged this when it adopted a \$6.50 residential and single-line business SLC cap for rate-of-return regulated ILECs. It noted that this rate level would “ensure reasonable comparability of SLC rates in urban and rural areas in light of the cost differences between providing common line service in such areas.” *Id.*, para. 45. Were rural ILECs required to raise their SLC rates above \$6.50, it is quite likely that those rates would no longer be reasonably comparable to the actual SLC rates assessed on customers of non-rural ILECs.

<sup>39</sup> Western Alliance, pp. 6-7.

The original intent of freezing high-cost loop support on a per-line basis was to limit excessive growth in the fund because of the introduction of CETCs in rural study areas. If modifications are made to the rules...including: 1.) funding based on each ETC's individual costs; 2.) adopting more stringent standards for defining the "public interest" in the ETC designation process; and 3.) requiring similar regulatory standards and service obligations for ETC designation of all providers, this issue becomes moot.<sup>40</sup>

Indeed, if the modifications proposed by TSTCI (and OPASTCO) were adopted, it would not be necessary to impose any type of artificial cap on the High-Cost program in order to contain its growth. Thus, OPASTCO is in agreement with those commenters who oppose caps or other limitations on high-cost support.<sup>41</sup> Caps are not contemplated by section 254 and violate the statutory principles of sufficiency and predictability.

**C. The adoption of a support calculation methodology for rural service areas based on forward-looking economic costs would threaten the sufficiency of support for many rural ILECs**

A number of CMRS providers suggest that one way to control the size and growth of the High-Cost program is to adopt a support calculation methodology for rural ILEC study areas based on forward-looking economic costs (FLEC).<sup>42</sup> OPASTCO strongly cautions against looking at adoption of a FLEC model for rural study areas as a way to address the problem of a rapidly growing High-Cost program due to CETC designations.

While high-cost support may presently provide a windfall for many wireless ETCs, for rural ILECs it remains genuine cost recovery. Providing rural ILECs with support based on their actual embedded costs has been critical to encouraging infrastructure investment in their service areas and providing rural consumers with

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<sup>40</sup> TSTCI, p. 8.

<sup>41</sup> *See, for example*, USTA, p. 15; MTA, p. 8; BellSouth, p. 9; Washington Utilities and Transportation Commission (WUTC), p. 14.

<sup>42</sup> *See*, Western Wireless, pp. 3-4, Attachments H, I; Rural Cellular Association and the Alliance of Rural CMRS Carriers (RCA-ARC), pp. 6, 8, 15; Smith Bagley, Inc. (SBI), p. 12; Nextel, p. 18; Dobson, p. 12; Sprint, p. 11.

affordable and “reasonably comparable” services and rates. The RTF has already demonstrated that applying the non-rural FLEC model to rural ILECs would produce results that are likely to vary widely from reasonable estimates of forward-looking costs.<sup>43</sup> The RTF recognized that unlike the large, non-rural carriers, rural ILECs do not have the ability to “average out” discrepancies in a model’s cost calculations for individual wire centers, which could potentially leave a carrier with a serious deficiency in “sufficient” support.<sup>44</sup> Furthermore, commenters state that the current embedded cost support calculation methodology for rural ILECs continues to be valid and appropriate.<sup>45</sup>

Therefore, instead of focusing on ways to migrate rural study areas to an unproven FLEC methodology that could threaten the provision of affordable and “reasonably comparable” services and rates, the Joint Board should recommend moving CETCs serving rural service areas to a methodology based on their own embedded costs. An embedded cost methodology for CETCs in rural service areas would help to control the growth of the High-Cost program in a manner that would continue to ensure that the objectives and directives of section 254 are met. It would result in support for CETCs that is “specific” and “sufficient.” It would eliminate the incentives that presently exist for competitive carriers to seek CETC status in order to receive windfalls of support.

And, it would provide greater assurance that support going to CETCs is being used for

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<sup>43</sup> *Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 16 FCC Rcd 6165, 6181 (2000).

<sup>44</sup> *A Review of the FCC’s Non-Rural Universal Service Fund Method and the Synthesis Model for Rural Telephone Companies*, Rural Task Force White Paper 4 (Sept. 2000), pp. 7-8.

<sup>45</sup> See, NTCA, p. 6 (“Today, the conditions under which rural companies operate have not changed significantly enough to necessitate any shift away from the embedded cost approach for determining high-cost universal service support.”); RICA, p. 17 (“The ILEC support computation is valid because it reasonably utilizes each carrier’s cost of service to determine whether an additional allocation of that carrier’s cost to the interstate jurisdiction is necessary to allow it to charge reasonable local service rates.”); TSTCI, p. 10 (“...if the rural ILECs, the current carriers-of-last-resort, are not able to recover their embedded costs, the rural consumer will be the one who ultimately pays the price either through significantly higher local exchange rates, poor quality of service or no service in an area.”).

the provision, maintenance and upgrading of facilities and services for which the support is intended.

**D. Claims that rural ILECs are “inefficient” take no account of the vast differences between rural ILECs and CETCs**

In an effort to avoid having to demonstrate their costs in order to qualify for high-cost support, several commenters assert that paying each ETC on the basis of their own costs would shield rural ILECs from the consequences of their “inefficiency.”<sup>46</sup> If a CETC’s costs are lower than an ILEC’s costs, they argue, it is still good public policy that the CETC receive the ILEC’s per-line support amount because it will force the ILEC to become more efficient. However, no commenter claiming that rural ILECs are inefficient offer one shred of evidence to support that statement. More importantly, these commenters fail to acknowledge that ILECs and CETCs – particularly CMRS providers – are not at all similarly situated.

