
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
High-Cost Universal Service Support) WC Docket No. 05-337
)
Federal-State Joint Board on Universal Service) CC Docket No. 96-45
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To: The Commission

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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SUMMARY

More than a decade after passage of the Telecommunications Act, mobile wireless is the telecommunications service of choice for the majority of American consumers. There are now many more mobile wireless subscribers than wireline switched access lines. Consumers' wireless minutes are growing and their wireline minutes are in decline. Wireless service quality is improving and prices continue to decline. A rapidly growing percentage of households, in particular lower-income households, are becoming wireless only. Many wireless consumers, particularly many lower-income wireless consumers, are located in rural, high-cost areas. The public safety community is increasingly relying on commercially-operated mobile wireless carrier networks – a particular benefit in rural areas. Now, the wireless industry is in the midst of efforts to extend the benefits of mobile broadband to American consumers, thereby bringing needed competition to DSL and cable modem providers.

Wireless carriers are making significant investments to satisfy all of this demand – using about \$1 billion in annual universal service support to supplement about \$27 billion in annual capital expenditures to extend the benefits of wireless and broadband to consumers in high-cost, rural areas. In contrast, wireline carriers receive about \$3 billion in annual high-cost universal service support and about \$6 billion in universal service support overall (*i.e.*, three to six times the support of wireless), while investing roughly the same amount as wireless carriers in network improvements.

Without addressing the \$3 billion in annual high-cost support – \$24 billion over the last nine years – received by incumbent LECs that are losing customers and traffic, the Federal-State Joint Board on Universal Service (Joint Board) now recommends that the Federal Communications Commission (Commission) immediately cap support available to competitive eligible telecommunications carriers (ETCs) based on support amounts available in 2006. The

Joint Board's proposal would exacerbate current funding inequities, even as policy-makers at the local, state, and federal levels increasingly are looking to wireless carriers to deliver social, economic, and public safety benefits to consumers in high-cost, rural areas. The recommended cap will have a detrimental impact on wireless service in rural areas. It does not take an advanced economics degree to conclude that in many, many areas, facilities will not be deployed, service quality will not improve, public safety and personal security will suffer, and rural communities will be bypassed.

As a long list of policy-makers already have noted, the Joint Board's cap proposal overlooks sound economic principles, a significant body of case law, and simple common sense demanding nondiscrimination in universal service. A competitive ETC cap is incompatible with the Act's various nondiscrimination requirements and with statutorily mandated principles. Moreover, the cap would violate crucial policy objectives, including the promotion of efficiency, the avoidance of economic distortions among technology platforms and classes of carriers, the deployment of broadband services to rural America, and the proliferation of mobile wireless services that customers increasingly view as either substitutes or complements to wireline offerings.

For these reasons, CTIA strongly urges the Commission to reject the Joint Board's recommendation and to move quickly to implement long-term reform designed to further the interests of consumers. CTIA again urges the FCC and the Joint Board to pursue market-oriented, competitively- and technologically-neutral universal service policies that recognize what consumers and the marketplace are saying: a greater portion of universal service must now be made available to mobile wireless providers in order to ensure ubiquitous service – even if that potentially means less support for incumbents. Consumers – who pay for and are the sole intended beneficiaries of universal service – deserve no less.

If the FCC nonetheless decides to pursue an interim cap, three elements are necessary. First, the cap should apply equally to both incumbent and competitive ETCs – with per-line support made portable based on consumer demand. Second, the “base period” used for the cap should be the most recent calendar quarter prior to adoption of the cap. Finally, the cap should sunset no later than one year from adoption.

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COMMENTS OF CTIA -- THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”) submits these comments in response to the Commission’s Notice of Proposed Rulemaking seeking comment on the Federal-State Joint Board on Universal Service’s (the “Joint Board’s”) Recommended Decision issued in these dockets on May 1, 2007 (the “Recommended Decision”).¹ The Commission should reject the proposed cap on universal service fund (“USF” or “Fund”) distributions to competitive eligible telecommunications carriers (“CETCs”) and instead act quickly to implement competitively- and technologically-neutral, long-term universal service reform. Properly framed, such reform would serve the needs of rural consumers while simultaneously curbing Fund growth.

