Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board	)	WC Docket No. 05-337
On Universal Service	)	

COMMENTS OF EMBARQ CORPORATION

TO THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

ON THE

PUBLIC NOTICE REGARDING THE MERITS OF USING AUCTIONS TO DETERMINE HIGH-COST UNIVERSAL SERVICE SUPPORT

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EXECUTIVE SUMMARY

The Joint Board in its Public Notice asks two important questions: What exactly should our universal service goals be and how can we best accomplish our goals. Both questions are fundamental to determining the long-term success of the federal USF program and how it should be structured. The goal, however, must first be understood before it can be addressed. From the Public Notice, it is not clear whether the intended goal is to control the fund size or to advance competitive choice for voice service, or, in fact, to expand the fund to support what are now non-supported services: mobility and broadband. And, there is obvious tension between controlling the fund size and ensuring competitive choice. Only after the intended goal of the Joint Board is better understood will a federal USF program that incorporates reverse auctions warrant consideration.

As changes to the USF program are discussed, the achievements to date must be considered and the continued need for USF support in high cost areas must be emphasized, not discounted. Market forces alone would not have produced America's ubiquitous, high quality telecommunications network. It is only through the ILEC fulfilling its carrier of last resort obligations that truly universal service exists today. Preserving and advancing the network that provides universal service today requires continued investment by the ILEC. Moreover, the ILEC network supports not only its own retail customers but is used by other providers and, under 47 U.S.C. §214(e)(1)(A), serves as the underlying network for other eligible telecommunications carriers (ETCs) that do not choose to invest in their own facilities. In the past, the ILEC has been able

to sustain this uneconomic build due only to the historic system of implicit and explicit federal and state support. The real challenge becomes ensuring that an explicit universal support system is sufficient to support universal service as it replaces the rapidly eroding system of implicit subsidy that helps support the ILEC network today. Any change to the support system to encourage competitive choice or to control the fund size must recognize this unique responsibility of the ILEC.

The growth in the number of Competitive ETCs (C-ETCs) and their USF receipts has put pressure on the fund size. Inefficient fund growth could be controlled by strengthening the ETC requirements and obligations so that C-ETCs truly provide service where it is most needed and at comparable quality and reliability to the ILEC. C-ETCs do not share in the responsibility of carrier of last resort and build only where it makes economic sense to do so, even when they receive universal service dollars. There is no requirement for C-ETCs to build throughout rural or high cost areas in order to qualify for universal service support. Instead, 47 C.F.R. §54.202(a)(1)(A) only requires the applicant to provide service to a customer outside its existing network coverage if service can be provided at a reasonable cost. If not, 47 U.S.C. §214(e)(1)(A) allows the competitor to resell the services of another carrier, most often the ILEC since it is the ILEC that was obligated to place facilities necessary to provide the supported services in those high cost areas.

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To: The Federal-State Joint Board on Universal Service

EMBARQ FEDERAL-STATE JOINT BOARD COMMENTS

Embarq Corporation (Embarq), on behalf of its local operating companies and interexchange and wireless operations, offers the following initial comments in response to the Federal-State Joint Board on Universal Service (Joint Board) Public Notice on the merits of using auctions to determine high-cost universal service support.[1]

I. Introduction

Pursuant to the Reverse Auction Public Notice, the Joint Board seeks comment on the merits of the use of reverse auctions, or competitive bidding, to determine high cost universal service funding provided to eligible telecommunications carriers (ETCs) under 47 U.S.C. §214 and §254. We applaud the Joint Board for its continued efforts to improve the universal service funding

[1] *Federal-State Joint Board on Universal Service Seeks Comment on the Merits of Using Auctions to Determine High-Cost Universal Service Support,* Public Notice, FCC06J-1, WC Docket No. 05-337 (August 11, 2006) (*Reverse Auction Public Notice*)

mechanism and to solicit thoughtful discussion of ideas that may result in changes to the fund that better serve the goals of the Communications Act of 1934, as amended (the Act). The Universal Service Fund (USF) is vitally important to the integrity of our nation's communications network today and becomes even more so tomorrow as an essential program for ensuring that customers in all regions of the nation, including rural and high cost areas, have access to telecommunications services that are reasonably comparable to the services provided in urban areas and at reasonably comparable rates. Consequently, it is crucial that changes to the fund, particularly changes that could alter how funding is distributed, be implemented based upon careful consideration and a thorough understanding of the goals and consequences, deliberate and unintended, of these actions.