Higher costs do not necessarily reflect inefficiencies.<sup>47</sup> Rural ILECs are highly efficient, when taking into consideration the level of service quality and reliability that they provide, their lack of scale economies,<sup>48</sup> and the regulatory obligations imposed on them at both the federal and state level.<sup>49</sup>

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<sup>46</sup> See, for example, Sprint, p. 11; CTIA, p. 7; RCA-ARC, p. 13; Western Wireless, Attachment I, p. 16; Dobson, p. 12; GCI, pp. 46-49; AT&T, p. 16.

<sup>47</sup> See, for example, RICA, p. 17 (“The fact that the wireless carrier’s cost is less than the ILECs is not evidence that the ILEC is inefficient, because the two services are not equivalent in many respects.”); NTCA, p. 14 (“Wireless CETCs neither provide the same quality of local service nor interstate access services to consumers. They do not use the same type of facilities to provide the services or incur the same costs for providing the services as rural ILECs. Wireless CETCs do not have high-cost loops and do not provide ubiquitous local service.”); See also, FW&A, p. 10.

<sup>48</sup> See, for example, the Companies, p. 6 (“...a wireless network does not suffer from the same lack of economies of scale and scope as the ILEC...It does not serve the purpose of efficient competition or an efficient universal service fund to pretend that this reality does not exist and instead provide support as though [a wireless carrier’s] service area is limited to the rural, sparsely populated, territories served by the rural telephone companies.”); ICORE, p. 5 (“[Wireless providers] also enjoy economies of scale and scope in switching and other areas that are unknown to small, rural ILECs.”).

For example, rural ILECs are typically required to meet stringent service quality and reliability standards imposed on them by state commissions which are generally not imposed on CMRS providers. It is interesting to note that while RCA-ARC and Western Wireless claim that rural ILECs are inefficient, they also strongly oppose having to meet the same service quality requirements imposed on ILECs as a condition of becoming an ETC.<sup>50</sup> The fact is, while rural ILECs provide ubiquitous, high-quality, reliable service, CMRS providers are still offering what can only be considered a “best effort” service.<sup>51</sup> This is illustrated by the most commonly spoken phrase by mobile wireless customers: “Can you hear me now?”

In addition, rural ILECs have invested in their networks to accommodate increased demand for network capacity caused by longer holding times when customers connect to the Internet. As a result, customers pay nothing extra when they use their landline connection for Internet access.<sup>52</sup>

In stark contrast, Internet access over a mobile wireless connection, if available, is considered a premium service and customers typically pay an extra charge for the service.

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<sup>49</sup> See, for example, TSTCI, p. 6 (“A CETC does not have the same carrier-of-last resort, regulatory and service quality obligations as a rural ILEC, which also results in lower costs of providing service to the same customers for CETCs.”); CenturyTel, pp. 38-39 (“CETCs receive a competitive advantage when they receive identical funding as the ILEC, but are subject to significantly lighter regulatory and service obligations.”); the Companies, p. 3 (“...CETCs are not required to meet the same regulatory requirements as ILECs; they do not serve as carriers of last resort...”).

<sup>50</sup> RCA-ARC, p. 23; Western Wireless, Attachment E, p. 4. In addition, RCA-ARC and SBI assert that wireless CETCs are not receiving a windfall under the current rules. RCA-ARC, p. 9; SBI, p.10. If this is the case, it begs the question why CMRS providers are so adamantly opposed to demonstrating their costs. Moreover, if wireless carriers are not receiving a windfall, how are they any more efficient than rural ILECs?

<sup>51</sup> See, for example, CenturyTel, p. 22 (“Wireless telephones are far more subject to geographic terrain limitations, spotty reception, dropped calls, and overall inferior and inconsistent voice quality compared to wireline telecommunications services.”); RICA, p. 23 (“...wireless carrier subscribers experience significantly higher percentages of blocked and dropped calls, generally offer less bandwidth, less E911 capability and may not offer TRS.”); MUST, p. 24 (“...serious problems with wireless technology are far from being resolved, such as reliability, network redundancy, geographic coverage, customer support, carrier of last resort obligations and emergency services.”).

Mobile wireless data connections are also less reliable than landline connections as the use of the Internet while roaming is dependent on coverage and the roaming carrier's support of circuit-switch data.<sup>53</sup> Furthermore, mobile wireless Internet connections, if one can be made, may range from 9600 baud to 14.4 Kbps.<sup>54</sup>

NASUCA sums up well the disparities that exist between rural ILECs and CMRS providers:

ILECs typically provide high quality, highly reliable service ubiquitously throughout their service territory and are the providers of last resort for that territory...By contrast, wireless carriers are generally unregulated entities that provide highly variable service quality, varying levels of customer service, unilaterally determined billing and collection policies, unilaterally determined rates and have no requirement to provide facilities in specific areas.<sup>55</sup>

Therefore, the only inefficiency that is presently occurring is the inefficiency of providing CETCs with windfalls of excessive support at ratepayers' expense. There needs to be a high level of confidence that the high-cost support received by each ETC is no more than sufficient, and that the support is being used for its intended purposes. This level of confidence does not exist when CETCs are able to receive support based on the entirely unrelated costs of rural ILECs.