I. AN INTERIM CETC CAP IS THE WRONG APPROACH TO REFORM

The record compiled by the Joint Board in this docket over the past five years contains numerous diverse proposals for reforming the USF distribution system. Many of these,

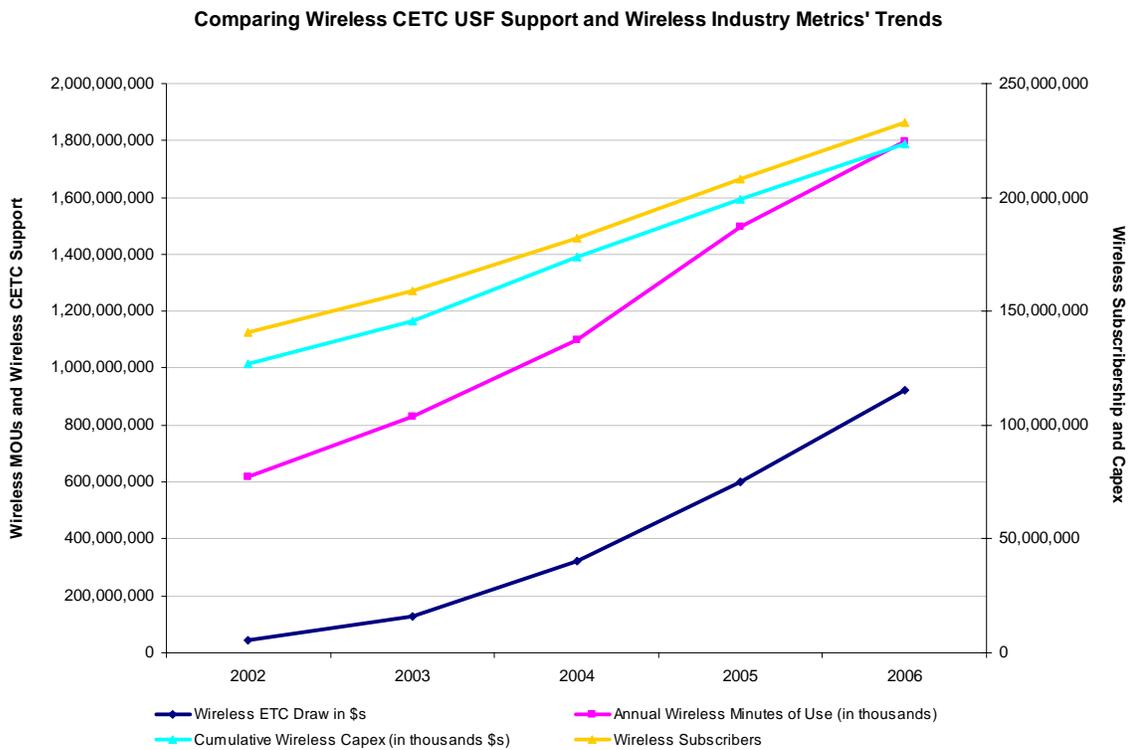
¹ *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 07-88 (rel. May 14, 2007) (“*NPRM*”).

including not only those that CTIA has proposed and supported but also several others,² reflect good-faith efforts to solve the problems that plague the high-cost regime. Given the existence of several feasible reform proposals, the Joint Board's proposal is baffling. The Recommended Decision would enact *de facto* wireline platform preferences that would lock in incumbent LEC inefficiencies, undermine the deployment of wireless mobile and broadband services, cripple competition in high-cost areas and frustrate the demonstrable consumer migration to wireless services.