To that end, the Reverse Auction Public Notice seems to be asking two important questions at once: "What exactly should our universal service goals be?" and "How can we best accomplish our universal service goals?" Both questions are fundamental to determining the long-term success of the fund and how it should be structured, but unfortunately, the questions cannot be answered simultaneously; they must be answered sequentially.

The Reverse Auction Public Notice and the attached "Discussion Proposal" contain references to minimizing the burden on consumers, but they also contain references to expanding competitive choices for consumers' voice service, as well as expanding the list of supported services to include broadband and

mobility—services that go beyond the scope of existing supported services.[2] The Commission must determine if its primary goal is to expand universal service beyond its current services, or, if its primary goal is to control the fund size, or, alternatively, if its primary goal is to promote competitive choice for voice service. Once the goal has been determined, only then will it be possible to determine whether reverse auctions are a feasible mechanism for achieving that goal or whether there could be other, equally (or more) effective approaches. Whatever goal is set or changes made, the solution must implement Section 254 of the Act, including the principles set forth therein requiring specific, predictable and sufficient universal service funding to preserve and advance universal service.[3]

II. What Do We Have Now?

In order to better understand the future direction and goals of universal service, it is worthwhile to consider what has been accomplished to date and, more importantly, how that has been accomplished. Section 254 of the Act

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[2] The following list of "core" services are supported by universal service: single-party service; voice grade access to the public switched network; Dual Tone Multi-Frequency signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance; and toll limitation services for qualifying low-income customers. *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8809, para. 61 (1997) (*First Report and Order)* In adopting this list, the Joint Board and Commission considered whether the service is 1) essential to education, public health, or public safety; 2) through the operation of market choices, subscribed to by a substantial majority of residential consumers; 3) being deployed by telecommunications carriers in public telecommunications networks; and 4) consistent with the public interest, convenience, and necessity. 47 U.S.C. §254(c).

[3] 47 U.S.C. §254(b)(5).

codifies the Commission's long-standing commitment to advancing universal service by ensuring the affordability and availability of telecommunications services for all Americans, including those in rural and high cost areas. For the provision of voice service, there is little debate that this goal is being achieved today. The "availability" has been achieved as a direct result of ILECs fulfilling their carrier of last resort (COLR) requirements. "Affordability" is being achieved through a complex system of implicit and explicit subsidies. Both of these are greatly affected by the impacts of competition and technological advances. While the ILEC network was designed and built to provide ubiquitous voice service, the ILEC network also serves as the foundation for the advanced communications services that are vital to the economic, educational and public safety needs of rural America.

A. Universal Service and universal availability has principally been achieved through the ILEC network, consistent with its Carrier of Last Resort obligation.

Market forces, left to their own dynamics, would not have produced the ubiquitous, reliable communications network this country relies on today. It is only through the ILEC fulfilling its carrier of last resort commitments that truly "universal" service exists today. The ILEC network is alone in ubiquitously providing the core services supported by the USF, consistent with COLR obligations. ILEC networks provide safe, reliable, and affordable service to all Americans. And, unlike other competitors, ILECs do not have the luxury of choosing when and where to build. Instead, COLR obligations have required the

ILEC to place facilities throughout its entire service territory, even when the cost of doing so far exceeds the revenue it receives from the customer.

Not coincidentally, it is also through this COLR obligation that high-cost areas have been served in the most economically efficient manner possible. By requiring a provider to serve all customers, including customers in both low-cost and high-cost regions, the cost per customer in the highest-cost regions reflects the economies of scale of the entire area. These same economies would not be available to a carrier serving those same high-cost areas but serving less than the entire market. This fact plays an important role in the practicality of "relieving" an ILEC of its COLR obligations in anything less than its entire serving territory.

Without a COLR obligation, other providers, including wireless providers, build only where it makes economic sense to do so, even when they receive universal service dollars. There is no requirement for them to build throughout rural or high cost areas in order to qualify for universal service support. Instead, the Act allows the competitor to resell the services of another carrier—most often the ILEC since it is the one ubiquitous provider.[4] While ILECs assume the full responsibility of universal coverage and COLR obligations, offering safe, reliable, high-quality service to all customers in its service area, competitive

[4] An Eligible Telecommunications Carrier (ETC) must offer the supported services using either its own facilities or a combination of its own facilities and resale of another carrier's services, including services offered by another ETC. 47 U.S.C. §214(e)(1)(A).