**E. Until the FCC is able to implement a support calculation methodology for CETCs based on their own costs, it is critical that USAC report CETC line count data by ILEC serving area**

Along with OPASTCO, other commenters document potential abuse of the rules which use a customer's billing address to identify the service location of a mobile wireless customer in a service area. The Washington Independent Telephone Association

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<sup>52</sup> See, Nebraska Companies, p. 10 ("...many residential users who access the Internet through dial-up connections benefit from flat fee pricing because of long call holding times during the connection.")

<sup>53</sup> See, [www.cingular.com/beyond\\_voice/wi\\_pricing](http://www.cingular.com/beyond_voice/wi_pricing).

(WITA) and USTA document discrepancies in the number of lines being reported by US Cellular in the service area of Toledo Telephone Company in Washington.<sup>56</sup> SBC Communications Inc. (SBC) points out discrepancies in the number of working loops being reported by Western Wireless on the Pine Ridge Reservation in South Dakota.<sup>57</sup> In addition, other commenters express concern that the rules do not accurately identify the location of a mobile wireless customer.<sup>58</sup>

The conundrum of how to determine the location of a mobile customer demonstrates yet again why the current system of per-line portability, based on the incumbent's costs, is so fundamentally flawed. Thus, basing support for each ETC in a rural service area on its own actual embedded network costs would have the added benefit of reducing the incentives for fraud which exist under the current rules.<sup>59</sup> However, until the FCC is able to implement a support calculation methodology for CETCs based on their own costs, USAC should be directed to take measures that will minimize abuse of the current rules.

In its initial comments, OPASTCO provided examples of line count reporting discrepancies involving US Cellular that were found in Appendix HC03 of USAC's Federal Universal Service Support Mechanisms Fund Size Projections for the Second

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<sup>54</sup> See, MUST, p. 24 ("The best data throughput rates for wireless providers in MUST's service areas are around 14 Kbps, far less than our dial-up rates.")

<sup>55</sup> NASUCA, p. 8.

<sup>56</sup> WITA, pp. 9-14; USTA, p. 16-17.

<sup>57</sup> SBC, pp. 10-11.

<sup>58</sup> See, for example, CenturyTel, p. 35 ("...the billing address associated with the phone may bear no relationship to where the phone is actually used."); RICA, p. 19 ("...the subscriber's billing address as a proxy for the subscriber's usage pattern is entirely without factual support and in many cases mostly, or entirely wrong."); Western Alliance, pp. 10- 11 ("...there are concerns that the use of 'billing addresses' to depict the 'location' of wireless customers is resulting in the payment of large amounts of portable support for wireless phones that are allegedly 'located' in rural telephone company study areas (where per-line portable support is high) but that are actually being used primarily in urban and suburban areas (where portable support is low or unavailable).").

<sup>59</sup> See, RICA, pp. 20-21.

Quarter 2003. Appendix HC03 of USAC's second quarter report provided CETC line count data for the disaggregated service areas of rural ILECs in Washington. OPASTCO recommended that USAC be directed to provide quarterly CETC line count data for all ILEC serving areas in order to permit public review of line counts similar to the information provided for Washington. Disappointingly, in USAC's Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2003, even the CETC line count data for the ILEC serving areas in Washington is no longer provided.

USAC is going entirely in the wrong direction with regard to its data reporting. So long as CETCs continue to receive ILEC-based per-line support, it is *critical* that USAC report quarterly CETC line count data *by ILEC serving area*. This is necessary in order for the public, state commissions and the FCC to be able to observe and question any line count reporting discrepancies by CETCs that may be occurring. The potential for abuse of the rules, even when line count data is reported, has already been documented. These "anomalies" could potentially get much worse if line count data by ILEC serving area is not made public. Furthermore, where inconsistencies in the data are found, USAC should be directed to audit the carrier in question. The public should have the utmost confidence that the High-Cost program that they pay for is being used judiciously, for the purposes for which it is intended and is not being abused.

**F. The use of auctions or the lowest-cost provider's costs to determine support levels in rural service areas was overwhelmingly rejected by commenters**

The use of auctions to award high-cost support for a designated service area to a single low-cost bidder was roundly rejected by commenters.<sup>60</sup> In fact, not one commenter supported the idea. Also rejected was the notion of basing support in competitive service areas on the lowest-cost provider's costs.<sup>61</sup> Among the numerous pitfalls of these proposals that were raised by commenters, the most important is the fact that “a lowest-cost provider policy could create a race to the bottom in terms of the kinds of services provided or quality offered to consumers.”<sup>62</sup> Commenters also point out that the vast differences between ILECs and CETCs in terms of service quality, technology and regulatory obligations make cost comparisons unfair and unworkable. As TSTCI explains:

[It] is not sound policy to compare the costs of one provider who has made investments based upon a different set of rules and different technology platforms available, at a different point in time, to the costs of new entrants in the market who may be operating and determining their network investments on a different set of regulatory requirements.<sup>63</sup>

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<sup>60</sup> See, Western Alliance, pp. 20-21; RICA, pp. 23-24; MTA, pp. 7-8; FW&A, pp. 27-29; GVNW, pp. 10-11; MUST, p. 34; ITCI, pp. 12-13; ATA, pp. 18-20; NTCA, pp. 17-19; Nebraska Companies, pp. 16-17; TSTCI, pp. 9-10; Sprint, pp. 11-12; Western Wireless, Attachment J, p. 9.