The Joint Board justifies these proposed departures from Congressional mandate and Commission precedent with assertions that CETCs are somehow exclusively responsible for the size of the Fund. This, of course, is far from the case. Indeed, even if wireless ETCs received *no* high-cost universal service funding, wireline carriers would still receive over \$3 billion in annual high-cost universal service support and over \$6 billion universal service support overall and the universal service contribution factor would still be almost 10 percent. Policies that have continued to pay "rural" incumbent LECs high-cost support based on their booked costs and guarantee a constant rate of return long after the intended sunset of the "interim" rural mechanism, as well as unnecessarily expensive access-related universal service support, are every bit as much responsible for Fund growth as the rise of predominantly wireless CETCs. The problem is exacerbated by the failure of the current system to reduce incumbent LEC funding when customers migrate away from their networks.

² See, e.g., *Reply Comments of CTIA – The Wireless Association®*, WC Docket No. 05-337 and CC Docket No. 96-45 (filed Nov. 8, 2006) (attaching a comprehensive reverse auctions proposal).

Furthermore, any suggestion that wireless CETCs merit punishment for their growing support levels ignores the fact that this growth reflects consumers' preference for more wireless service, including in high-cost areas. Universal service support for wireless carriers has been "explosive and dramatic" only to the extent that growing consumer demand for mobile wireless services has been "explosive and dramatic." Wireless carriers are deploying network facilities only because their services are increasingly demanded by consumers – the only intended beneficiaries of universal service. As the chart below demonstrates, growth of wireless carrier high-cost universal funding has tracked other measures of the wireless industry's incredible success.



Over the past five years, annual high-cost universal service support for wireless ETCs has increased to about \$1 billion. At the same time, the number of mobile wireless subscribers has

increased from 118 million in June 2001 to more than 233 million in December 2006.³ Over the past five years, the average number of minutes that subscribers use their mobile devices each month rose from 380 to 714 minutes, or approximately 12 hours per month.⁴ In 2006, there were approximately 1.8 trillion minutes of use on wireless networks.⁵ U.S. commercial wireless service providers are investing billions of dollars a year, more than \$27 billion, to increase the capacity of their networks so they can respond to consumer demand and deliver next generation services to consumers.⁶

By every metric, wireless carriers have been delivering “dramatic” benefits to consumers for universal service dollars spent: Subscribership is rising, minutes of use are increasing, and prices per minute are falling. Wireless services are becoming an increasingly important tool in ensuring public safety. Demand for distinctively wireless offerings such as text, picture, and video messaging is growing. And wireless broadband offerings are becoming increasingly competitive, accounting for almost half of all broadband growth over the last year.

The FCC should be embracing, not undercutting, wireless carrier efforts to respond to “explosive” consumer demand in rural, high-cost areas for wireless mobile and broadband services. Instead of questioning why support has been increasing for wireless ETCs, the Commission instead should be asking why incumbent LECs continue to receive the lion’s share

³ CTIA’s Semi-Annual Wireless Industry Survey Results, January 1985 - December 2006, available at http://files.ctia.org/pdf/CTIA_Survey_Year_End_2006_Graphics.pdf.

⁴ CTIA’s Year-End 2006 Wireless Industry Indices Report, May 2007.

⁵ CTIA’s Semi-Annual Wireless Industry Survey Results, January 1985 - December 2006, available at http://files.ctia.org/pdf/CTIA_Survey_Year_End_2006_Graphics.pdf.

⁶ See Annual Capital Expenditures: 2005, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, at Table 4a (Issued February 2007).

of high-cost funding, even while wireless carriers serve more lines, carry more minutes, and are undertaking more aggressive, more consumer-desired network expansion.

The proposed cap would continue the avoidance of these questions. As discussed in greater detail in the remainder of these comments, the proposal also departs from statutory requirements and universal service policy considerations. As a result, the Commission should eschew a CETC cap and proceed without delay to comprehensive reform of the universal service distribution system. To the extent that the Commission nonetheless pursues an interim cap, it should apply equally to all incumbent and competitive ETCs, should use the latest calendar quarter as the base period, and should have a specified sunset of no more than one year from adoption.