ETCs (C-ETCs) do not share that responsibility and the Commission's and most states' current rules effectively do not require it.

B. *Affordable Universal Service has been achieved through explicit and implicit support. The system of implicit support is rapidly eroding.*

The ILEC has been able to sustain this uneconomic build in the provision of universal coverage due to the historic system of implicit and explicit federal and state support. The Commission has long recognized that implicit subsidies have served a vital role in achieving and sustaining universal service:

> Today, universal service is achieved largely through implicit subsidies. . . . The current "system," however, consists principally of a number of implicit mechanisms at the state and, to a substantially lesser extent, federal levels designed to shift costs from rural to urban areas, from residential to business customers, and from local to long distance service.
>
> The urban-to-rural subsidy has been accomplished through the explicit high cost fund mentioned above, and through geographic rate averaging. The result of state requirements that local telephone rates be averaged across the state is that high-density (urban) areas, where costs are typically lower, subsidize low-density (rural) areas. State pricing rules have also in many cases created a business-to-residential subsidy. Most states have established local rate levels such that businesses pay more on a per-line basis for basic local service than do residential customers, although the costs of providing business and residential lines are generally the same. In addition, rates charged for vertical services such as touch tone, conference calling and speed dialing, subsidize basic local service rates.[5]

However, the Commission also recognized that a system heavily dependent on implicit subsidies is not sustainable in a competitive environment:

> Implicit subsidies were sustainable in the monopoly environment because some consumers (such as urban business customers) could

[5] *First Report and Order,* 12 FCC Rcd at 8784, para. 10 and 11.

> be charged rates for local exchange and exchange access service that significantly exceeded the cost of providing service, and rates paid by those customers would implicitly subsidize service provided by the same carrier to others. By adoption of the 1996 Act, Congress has provided for the development of competition in all telephone markets. In a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor. This incentive to entry by competitors in the lowest cost, highest profit market segments means that today's pillars of implicit subsidies—high access charges, high prices for business services, and the averaging of rates over broad geographic areas—will be under attack. New competitors can target service to more profitable customers without having to build into their rates the types of cross-subsidies that have been required of existing carriers who serve all customers.[6]

There is no question that competition is in fact eroding the elaborate implicit subsidy scheme relied upon to foster universal service, just as the Commission recognized it would ten years ago. As that happens, there is greater and greater need for explicit support mechanisms. Consequently, while Embarq appreciates the Joint Board's apparent concern with controlling the existing fund size, the real challenge will be ensuring that an explicit cost recovery system is sufficient to support universal service as it replaces the rapidly eroding system of implicit support the ILEC has used to provide the truly universal service mandated by the Act. In particular, this unabated erosion of implicit subsidies suggests that what is adequate today will likely be less than adequate tomorrow. Any discussion that includes the possibility that the ILEC will be left with little or no explicit USF support at the same time the implicit subsidy

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[6] *Id.*, 12 FCC Rcd at 8786-8787, para. 17.

scheme is collapsing threatens to undermine the progress toward universal service that has been achieved to date.

C. *The growing number of C-ETCs is putting pressure on the fund.*

The Joint Board's proposal implicitly acknowledges an unmistakable trend: there are an increasing number of C-ETCs that are receiving money through the USF, leading to increased pressure on the fund.[7] And, the overall size of the fund has grown in order to support this competition. The Commission echoed this concern nearly three years ago:

> . . . we are increasingly concerned about the rapid growth in high-cost support distributed to competitive ETCs. Specifically, although competitive ETCs only receive a small percentage of all high-cost universal service support, the amount of high-cost support distributed to competitive ETCs is growing at a dramatic pace. For example, in the first quarter of 2001, three competitive ETCs received approximately $2 million or 0.4 percent of high-cost support. In the fourth quarter of 2003, 112 competitive ETCs are projected to receive approximately $32 million or 3.2 percent of high-cost support.[8]

According to data available from the Universal Service Administrative Company (USAC), in 2002 the total High Cost support program was approximately $3.4B, with C-ETCs receiving approximately $189M. Four years later, in 2006, the total High Cost support program was approximately $4.2B, with C-ETCs receiving over $1B, or nearly 25% of the total.[9] During that same time period, the raw number of C-ETCs has grown dramatically, from fewer than 30 in Q1-2002 to over

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[7] While there may other causes for specific increases in the fund, e.g. CALLS, MAG, these access replacement mechanisms are known dollars.