<sup>61</sup> See, RICA, p. 23; MUST, p. 33; MTA, pp. 7-8; TSTCI, pp. 8-9; ITA, p. 8; NASUCA, p. 12.

<sup>62</sup> MTA, p. 8. See also, RICA, p. 23 (“If support is provided at a level only sufficient to fund the listed services, where the only quality requirements is a 3khz signal, telephone service will, over time, be severely degraded to the lowest common denominator, contrary to the objective of the act to promote ‘quality’ service.”); NTCA, p. 17 (“Support to the lowest bidder is inconsistent with the notion that companies must invest in networks to maintain service and that the evolution of the definition of universal service requires additional and timely investment in new technologies.”); ATA, pp. 18-19 (“...the ETC designee under an auction system is the company that ...will do the least to enhance the network.”).

<sup>63</sup> TSTCI, p. 9. See also, RICA, p. 23 (“Support should not be based on the costs of the lowest cost provider because of the difficulties of determining whether the cost comparison is apples to apples, i.e., whether the other carriers are providing the same grade of service.”); NASUCA, p. 12 (“ILECs continue to serve as the only reliable carrier of last resort. Thus it would not be workable, for example, to limit ILEC support to the level of a lower-cost wireless carrier’s support.”) MUST, p. 33 (“...there are critical distinctions between wireline incumbents and wireless competitors relating to reliability, geographic coverage, traffic capacity, redundancy, and customer support, just to name a few.”).

Only two commenters recommend that some form of low-cost provider calculation methodology be considered. Western Wireless suggests that “negative” auctions could be used to determine the lowest amount of support needed to support universal service in an area and that all ETCs would receive.<sup>64</sup> RCA-ARC asserts that once competitive networks have been constructed, the lowest-cost provider’s costs is the appropriate benchmark for basing support.<sup>65</sup> Not surprisingly, however, both of these commenters are opposed to subjecting CETCs to any of the responsibilities that are imposed on ILECs, such as carrier of last resort obligations and service quality standards.<sup>66</sup> Clearly it would not be competitively neutral to base support on a low-cost provider’s costs and not require all ETCs to meet all of the same regulatory standards and service obligations.

Therefore, for the numerous reasons cited in the record, the Joint Board should reject both the use of auctions and the lowest-cost provider’s costs as ways to determine support levels for ETCs in rural service areas. They provide all of the wrong incentives for carriers and pose too many risks to the continued provision of ubiquitous, high-quality, affordable service to rural consumers.

#### **IV. SCOPE OF SUPPORT: COMMENTERS HAVE OVERWHELMINGLY REJECTED A POLICY THAT LIMITS SUPPORT TO PRIMARY LINES**

The vast majority of commenters, including both wireline and wireless carrier interests, oppose limiting support to a single connection to the end user.<sup>67</sup> Such a policy cannot be reconciled with the objectives of section 254 of the 1996 Act.

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<sup>64</sup> Western Wireless, p. 18, Attachment J, p. 9.

<sup>65</sup> RCA-ARC, p. 13.

<sup>66</sup> RCA-ARC, pp. 18-24; Western Wireless, Attachment J, p. 9.

<sup>67</sup> See, USTA, pp. 5-7; NTCA, pp. 7-8; MUST, p. 36; MTA, pp. 8-9; FW&A, p. 26-28; ATA, pp. 17-18; ITA, pp. 8-9; TSTCI, pp. 11-12; the Companies, pp. 8-9; RICA, p. 25; Nebraska Companies, pp. 22-25;

Commenters explain that rural ILECs build networks that are engineered to serve their entire study area and that “the loss of a line does not translate into a corresponding reduction in the cost of building and maintaining the...network.”<sup>68</sup> Moreover, rural ILECs’ support amounts are based on the total embedded network costs of serving their entire study area.<sup>69</sup> If rural ILECs are uncertain that they will be able to recover their network costs due to a primary line support restriction, the incentive to continue investing in infrastructure will be inhibited.<sup>70</sup> As a result, rural consumers’ access to high-quality services that are reasonably comparable to those offered in urban areas will be jeopardized.

In addition, commenters discuss the fact that limiting support to a single connection would create formidable administrative and enforcement challenges that would be costly and onerous to overcome.<sup>71</sup> Several commenters also note the likelihood

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GVNW, pp. 11-12; ICORE, p. 7; WITA, pp. 6-9; Verizon, p. 7; CTIA, pp. 8-9; SBI, pp. 16-17; RCA-ARC, pp. 27-28; Western Wireless, p. 18, Attachment J, pp. 4-6; WUTC, pp. 15-20.

<sup>68</sup> The Companies, p. 8. *See also*, ATA, p. 17 (“Building-out a telephone network is not accomplished through a series of individual lines to individual customers...most of the costs of placing telephone plant are incurred no matter how many lines are placed.”); Nebraska Companies, p. 22 (“...telecommunications networks are engineered to provide service to a serving area, not to a single subscription or a single customer.”); ITA, p. 9 (“...capital investment decisions of the rural ILECs are made at the network level, not the line level.”); MTA, p. 8 (“...incumbents’ networks have been built on the premise that all customers should be served. Network investment is based on calculating the cost of reaching these customers.”).