II. POLICY CONSIDERATIONS WEIGH HEAVILY AGAINST THE ADOPTION OF EVEN AN “INTERIM” CAP.

Setting aside for a moment the fact that the Joint Board’s arguments in favor of a CETC-only cap are deeply flawed, and the fact that such a cap would be incompatible with the Act’s legal requirements, the Recommended Decision’s proposals are fundamentally inconsistent with several critical federal policy objectives, and should be rejected on that basis alone.

A. The Proposed Cap Would Preserve Inefficiencies in the Current Incumbent LEC Funding Mechanism and Therefore Would Fail to Address the Root Cause of the Fund Size.

Most fundamentally, a CETC-specific cap would utterly fail to address (and indeed would exacerbate) the principal cause of today’s oversized Fund. Rural incumbent LECs receive support that guarantees a predetermined rate of return over and above their historical book costs. Under the existing mechanism, there is no inquiry into whether these LECs, which operate mature networks, actually need the approximately \$3 billion per year in high-cost support they currently receive. Even worse, rural incumbent LECs’ loss of customers does not reduce their

support; rather, it *increases* the per-line support available, both to the rural incumbent LEC *and* to all of the competitive ETCs in the study area. A CETC-only cap would neither reduce these currently bloated support levels nor account for consumers' growing preference for wireless alternatives. Instead, the proposed cap would perpetuate incumbent LECs' current support levels, without regard to whether these levels are appropriate or benefit consumers.

Indeed, the cap would likely exacerbate existing inefficiencies. Under the current regime, the incumbent LEC knows that its competitors will also benefit from any increase in its support levels. This knowledge may be one of the few factors that inhibit the incumbent LECs' incentive to overstate costs. Under the proposed cap, however, that limitation would evaporate. Incumbent LECs would know that the support available to their competitors could not increase, even if their own support levels rose. Thus, their incentives to increase their support levels would be strengthened, and in doing so to enhance their existing regulatory advantage *vis-à-vis* CETCs.⁷

B. The Proposed Cap Would Inhibit the Deployment of Broadband Services to Rural America.

A CETC cap would also undermine the Commission's broadband deployment goals. Wireless services are playing an increasingly important role in the broadband market. For wireless carriers, the availability of universal service for network expansion provides capital, making it available to make mobility and broadband available in rural areas. Universal service support also allows wireless carriers to expand their networks deeper into rural areas, widening the areas in which wireless mobility and broadband service can be enjoyed.

⁷ This could be addressed, in part, by capping per-line support levels in study areas with incumbent and competitive ETCs.

In its recent *Wireless Broadband Order*, the Commission emphasized its view that “wireless broadband will play a critical role in ensuring that broadband reaches rural and underserved areas, where it may be the most efficient means of delivering these services.”⁸ In his separate statement, Chairman Martin noted that “[w]ireless service is becoming increasingly important as another platform to compete with cable and DSL as a provider of broadband.”⁹ Indeed, wireless carriers have been adding broadband customers at a rate exponentially faster than any other technology platform.

Rate of broadband subscriber increase by technology platform¹⁰	June-Dec 2005	Jan-June 2006
Cable Modem	10%	7%
DSL	19%	15%
Mobile Wireless	295%	211%

Moreover, there are now fully half as many mobile wireless broadband customers as DSL customers.¹¹

Wireless broadband services, moreover, now offer speeds competitive with those available over other platforms. For example, Verizon Wireless’s EV-DO Revision A technology offers average download speeds of 600 kbps to 1.4 megabits, and average upload speeds of

⁸ *Wireless Broadband Order* at ¶ 17.

⁹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”), Statement of Chairman Kevin J. Martin.