[8] *Virginia Cellular ETC Designation Order,* 19 FCC Rcd at 1577, para. 31.

[9] Figures taken from HC01.xls files available publicly at ww.universalservice.org.

650 in Q3-2006, with over 95% of those being wireless carriers. This result was predictable and in fact, predicted.[10] With an increasing number of C-ETCs there is no upper bound or cap on the C-ETC's draw, and effectively no limiting principle on the number of carriers that could receive support in any given area. Moreover, state commissions have little incentive to limit C-ETC growth since it results in additional federal support coming to their state with the added plus of arguably increasing competitive choices for customers. However, this is a false promise since, in the areas where that support is most needed—the truly high cost and rural areas, many C-ETCs do not truly serve all customers.

Because C-ETCs do not have a COLR obligation similar to the ILECs but have the ability to satisfy whatever obligation to serve it has through resale of the ILEC's services, it is not surprising that C-ETCs build network where there is higher-density and a better opportunity for return on investment. The fact that C-ETCs are able to pick and choose where they serve underlies the Commission's insistence on a "creamskimming" analysis as it considers the public interest of particular ETC designations. As the Commission acknowledges: "[r]ural creamskimming occurs when competitors seek to serve only the low-cost, high revenue customers in a rural telephone company's study areas."[11] Of course, choosing only low-cost, high revenue customers isn't limited to study area by study area but can also occur within a study area. This inequality in obligations

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[10] *See e.g.* May 5, 2003 Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, CC Docket No. 96-45, pg. 9-11.

[11] *Virginia Cellular ETC Designation Order,*19 FCC Rcd at 1578, para. 32.

is no way to ensure C-ETCs provide a reliable, robust communications service ubiquitously to rural and high cost areas.

III. What is the Goal: Controlling Fund Size or Expanding Competitive Choices?

It is clear that in 2006 universal service is not just a goal but a reality that is being implemented every day, principally through the ILEC networks and its COLR obligations. Customers have ubiquitous access to high quality voice services at reasonably comparable prices through the combination of implicit and explicit support. Consequently, the question for the Joint Board is how to best ensure an evolving level of service, while nonetheless ensuring that the universal service achieved to date is preserved as the implicit subsidy mechanism underpinning this achievement is eroded. If reverse auctions are to be considered as a possible solution to a problem or means of achieving a goal, it must be clearly understood what that problem or goal is in order to properly evaluate whether reverse auctions are a feasible solution.

In the Reverse Auction Public Notice, the Joint Board appears concerned with the expanding size of the USF, its impact on customers, and developing a means to control the USF's growth.[12] But, it also appears that there is a concomitant goal of incorporating competitive choices for voice service, based

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[12] *Reverse Auction Public Notice,* para. 4. As the Reverse Auction Public Notice acknowledges, the Act instructs the Joint Board and the Commission to base their policies for the preservation and advancement of universal service on a set of defined principles, including the direction that Federal and State mechanisms must be specific, predictable and sufficient to preserve and advance universal service. *Id.,* para. 6. Consequently, controlling the fund size in and of itself cannot be the goal to the extent it results in a mechanism that violates or undermines these directives.

upon the Discussion Proposal. In fact, the Discussion Proposal suggests going even further than competitive choice for supported service by expanding the consideration to specifically require broadband and mobility.[13] There is obvious tension between the two goals of controlling fund size on the one hand and using the fund to expand competitive choices for supported voice services, let alone expansion to broadband and mobility. The Reverse Auction Public Notice evidences this tension. These two apparent goals—controlling fund size and ensuring or expanding competitive choice—tend to work directly against each other in two clear ways: not only does supporting more than one network increase the required support dollars, but, by splitting the market in order to ensure the customer a choice, each company is forced to operate at a less efficient scale and, therefore, at a higher cost.