<sup>69</sup> *See, for example*, TSTCI, p. 11 (“Support is based upon total network investment, not on the number of connections or type of residence or business services provided.”); NTCA, p. 7 (“High-cost support reflects the legitimate costs of rate-of-return rural carriers serving their entire rural study areas.”)

<sup>70</sup> *See, for example*, NTCA, p. 8 (“Limiting support to anything less than total network facilities will halt future investment to modernize the telecommunications infrastructure in rural America...”); ITA, p. 9 (“Restricting support to a single connection...raises compelling questions concerning the ILEC’s ability to continue to invest in the network, maintain quality service at affordable rates, and fulfill their carrier of last resort obligations.”); ATA, pp. 17-18 (“If there is no guarantee that a carrier will actually capture or maintain a remotely located customer, or that its facilities will be considered the ‘primary’ line, the incentive to undertake the investment is decreased.”). *See also*, TSTCI, p. 11; Verizon, p. 7.

<sup>71</sup> *See, for example*, TSTCI, p. 11 (“...the administrative costs required to make a primary line determination would outweigh the benefits of limiting support.”); Verizon, p. 7 (“...such a limitation would create significant administrative problems not unlike those presented when PICC charges were first implemented.”); USTA, p. 6 (“...ILECs would have to try to determine whether residences have multiple connections (which may be from multiple providers), which would increase their administrative burdens considerably and may not be operationally feasible.”); FW&A, p. 26 (“There is no viable method to identify which line is the primary line that is not subject to dispute and manipulation.”). *See also*, MTA,

that consumers would encounter “slamming” at the local service level, as competing ETCs vie to be designated as a customer’s “primary line” service provider.<sup>72</sup>

Yet another issue raised by commenters is the negative impact that a primary line support limitation would have on the rates for second lines in high-cost areas. In some instances these rates would no longer be affordable, and in most cases, they would no longer be reasonably comparable to the rates available in urban areas, contrary to the universal service principles of section 254(b) of the Act.<sup>73</sup> Thus, “...providing universal service support for only primary lines would create a market abnormality in that urban consumers would have access to as many affordable lines as needed, but rural consumers would have access to only one affordable line.”<sup>74</sup>

In addition, commenters note that second lines are often used for access to information services, such as dial-up Internet access.<sup>75</sup> They also point out the strain a primary line support restriction would place on small businesses operating in high-cost areas and the resulting impact on economic development in rural America.<sup>76</sup>

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p. 9; MUST, p. 36.

<sup>72</sup> See, for example, Nebraska Companies, p. 24 (“Such a system would also invite a new form of rural ‘slamming’, since it would be the number of reported primary lines that would determine the amount of support for which a carrier would qualify.”); RCA-ARC, pp. 27-28 (“Carriers would be placed in the position of fighting over the customer designation and would undoubtedly begin a new round of ‘slamming’, a consumer abuse that must be avoided.”); MTA, p. 9 (“It is conceivable that with such a policy, unscrupulous competitors would be tempted to engage in the kinds of marketing behavior seen today in the slamming and cramming practices that no one likes.”).

<sup>73</sup> See, for example, USTA, p. 6 (“...limiting support to single lines would violate the principles of section 254(b) of the Act by denying business and residential consumers in high-cost areas access to services and rates that are reasonably comparable to those of their urban counterparts.”); TSTCI, p. 11 (A customer in a rural, high-cost area would not have access to telecommunications services and information services comparable to the access available to a customer in an urban area.”); WUTC, p. 15 (“Prices in areas served by rural telephone companies could increase...more than \$100.00 per month in many locations.”). See also, MUST, p. 36.

<sup>74</sup> *Competition and Universal Service*, Rural Task Force White Paper 5 (Sept 2000), p. 24.

<sup>75</sup> See, for example, ITA, p. 9 (“Customers maintain more than one line for a variety of reasons including telecommuting, Internet access and fax. To these customers both lines are important to their everyday lives.”); TSTCI, p. 11 (“...many rural consumers use a second line for dial-up access to the Internet.”).

<sup>76</sup> See, for example, USTA, p. 6 (“This would be especially burdensome for small business in high-cost areas because few businesses can function using only a single telephone line...This will stifle economic

The few commenters that advocate limiting support to primary lines<sup>77</sup> fail to acknowledge all of the universal service principles and directives Congress established in section 254 of the Act. Essentially, these commenters attempt to boil down the objectives of the High-Cost program to affordable access to the public switched network for every household. They conveniently ignore that section 254(b)(3) calls for services and rates in rural and high-cost areas that are *reasonably comparable* to those in urban areas, which would not be achieved under a primary line restriction. Nor do they recognize that section 254(e) calls for high-cost support to be used for infrastructure investment, which would be hindered if support is not sufficient to recover a carrier's network costs.

Understandably, commenters supporting a primary line restriction are concerned with the size and growth of the Universal Service Fund (USF) and seek a way to contain it. However, first and foremost, the Joint Board must ensure that the measures it recommends to sustain the High-Cost program would not inadvertently defeat its fundamental objectives. A policy that limits support to primary lines would have just such a result and should therefore be rejected.