¹⁰ Based on data from *High-Speed Services for Internet Access: Status as of June 30, 2006*, FCC Industry Analysis and Technology Division, Wireline Competition Bureau (January 2007), at Table 1.

¹¹ *Id.*

500-800 kbps, to more than 145 million consumers.¹² Sprint Nextel has also launched EV-DO Rev. A-based service, reaching more than 193 million people in more than 5,400 communities. Its product offers upload speeds of 350-500 kbps, and average download speeds of 600 kbps-1.4 mbps (from 400-700 kbps with EV-DO).¹³ AT&T Mobility's BroadbandConnect (HSDPA) service offers speeds of 400-700 kbps, and serves virtually all of the top 100 markets.¹⁴ Even faster services will arrive in the near future: Sprint Nextel has pledged to spend more than \$2 billion in building its 4G Wi-MAX network, and T-Mobile has stated its intent to spend \$2.7 billion in building its HSDPA network to exploit the spectrum won in last year's Advanced Wireless Services ("AWS") auction.¹⁵

Wireless broadband also offers unique benefits in rural and hard-to-serve areas. First, the ability to access information while *mobile* is of particular advantage to customers in rural areas, who may have to travel greater distances between their homes, places of work, and other routine destinations. In addition, mobile broadband offerings generally can be accessed on devices that are substantially *more affordable* than a computer. While mobile broadband allows customers to access the Internet or other broadband offerings with a modem card in a laptop, it also allows

¹² See Verizon Wireless, BEST WIRELESS SERVICE PROVIDER at <http://www.vzw-whoware.com/best/leadership.asp>; FACTS ABOUT...VERIZON WIRELESS NETWORK at http://news.vzw.com/pdf/Verizon_Wireless_Press_Kit.pdf (accessed May 2, 2007).

¹³ See *Sprint Nextel Announces 4G Wireless Broadband Initiative with Intel, Motorola and Samsung*, Press Release at http://www2.sprint.com/mr/news_dtl.do?id=12960 (Aug. 8, 2006).

¹⁴ See AT&T TO INVEST \$750 MILLION-PLUS GLOBALLY IN 2007 TO SPEED ADVANCED SOLUTIONS TO BUSINESS CUSTOMERS, Press Release at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23522> (Mar. 13, 2007).

¹⁵ See SPRINT NEXTEL ANNOUNCED 4G WIRELESS BROADBAND INITIATIVE WITH INTEL, MOTOROLA AND SAMSUNG, Sprint Nextel News Release, at <http://www.2.sprint.com/mr/news-dtl.do?id=12960> (Aug. 8, 2006). See David Janazzo, *et al.*, T-MOBILE USA READ ACROSS: TOWERS AND ROAMERS, Merrill Lynch (Nov. 9, 2006) (noting T-Mobile spending commitment).

access via mobile handsets, PDAs, and other, less expensive devices. The greater affordability of devices for mobile wireless broadband access can be particularly beneficial to lower-income consumers in rural areas that would not otherwise be able to afford the equipment needed to access broadband offerings. Third, wireless broadband offers unique benefits to public safety organizations, permitting high-speed communications while first responders are *en route* to or from or at the scene of an emergency.¹⁶

Although broadband is not a supported service, the Commission has recognized that “the network is an integrated facility that may be used to provide both supported and non-supported services,” and has committed itself to “ensuring that appropriate policies are in place to encourage the successful deployment of infrastructure capable of delivering advanced and high-speed services.”¹⁷ For wireless carriers and wireline LECs, the availability of universal service for network expansion provides capital to make broadband available in rural areas. Universal service support also allows wireless carriers to expand their networks deeper into rural areas, widening the areas in which wireless broadband can be deployed. Moreover, unsupported broadband services are increasingly intertwined with supported offerings. Providers have begun to distribute WiFi-enabled mobile wireless handsets that connect to broadband networks using unlicensed spectrum where feasible and incumbent LECs have employed satellite and fixed-wireless capabilities to reach rural consumers. These developments underscore the need to accommodate all technologies in the context of decisions regarding USF distributions.