As the Joint Board weighs and balances these competing goals, it is important to note that there is scant evidence demonstrating that the benefits of competition clearly outweigh the costs of promoting or encouraging competition in areas that require USF support—support not only of the competing networks that bring the choice but of the very network that provides the ubiquity and universal service to begin with and which, in many instances, enables the competitor to compete. Instead, it is clear that supporting more than one network results in increased excess capacity, increased inefficiency,

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[13] "No more than two ETCs would be supported in each area. Both ETCs would be required to support basic voice. One would be required to provide broadband internet access in addition to voice service and the other would be required to provide wireless mobility service in addition to voice service." *Reverse Auction PN*, pg. 8, Attachment, II. Services and Number of ETCs Supported.

increased per unit costs, and increased need for support. Thus, it has not been effectively demonstrated that competition for the sake of competition in rural and high cost areas is in the public interest, particularly when that competition comes at such a high cost: subsidizing multiple networks. Then-Commissioner Martin succinctly recognized the problem:

> I also note that I have some concerns with the Commission's policy—adopted long before this Order-- of using universal service support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.[14]

More recently, the Commission recognized the importance of such a cost/benefit analysis and flatly rejected the notion that increased competition alone satisfies the public interest.[15] The Commission specifically acknowledged

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[14] *MAG Plan Second Report and Order,* Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19613. Similar sentiment was again expressed by then-Commissioner Martin when examining the ETC designation for Virginia Cellular: "During the past two years, I have continued to express my concerns with the Commission's policy of using universal service support as a means of creating 'competition' in high cost areas. As I have stated previously, I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. The Commission's policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in rural areas." *Virginia Cellular ETC Designation Order,* 19 FCC Rcd at 1601, Dissenting Statement of Commissioner Martin.

[15] "We conclude that the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas." *Virginia Cellular ETC Designation Order,* 19 FCC Rcd at 1565, para. 4. It is similar in non-rural study areas: "We note that the Bureau previously has found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest . . . . We do not believe that designation of an additional ETC in a non-rural telephone company's study area based merely upon a showing that the

that its public interest analysis for ETC designations must examine the benefits of increased consumer choice (the benefit), the impact of the designation on the universal fund (the cost) and the unique advantages and disadvantages of the competitor's service offering (the benefit/cost).[16]

The Reverse Auction Public Notice and Discussion Proposal essentially side-steps these issues and leap-frogs over existing supported services to the next generation of potentially supported services: broadband and mobility. Neither broadband nor mobility are core or supported services today and the legally required analysis under 47 U.S.C. §254(c) to make them so has not been completed.[17] Yet, the Discussion Proposal attempts to create a "competitive" market in which each of these non-supported services is offered and receives USF support. Before considering whether to add additional services, it is important to examine whether the goal of competitive choice is met today for *currently* supported services. What looks like competition today for voice services is not the reality in many areas. As the NTCA recently reported, many

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requesting carrier complies with section 214(e)(1) of the Act will necessarily be consistent with the public interest in every instance." *Id.*, 19 FCC Rcd at 1575, para. 27.

[16] *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 20 FCC Rcd 6371, 6379, para. 18 (2005) (*ETC Designation Order).*

[17] During its last review, the Commission specifically agreed with the Joint Board and declined to extend the list of supported services to include advanced or broadband services. *In Re: Federal-State Joint Board on Universal Service*, Order and Order on Reconsideration, CC Docket No. 96-45, FCC 03-170, 18 FCC Rcd 15090, 15093, para. 8 (2003) (*Supported Services Order).* The Joint Board may not simply add mobility and broadband to the supported services through the Discussion Proposal without conducting the analysis required by 47 U.S.C. §254(c).

wireless carriers only serve the more populous portions of a rural carrier's territory—such as small towns—or along highways that run through the territory. Those customers who do not live in town or along the highway do not have the same options for service.[18] Dropped calls, poor coverage and dead spots are acknowledged by the Commission and deemed permissible.[19] Most recently, the 2006 Wireless Call Quality Study found call quality performance varied based upon location with calls placed when roaming (i.e., in rural areas) reporting problems at a stunning 55 per 100 calls.[20] Designating a C-ETC eligible for USF