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development in high-cost rural areas.”); ITA, p. 9 (“...the loss of support for multi-line small rural businesses could place those businesses at a competitive disadvantage vis a vis their urban counterparts.”); the Companies, pp. 8-9 (“It also would increase significantly the cost to local businesses, schools, government, health care providers, and other end-user customers with multiple lines, which could have a significant adverse impact on the community...”).

<sup>77</sup> See, GCI, pp. 67-69; AT&T, pp. 3, 8-10; SBC, pp. 12-17; NASUCA, pp. 4-7.

**V. PROCESS FOR DESIGNATING ETCs: THE RECORD SUPPORTS THE ADOPTION OF PUBLIC INTEREST PRINCIPLES AND STANDARDIZED CRITERIA TO GUIDE STATE COMMISSIONS AND THE FCC IN THEIR CONSIDERATION OF ETC APPLICATIONS FOR RURAL SERVICE AREAS**

**A. State commissions and the FCC need guidance in conducting public interest analyses that are consistent with Congressional intent**

Numerous commenters urge the Joint Board to recommend the adoption of standardized public interest principles and/or criteria to guide state commissions and the FCC in their consideration of ETC applications for rural service areas.<sup>78</sup> Like OPASTCO, these parties express great concern that state commissions and the FCC are misinterpreting the intent of Congress when performing their section 214(e)(2) public interest analyses for rural service areas. It is clear from the language of section 214(e)(2) that Congress did not presume that supported competition would always serve the public interest in the areas served by rural telephone companies. Indeed, “[n]either universal service nor healthy competition is necessarily enhanced by an attempt to support multiple networks with public funds.”<sup>79</sup> Nevertheless, the determinations being made by state commissions and the FCC have tended to view competition as a goal unto itself and have equated the introduction of financially supported competition in a rural service area to serving the public interest.<sup>80</sup>

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<sup>78</sup> *See, for example*, NASUCA, pp. 8-11; TSTCI, pp. 12-17; TCA, pp. 3-6; WITA, pp. 14-26; CenturyTel pp. 16-31; USTA, pp. 8-15; ICORE, pp. 10-16; BellSouth, pp. 3-7; Western Alliance, pp. 8-17; United Utilities, pp. 6-8; ITCI, pp. 4-7; MUST, pp. 37-38; ATA, pp. 3-5.

<sup>79</sup> NASUCA, pp. 15-16.

<sup>80</sup> *See, for example*, Western Alliance, p. 9 (“...the FCC and many state commissions have largely disregarded the statutory public interest requirement. Instead, they have routinely rubber-stamped requests for designation of CETCs in rural telephone service areas, often on little more than bare assertions that the designation of multiple CETCs will ‘promote competition’ or ‘increase consumer choices.’”); USTA, p. 3 (“The certification of competitive ETCs by state commissions and the FCC...in areas served by rural telephone companies appears to have become a public interest goal unto itself. In recent state commission and FCC certification decisions the goal of facilitating competition in rural telephone company service areas has eclipsed all other public interest considerations.”); CenturyTel, p. 18 (“...in some states, regulators have allowed their desire to induce competition to eclipse their duty to fully consider the public

The comments of the WUTC illustrate this misguided philosophy: “We have determined that designation of additional ETCs in areas served by rural telephone companies will result in providing the benefits of competition to consumers.”<sup>81</sup> But, as ATA succinctly explains, “these assumptions render the public interest inquiry practically superfluous – a result Congress in promulgating §214(e)(2), clearly did not intend.”<sup>82</sup> Furthermore, NASUCA points out that state commissions may have certain “temptations” when conducting public interest analyses that can only be overcome through the adoption of federal guidelines:

Federal ETC designation guidelines would ensure that all states receive federal support in a consistent manner. Under current rules, states have something of a conflict of interest. That is, there may be a bias toward granting of ETC status because, when new ETCs are created, more federal dollars flow into the state. Conversely, there is a disincentive for states to ensure that the public interest is fulfilled on a national basis because the benefit of additional federal funds may outweigh a state regulators’ concerns about the sustainability of the federal program.<sup>83</sup>

Therefore, the Joint Board should recommend the adoption of the public interest principles and standardized minimum qualifications, requirements and policies set forth in the OPASTCO white paper *Universal Service in Rural America: A Congressional Mandate at Risk*, as OPASTCO and others commenters suggest.<sup>84</sup> Public interest principles would guide state commissions and the FCC in conducting thorough and

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interest as required by the Act, and, in many cases, equated competition alone with the public interest standard.”)

<sup>81</sup> WUTC, p. 21.

<sup>82</sup> ATA, p. 4. *See also*, NASUCA, p. 9 (“It appears that, in finding that CETCs should be designated in rural ILECs’ territories, the Commission and some states have found the mere encouragement of competition sufficient under the law to meet the public interest test. If that were sufficient, Congress would not have needed to establish the public interest test; the Commission and states would simply have been directed to authorize multiple ETCs in all ILECs’ territories, rural or not.”).

<sup>83</sup> NASUCA, pp. 8-9.

<sup>84</sup> *See, for example*, TSTCI, pp. 12-16; WITA, pp. 20-22; TCA, p. 6.

balanced cost/benefit analyses<sup>85</sup> which are essential to making well-reasoned public interest determinations. Furthermore, standardized criteria would assist states in determining whether or not the public interest would be served by a particular carrier's designation as an ETC. It would also improve the long term sustainability of the USF as only the most qualified carriers that are capable of, and committed to, being true providers of universal service would be able to receive and retain the ETC designation.