¹⁶ The Southern Governors Association has adopted a resolution emphasizing the critical role that mobile broadband offerings can play in this regard. *See* Letter from Diane C. Duff, Executive Director, Southern Governors Association, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150, 06-169, and 96-98 (filed May 18, 2007).

¹⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Order and Order on Reconsideration*, 18 FCC Rcd 15,090, 15,096-97 (2003) (“*Supported Services Order*”).

C. A CETC-Only Cap Would Disregard Consumers' Strong Preference for Expanded Wireless Offerings

The Joint Board's proposed CETC-only cap would stymie deployment of precisely the services for which consumers have expressed the most interest and enthusiasm. There are now 26 percent more wireless handsets in service than wireline connections,¹⁸ and about 12.8 percent of households have abandoned wireline service altogether and subscribe only to wireless service.¹⁹ A majority of consumers currently using wireline service consider their wireless phone their "primary" connection; if forced to choose one or the other, they say they would keep their wireless phone and give up their wireline connection.²⁰

Given consumers' preference for wireless services, there is no basis for curtailing funding to (mostly wireless) CETCs without making any attempt to curb support to incumbent LECs. These LECs have received over \$24 billion in explicit support, and continue to reap over \$3 billion annually, even though their networks are mature and reach virtually all end users. In contrast, the wireless networks preferred by consumers are still expanding into rural areas, evidencing a much greater need for continued high-cost support. Consumers recognize that

¹⁸ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2006* (2007), at Tbl. 1 (showing 172,031,909 combined incumbent and competitive LEC lines) and Tbl. 14 (showing 217,418,404 mobile wireless connections).

¹⁹ See Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July-December 2006, May 14, 2007, available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf>.

²⁰ On March 6-8, 2007, MyWireless.org® commissioned a national survey of 1,000 adult wireless phone users who also have wireline phones and who are likely voters ("MyWireless.org National Consumer Survey", <http://www.mywireless.org/nationalsurvey/>). All interviews were conducted by professional interviewers via telephone. Interview selection was at random within predetermined geographic units. The accuracy of the sample is within 3.1% at a 95% confidence interval. The precise question asked was: "If you could keep one service, would you keep your cell phone service or your home landline phone service?"

current funding preferences are skewed. In a recent poll commissioned by MyWireless.org®, 70 percent of consumers said they support using a greater portion of the universal service fund to help wireless carriers improve wireless service in rural areas,²¹ and only 16 percent said they oppose such a proposal.²² The Commission should acknowledge what consumers recognize: Efforts to curb Fund growth should begin with incumbent wireline providers.

III. THE PROPOSED CAP WOULD VIOLATE COMPETITIVE NEUTRALITY.

By capping support to CETCs but not incumbent LECs, the Joint Board’s proposed cap would squarely violate the additional principle of competitive neutrality. The Joint Board’s protestations to the contrary do not hold up on inspection.

First, and most critically, the Commission must reject any claim that “competitive neutrality” only applies to similarly regulated entities. The entire point of competitive neutrality is that functionally similar service providers should be subject to similar regulatory requirements regarding access to universal service support. In fact, the Fifth Circuit has said that “the program must treat *all* market participants equally.”²³ Under a competitively neutral regime, “[regulatory] disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of

²¹ *Id.* The question posed was: “You are currently charged about \$1 a month for a ‘universal service’ fee on landline phone bills and cell phone bills in part to enable telecom carriers to provide service in rural and other high-cost areas. About 75% of the funds currently go toward providing landline phone services. Would you support or oppose using a greater portion of universal service funding to help cell phone companies improve the quality of cell phone service in rural and high-cost areas?”

²² *See id.*

²³ *See Alenco Communications Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000) (emphasis added).

services or restricting the entry of potential service providers.”²⁴ Thus, the overriding mandate of competitive neutrality is that disparities in the regulatory regimes governing functionally equivalent offerings should be minimized or eliminated.