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[18] *In Re: WTB Seeks Comment on CMRS Market Competition*, WT Docket No. 06-17, DA 06-62, Reply Comments of the National Telecommunications Cooperative Association, p. 2. Even the most recent reporting of wireless coverage continues to reflect this flaw in measuring wireless coverage. As Commissioner Copps states: "Finally, we really need to develop new methods to meaure coverage in rural areas. As today's report acknowledges, one important flaw in our present methodology is the assumption that if one part of a county (such as interstate highway) receives coverage, then every part of the county receives coverage. . . . The present method distorts reality." *In the Matter of 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,* Eleventh Report, WT Docket No. 06-17, FCC 06-142, (rel. Sept. 29, 2006), Concurring Statement of Commissioner Copps. (*CMRS 11th Report)*

[19] "We acknowledge arguments made in the record that wireless telecommunications offerings may be subject to dropped calls and poor coverage." *In Re: Federal-State Joint Board on Universal Service; Virginia Cellular, L.L.C Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia,* Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563, 1576, para. 30 (2004) *(Virginia Cellular ETC Designation Order)*. "... [W]e find that the existence of so-called 'dead spots' in Virginia Cellular's network does not preclude us from designating Virginia Cellular as an ETC.. . . Section 22.99 of the Commission's rules states that '[s]ervice within dead spots is presumed.'" *Id.*, 19 FCC Rcd at 1573, para. 23.

[20] *CMRS 11th Report,* para. 183. While a lower rate is reported in local calling areas (27 per 100 calls), both far exceed the ILEC service standard of 99.999% call completion. "Moreover, users typically experience fewer problems with

support in such areas; allowing that C-ETC to avoid COLR obligations and service quality requirements, while claiming that area competitive for voice service, is a disservice to these rural areas.

IV. Regardless of the goal, tightening the eligibility criteria for C-ETCs can play a role in controlling the fund size and promoting truly competitive choice.

As stated, reverse auctions might be a useful approach to accomplishing certain objectives or to fix certain problems but there could also be other, equally (or more) effective ways to proceed once the goal is understood. For example, if the primary goal is to control the fund size, a reverse auction process purports to control the fund size by limiting the sheer number of recipients of the funds and awarding dollars to the provider deemed to submit the most cost-effective proposal. However, there are other ways that the number of recipients can be limited that work within the current system. Strengthening the ETC requirements and obligations is a logical and equitable way to ensure current and future recipients actually provide the service where it is most needed and at comparable quality and reliability to the ILEC. C-ETCs that do not wish to assume the obligations associated with strengthened ETC requirements would forego the benefit of universal service funding, resulting in reasonable control on the fund size.

The Commission recently adopted a more rigorous ETC designation process designed to "ensure that only ETCs that can adequately provide universal service will receive ETC designation, thereby lessening fund growth

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outdoor wireless calls than with calls placed inside of buildings, particularly calls made from home." *Id.*

attributable to the designation and supporting the long-term sustainability of the universal service fund."[21] Moreover, these additional reporting requirements purportedly ensure that high-cost universal service support continues to be used for its intended purpose.[22] Many of these added requirements are clearly a step in the right direction if rigorously enforced and audited. For example, 47 C.F.R. §54.202 specifically requires, among other things, designated ETCs to submit a five-year plan that describes the proposed improvements or upgrades to the applicant's network, a demonstration of its ability to remain functional during emergencies, a demonstration that it will satisfy applicable consumer protection and service quality standards, and an acknowledgement that it may be required to provide equal access to long distance carriers in the event that no other ETC is providing equal access. It also sets out a public interest analysis and cream-skimming analysis where the applicant seeks designation below the study area level of a rural telephone company.

As welcome as these additional requirements are, there is still too much latitude for ETC designations. Because 47 U.S.C. §214(e)(2) allows state commissions to designate an ETC under its jurisdiction, these additional requirements are only mandatory requirements for ETCs designated by the Commission pursuant to 47 U.S.C. §214(e)(6). State commissions are only encouraged to exercise similar rigor over its certification process as the Commission proposes for itself. The Reverse Auction Public Notice poses the

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[21] *ETC Designation Order*, 20 FCC Rcd at 6373, *para. 5.*

[22] *Id.*, para. 4.

question of appropriate roles for the Commission, state commissions and the USAC with respect to auctions but the examination should be broadened to cover the options the Commission may have in imposing more stringent requirements around the ETC designation process that all jurisdictions must follow. While 47 U.S.C. §214(e)(2) clearly contemplates an important state role in the designation process, it is not bottomless. The state commission must find that, throughout the service area for which the designation is received, the ETC offers the supported services, it advertises the availability of such services and the charges for those services, and that it is in the public interest. While the Fifth Circuit clearly found that the Commission could not preclude a state commission from imposing additional eligibility requirements,[23] it is not at all clear that the Commission is precluded from placing some minimum definition around these determinations or from offering an inducement to states in addition to mere encouragement.