**B. The record supports requiring CETCs in rural service areas to adhere to the same service obligations and regulatory standards that are imposed on the ILEC**

OPASTCO strongly concurs with those commenters proposing that as a prerequisite to obtaining ETC status in a rural service area, a carrier must be able and willing to adhere to the same service obligations and regulatory standards imposed on the ILEC.<sup>86</sup> This should include the same service quality standards, reporting requirements and customer billing requirements that are imposed on the rural incumbent by the state commission. Equal obligations and standards for all ETCs serving the same area is particularly important because ETC designation connotes an ability to serve as the sole service provider throughout the designated area. This is made clear in section 214(e)(4)

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<sup>85</sup> See, BellSouth, p. 5 (“When evaluating whether the public interest is served, the Commission and the states must consider the costs and benefits associated with designating multiple ETCs in a given area. These agencies must determine whether supporting multiple ETCs truly benefits consumers.”); NTCA, p. 22 (“The public interest requires a balancing test that weighs the benefits and burdens of introducing multiple ETCs in rural, high-cost and sparsely populated areas...Artificially induced competition in rural areas serves to undermine the already weak business case for the deployment of new, costly services by rural telephone companies.”); NASUCA, p. 15 (“Public support should not be available to foster a type of competition that could harm universal service...”).

<sup>86</sup> See, for example, NASUCA, pp. 9-10 (“...ETC designation and the concomitant acceptance of public support should require CETCs to meet certain obligations that approach those required of ILEC ETCs.”); BellSouth, p. 6 (“Another eligibility requirement should be a demonstration that the carrier seeking ETC status can and will provide to all customers in a designated service area service that is comparable to that provided by the carrier of last resort, typically the incumbent.”); ATA, p. 9 (“...the public interest inquiry must involve an affirmative showing by the ETC petitioner...that it will, throughout the study area, satisfy the same service quality standards to which the incumbent LEC is subject.”). See also, Western Alliance, p. 15; USTA, p. 14; CenturyTel, pp. 21-22; ITCI, pp. 8-9 .

of the Act which requires state commissions to allow any carrier – including the ILEC – to relinquish its ETC designation in any area served by more than one ETC. Therefore, it is reasonable to presume that Congress expected that all ETCs would be capable of meeting the same service obligations and regulatory standards as the ILEC, since any ETC could potentially be the only ETC serving an area.

It comes as no surprise that wireless carriers have opposed the imposition of any additional requirements by state commissions as a condition of becoming an ETC.<sup>87</sup> CMRS providers want to obtain ETC status in order to be eligible for high-cost funding, but they have no interest in taking on the responsibilities that ETC designation is supposed to entail. A CMRS provider that has been designated as an ETC can no longer expect to be treated as if it is merely a complementary service to the ILEC’s services and only competing with the other wireless carriers serving the area.<sup>88</sup> Once designated as an ETC, a CMRS provider is holding itself out as a substitute for the ILEC. State commissions therefore need to be certain that an ETC applicant can provide the same level of service as the ILEC. Otherwise, rural consumers could potentially be left without service that is reasonably comparable to the service offered in urban areas.

RCA-ARC states that “[a]ll carriers within the same class should be subject to the same rules.”<sup>89</sup> OPASTCO agrees and contends that all ETCs are in the same class,

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<sup>87</sup> See, Western Wireless, Attachment E, p. 4; RCA-ARC, p. 23; SBI, p. 18.

<sup>88</sup> RCA-ARC suggests that the imposition of additional standards and obligations on CMRS ETCs may place them at a competitive disadvantage vis a vis their wireless competitors. RCA-ARC, p. 20. This is an audacious suggestion. In fact, the Joint Board should consider just the opposite. If the standards and obligations imposed on the ILEC are not also imposed on CMRS ETCs, does that not give the CMRS providers that are receiving federal funding a substantial unfair advantage over their wireless competitors who do not have ETC status? This is what is occurring today, and is one of the reasons why once one CMRS provider gains ETC status, the other wireless carriers serving the same area are compelled to seek the ETC designation as well. RCA-ARC’s statement just goes to highlight the fact that most CMRS providers that seek ETC status view it as a way to maximize their profits at the public’s expense without having to take on any additional responsibilities.

<sup>89</sup> RCA-ARC, p. 23.

regardless of their technology platform or whether they are an incumbent or competitor. If CMRS providers or other competitive carriers are not able or willing to meet the same standards and obligations as the ILEC, they should not seek or be granted ETC status. As ATA states:

Those who seek public money to provide service in high-cost areas are accountable to those individuals (*i.e.* the consumers) who fund the enterprise. Pursuing ETC designation is a choice, not a requirement. With ETC designation comes the responsibility to provide rural consumers with a baseline level of service.<sup>90</sup>

Western Wireless attempts to argue that state commissions may not impose additional requirements on CMRS providers as a condition of becoming an ETC, since they are federally regulated.<sup>91</sup> However, the preemption from state regulation that CMRS providers are afforded under section 332 of the Act cannot be equated with conditions that apply only to carriers that choose of their own volition to seek ETC designation and universal service support.<sup>92</sup> In 2002, the Utah Supreme Court made such a distinction when it ruled that pricing conditions established for the receipt of state universal service support do not equate to rate regulation in violation of section 332 of the Act. In support of its decision, the Court noted that:

An ETC becomes subject to the rate regulation requirement only after it chooses to seek [universal service] funding. Because Utah [rate regulation] becomes applicable only after discrete, voluntary

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<sup>90</sup> ATA, p. 11.