The Recommended Decision turns this logic on its head, however, suggesting that existing regulatory disparities in the treatment of otherwise similar services justify further differentiation. This argument portends a slippery slope of government-sanctioned discrimination justifying more discrimination. Absent clear market-based or technology-based justifications for regulatory distinctions, customers are disserved by disparate regulatory regimes that discriminate between competitor classes. To the extent, if any, that incumbent LECs and CETCs are subject to differing frameworks, CTIA supports the removal of incumbent LEC regulatory obligations that are no longer appropriate given marketplace evolution, and the enactment of genuinely neutral USF rules that treat all ETCs alike.

Even if regulatory disparities *could* in some circumstances justify the abandonment of technological neutrality, the grounds cited by the Joint Board for doing so do not justify differential USF treatment. In most cases, the regulatory obligations emphasized by the Joint Board were meant to contain incumbent LEC market power. If that market power no longer exists, the regulations should be removed. If the incumbent LEC still retains such power, economic regulation cannot be a basis for preferential regulatory treatment in other contexts. Wireless carriers and other CETCs should not be punished for their own non-dominance, and their resulting failure to merit regulation equivalent to the incumbent’s. In any event, the “fundamental differences” cited by the Joint Board as a basis for treating incumbent LECs and

²⁴ *USF First Report at Order*, 12 FCC Rcd at 8802 ¶ 48.

CETCs differently are in many cases illusory, and do not render a CETC-only cap “competitively neutral.”

Rate Regulation: The Recommended Decision indicates that a CETC-only cap is justified by the fact that incumbent LECs are subject to rate regulation, while CETCs are not.²⁵ This argument finds no support in the legislative record and has no merit. First, in many states, incumbent LECs are *also* free from retail rate regulation; other states are moving in the same direction. In other instances, incumbent LECs have declined to seek rate deregulation even when provided the opportunity.²⁶ Second, it is not at all clear why the absence of retail rate regulation would render CETCs less deserving of support. In a competitive market, unregulated providers are more likely to reduce rates to the lowest feasible level. For example, the average local monthly wireless bill has fallen more than 95 percent since 1992.²⁷ Such price reductions are the *sine qua non* of competition. For this reason, CTIA has *supported* deregulation for incumbent LECs as appropriate given marketplace realities.²⁸ Third, wireless CETCs’ immunity from state rate regulation stems from section 332(c)(3) of the Act, which reflects Congress’s judgment that the competitive wireless market does not warrant such regulation. If market realities now support similar deregulation of incumbent LECs, the Commission and state PUCs should act accordingly; if not, CETCs should not be penalized for the fact that they have less market power than incumbent LECs.

²⁵ RD at ¶ 6.

²⁶ *Wireline Broadband Order*, 20 FCC Rcd at 14900-01.

²⁷ Inflation adjusted figure comparing the average local monthly bills of December 1992 and December 2006, see: http://files.ctia.org/pdf/CTIA_Survey_Year_End_2006_Graphics.pdf.

²⁸ See, e.g., Comments of CTIA - The Wireless Association, CC Docket No. 01-92, at 16-17 (filed May 23, 2005).

Equal Access: Similarly, the Recommended Decision cites disparities in equal-access regulation as a basis for a CETC-only cap.²⁹ To the extent those obligations do not apply to a given CETC, though, this fact provides no basis for dissimilar USF treatment. This regulation, too, stems from the incumbent LECs' historical monopoly status, having arisen from post-divestiture fears that the Bell Operating Companies ("BOCs") would stymie long-distance competition by favoring AT&T.³⁰ CTIA supports removal of incumbent LECs' equal access obligations as appropriate given market conditions. Whether or not these obligations are warranted in the case of incumbent LECs, however, they are not appropriate in the case of wireless providers, which operate in an extremely competitive market. Unlike the divestiture-era BOCs, wireless carriers have no ability to control users' access to long-distance service, and fierce competition has mooted the issue by compelling most wireless carriers to offer long distance service at no additional charge.³¹ In short, as with rate regulation, the presence or absence of equal access obligations with regard to a particular carrier is entirely a function of that carrier's market power, and has no bearing on whether carriers are entitled to equivalent USF treatment.