For those C-ETC designations under the Commission's jurisdiction, the additional requirements are an improvement but should be strengthened further to ensure that scarce resources are truly directed to where there is a need. For example, while the new requirements may be perceived by some as requiring "competitive carriers seeking ETC status [to] serve as carriers of last resort, just

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[23] "We reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support." *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 418 (1999)

as incumbents must"[24] the reality is the rules do not impose this obligation. To the contrary, 47 C.F.R. §54.202(a)(1)(A) only requires the applicant to provide service to a customer outside its existing network coverage *if service can be provided at a reasonable cost.*[25] Neither is there a requirement to provide the same quality or reliability of service nor to provide equal access to long distance providers. Instead of allowing such variance, C-ETCs should only receive USF dollars when they commit to serve the areas where competitive choice must be subsidized and should be required to provide the quality of service to those areas that enable that choice. C-ETCs should truly have the same COLR obligations as the ILEC. At the very least, the Commission should re-examine the level of support that C-ETCs receive. As Commissioner Adelstein noted:

> A large number of CETCs are wireless carriers. Wireline and wireless carriers provide different types of services and operate under different rules and regulations. Their cost structures are not the same. To allow a wireless CETC to receive the same amount of funding as the wireline carrier, without any reference to their cost structures, is artificial, not to mention clearly inconsistent with Section 254 (e).[26]

Imposing these legitimate requirements on the receipt of funding will weed-out those C-ETCs that view the money as a windfall and are not using the

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[24] *ETC Designation Order,* 20 FCC Rcd at 6436, Statement of Commissioner Abernathy.

[25] In many respects, permitting a C-ETC to avoid providing service because it is too costly is antithetical to what the federal explicit USF mechanism is intended to do, namely, provide support to ensure service is offered in the very locations where it would be cost prohibitive to serve otherwise.

[26] *Virginia Cellular ETC Designation Order,* 19 FCC Rcd at 1597, Separate Statement of Commissioner Adelstein.

money for the intended purpose. This will naturally limit the number of recipients as fewer companies may be willing to meet these heightened standards, thus leading to a natural control on the size of the fund. Doing anything less is not competitively neutral. As then-Commissioner Martin acknowledged:

> I am troubled by today's decision because the Commission fails to require ETCs to provide the same type and quality of services throughout the same geographic service area as a condition of receiving universal service support. In my view, competitive ETCs seeking universal service support should have the same "carrier of last resort" obligations as incumbent service providers in order to receive universal service support. Adopting the same "carrier of last resort" obligation for all ETCs is fully consistent with the Commission's existing policy of competitive and technological neutrality amongst service providers.[27]

The *ETC Designation Order* fails to correct these flaws. In fact, by failing to match the COLR obligations, quality of service requirements and consumer protection obligations among ETCs, the Commission continues to place the ILEC at a competitive disadvantage and allows competitors to reap an artificial competitive advantage. This only exacerbates the implicit subsidy erosion discussed *supra*.

V. Because ILECs are the pillars underlying universal service support, care must be taken to ensure that nothing done threatens the ILEC's ability to continue to satisfy this need.