<sup>91</sup> Western Wireless, Attachment E, p. 4.

<sup>92</sup> *See*, Nebraska Companies, p. 30 (“...section 332 does not impose limitations on State commissions with respect to regulation of wireless carriers when ETC status is an elected condition by such carriers. A State commission is free to exercise any applicable rule as a condition for ETC status determination as long [as] those regulations are not inconsistent with the Commission rules to preserve and advance universal service.”); Western Alliance, p. 15 (“...when a wireless carrier voluntarily seeks ETC status in order to obtain portable high-cost support dollars, it subjects itself to the ETC jurisdiction of the state commission. This plainly includes service, service area, and service quality regulation; and also encompasses rate regulation if the FCC and state commissions impose affordable rate requirements upon all ETCs.”). *See also*, ITCI, p. 8.

circumstances, the element of restriction or control is absent. It is therefore not rate regulation.<sup>93</sup>

A state commission has every right under the law to impose on CMRS ETCs the same service quality standards, reporting requirements, customer billing requirements and any other service obligations and regulatory standards that it imposes on rural ILEC ETCs. In addition to serving the public interest, evenly applied standards and obligations is competitively neutral and promotes a more level playing field among all ETCs.

**C. Disaggregation of support does not prevent creamskimming and does not justify the designation of CETCs for portions of a rural ILEC's study area**

Finally, RCA-ARC argues that as long as a rural ILEC is required to disaggregate its support when a CETC is designated, it should not matter if the CETC is designated for a service area that does not encompass the rural ILEC's entire study area.<sup>94</sup> This is simply not the case. As NTCA correctly explains, "[d]isaggregation plans increase the likelihood that the incumbent's support is targeted to reflect the incumbent's cost. The plans do not remove the inherent problems that are created by basing support on the ILEC's cost in the first place."<sup>95</sup> In fact, one of the main reasons why so few rural ILECs chose to disaggregate their support is due to the complete lack of correlation between what is a relatively high-cost customer for a wireline carrier and what is a high-cost customer for a CMRS provider. This is yet another reason why support for CETCs in rural service areas should be based on their own actual costs.

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<sup>93</sup> *WWC Holdings Co. Inc. v. Public Service Commission of Utah, et. al.*, Case No. 20000835, 2002 UT 23 (filed March 5, 2002).

<sup>94</sup> RCA-ARC, pp. 28-29.

<sup>95</sup> NTCA, p. 26.

Along with OPASTCO, commenters discuss the heightened risk of creamskimming when CETCs are designated for portions of a rural ILEC's study area.<sup>96</sup> The risk of creamskimming exists even where it may not be intentional but is due to the fact that a CMRS provider's licensed service area does not entirely encompass a rural ILEC's study area.<sup>97</sup>

The ability of competitors to creamskim through the adoption of more narrowly defined service areas is antithetical to the objectives of high-cost support and universal service. Congress recognized this when it established a presumption that a rural telephone company's entire study area would be the area that a competitor would have to agree to serve before it could become eligible for universal service support.<sup>98</sup> Therefore, regardless of whether or not a rural ILEC has disaggregated its support, "[t]he Joint Board should recommend that the FCC and the states presume that it is in the public interest for a CETC to serve the entirety of the rural ILEC's study area...and critically analyze any requests that deviate from this standard."<sup>99</sup>

## VI. CONCLUSION

The record in this proceeding provides ample support for the Joint Board to recommend to the FCC that it: (1) base support for CETCs in rural service areas on their own actual embedded costs, and (2) adopt the public interest principles and standardized

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<sup>96</sup> See, CenturyTel, p. 27 ("State regulators and the Commission, however, have exacerbated the potential for cherry-picking by routinely redefining the service areas of rural carriers to be smaller than the study area, further lowering the bar for CETC designation and relieving CETCs of the responsibility to extend service to the highest-cost customers of the ILEC's study area."); NTCA, p. 26 ("...CETCs serving partial study areas can still cream skim [thereby escaping] the obligations of ILECs with COLR obligations to serve.").

<sup>97</sup> See, NTCA, p. 26 ("It is entirely possible that the lowest cost portion of a rural study area is the only area the wireless carrier is licensed to serve. This inadvertent or accidental cream skimming by a wireless carrier is no less harmful than intentional cream skimming, and can do substantial damage to the rural telephone company and its remaining customers.")

<sup>98</sup> 47 U.S.C. §214(e)(5).

<sup>99</sup> CenturyTel, p. 26.

criteria enumerated in the OPASTCO white paper, *Universal Service: A Congressional Mandate at Risk*, to guide state commissions and the FCC in their consideration of ETC applications for rural service areas. In so doing, the Joint Board will provide for the sustainability of the High-Cost program in a manner that will continue to achieve the program's objectives -- the encouragement of infrastructure investment in high-cost areas that enables rural consumers to receive high-quality services that are affordable and reasonably comparable to the services and rates offered in urban areas.

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June 3, 2003

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