The ILEC's network is what today is satisfying the fundamental tenant of universal service—a ubiquitous network, providing access to high quality supported services, at a reasonably comparable rate. USF receipts, together

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[27] *Id.*, 19 FCC Rcd at 1601, Dissenting Statement of Commissioner Martin.

with increasingly unsustainable implicit support, aid in sustaining the viability of this network in rural and high cost areas. Contrary to the suggestion of some, the ILEC network is not a staid network, no longer requiring support. Rather, investment in supporting infrastructure is constantly being added, replaced and maintained as technology advances and new customers are added and new services, including high speed internet capability, are demanded.[28] For example, COLR obligations require ILECs to build new facilities where customers are moving even as access lines are declining and there is no assurance that those new customers will remain ILEC customers.[29] While it may be appealing to assume that COLR obligations where network already exists can simply be lifted from the ILEC (somehow allowing the ILEC to be overlooked on universal service funding), it ignores reality. First, efficient network design mandates that the network be built ubiquitously and building otherwise only makes the economics of serving high-cost areas more problematic, defeating the purpose of guaranteeing that the network reaches all. Second, there is little experience where this Commission has actually released an ILEC from an obligation to serve broadly and 47 U.S.C. §214(e)(4) sets a relatively high, and permissive, standard for its removal. Before an ILEC could be relieved of COLR there must be other ETCs and the remaining ETC(s) are given up to a year to purchase or construct

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[28] Embarq recently examined its network investment in state USF supported exchanges in Texas. The analysis showed that capital and plant specific expenses alone exceeded both state and federal USF high cost support receipts during the period 1999-2005.

[29] That same Texas analysis shows that Embarq added facilities to serve over 47,000 new customer locations in the past three years, despite experiencing overall line loss of 13%.

adequate facilities. Third, COLR obligations flow from both federal and state jurisdictions so "relief" in the federal jurisdiction does not necessarily relieve an obligation to serve arising under state law.

Consequently, any changes offered to encourage competitive choices or to control the fund size must also recognize that the ILEC is in a unique situation. The Reverse Auction Public Notice seems to acknowledge the unique situation of the ILECs and asks if it is appropriate to treat ILECs differently than other ETCs in an area.[30] The answer is yes.

The notion of not supporting the ILEC or of an ILEC "losing" an auction is not practicable and fundamentally threatens universal service and competitive choice. Simply put, the ILEC's investment is what universally serves today, not only its own retail customers, but it is used by the customers of other providers and, under 47 U.S.C. §214(e)(1)(A), serves as a backdrop if the C-ETC does not wish to invest in its own facilities. For example, the ILEC wireline network supports services offered through resale, it is used to terminate calls that originate on the wireless network and terminate on the wireline network, it is used to connect cell towers, and it is used to haul wireless long distance traffic. This investment must be recovered and maintained and it is folly to assume otherwise. Furthermore, there is little "choice" if changes to the fund result in the one truly ubiquitous provider, the ILEC, being replaced. Although it is easy to get enamored with the growth in wireless subscribership and the rise in the number of customers that have completely "cut the cord," the fact remains that

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[30] *Reverse Auction PN,* para. 13.

the overwhelming majority of customers maintain an ILEC connection and have not chosen to view wireless service as an acceptable substitute for a wireline connection. In fact, while exact percentages are difficult to determine, a recent survey estimates that approximately 92% of those households with wireless service still opt to maintain a wireline connection.[31]

VI. Conclusion

As the Joint Board weighs proposed changes to the USF program, it must carefully consider what is being achieved today and how. There is little debate that the ILEC is providing affordable, reliable, ubiquitous voice service today through a complex system of implicit and explicit support mechanisms. That ubiquitous voice network also serves as the foundation for the advanced services that are vital to the economic, educational and public safety needs of America, particularly rural America. The real challenge becomes ensuring that an explicit universal support system is sufficient, specific, and predictable as competition rapidly erodes the existing system of implicit subsidy that helps support the ILEC network, and the need for explicit support increases.

A federal USF program that incorporates a reverse auction might warrant consideration once the intended goal of the Joint Board is better understood. However, regardless of the specific goal, strengthening the C-ETC requirements

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[31] *CMRS 11th Report,* para. 205 ("based on a survey conducted in the fourth quarter of 2005, one analyst found that about 8 percent of U.S. households that subscribe to cellphone service had given up their landline phones"). Another survey found that 7.8% of adults lived in households with only wireless phones in the second half of 2005. *Id.* Again leaving a substantial majority with a wireline connection.

and obligations so that C-ETCs truly provide service where it is most needed and at comparable quality and reliability to the ILEC is a step in the right direction.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Embarq Corporation's Comments in WC Docket 05-337 was delivered by electronic mail or by First Class, postage prepaid, U. S. Mail on this 10th day of October 2006 to the parties listed below and to the parties on the attached list.

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