²⁹ RD at ¶ 6.

³⁰ See, e.g., *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, 17 FCC Rcd 4015, 4016 ¶ 3 (2002) (noting that equal access requirements "reflect concerns that existed at a time when [the BOCs] were the monopoly providers of local services and were prohibited from offering interexchange services").

³¹ Nevertheless, the Commission has required every CETC, prior to designation, to "acknowledge that it may be required to provide equal access if all other ETCs in the designated service area relinquish their designations pursuant to section 214(e)(4) of the Act." *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, 6372 ¶ 2; see *id.* at 6386-87, ¶¶ 35-36 (2005) ("*ETC Order*"). It has urged states to adopt this requirement as well. *Id.* at 6379 ¶ 19.

Carrier of Last Resort: The Recommended Decision next states that “competitive ETCs may not have the same carrier of last resort obligations that incumbent LECs have.”³² This argument both understates the obligations of CETCs and overstates the obligations of many incumbent LECs. First, federally designated CETCs and most state-designated CETCs are required to provide service in response to any reasonable request, and the FCC has urged states to adopt similar requirements.³³ The Commission has required – and has urged the states to require – that any “ETC applicant make specific commitments to provide service to requesting customers in the service areas for which it is designated as an ETC.”³⁴ Moreover, in many states, incumbent LECs either are subject to *no* carrier of last resort obligations, or are permitted to charge substantial, non-negotiable, rate regulated line extension fees. For example, one recent Commission filing evidences a LEC’s attempt to assess a \$22,000 line extension fee.³⁵ There is no basis for suggesting, in these circumstances, that wireline incumbents are subject to obligations from which CETCs are “free” – and no basis for abandoning competitive neutrality as a result.

Identical Support Rule: Reliance on the identical support rule as a justification for differential treatment is circular. Competitive neutrality mandates equal treatment, because only equal treatment will guarantee that consumer and provider choices are governed by cost and value considerations rather than regulatory arbitrage. Therefore, any claim that a rule requiring

³² RD at ¶ 6.

³³ 47 C.F.R. § 54.202. *ETC Order*, 20 FCC Rcd at 6379 ¶ 19.

³⁴ *ETC Order*, 20 FCC Rcd at 6381 ¶ 22.

³⁵ Letter from David L. Sieradzki, Counsel to DialTone Services, L.P., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337 (filed May 16, 2007).

equal treatment of all competitors justifies a *departure* from a competitively-neutral policy is simply perverse.

Nor should the Commission endorse the Joint Board's argument that the identical support rule in fact discriminates between providers because incumbent LECs' support is cost-based, while competitive ETCs' support is not.³⁶ To begin with, this argument substantially overstates the extent to which incumbent LEC support *is* cost-based. A large portion of the support received by incumbent LECs is not cost-based at all. This includes support based on average schedules developed by the National Exchange Carrier Association (designed precisely to *avoid* reliance on a particular carrier's costs), local switching support, support based on forward-looking models, support based on the costs of an exchange's *previous* owner, and interstate access support. In all, USAC data suggest that approximately \$1.3 billion or over 40 percent of all incumbent LEC USF support is not cost based.

Moreover, the Joint Board's criticism of the identical support rule overlooks the significant benefits associated with equal treatment of *all* competitors, irrespective of the platform over which they provide service. A framework that differentiated the amount of support received by competitors in the same geographic market would provide one competitor an artificial advantage over another, distorting competition and promoting inefficient consumption decisions. In contrast, the identical support rule helps to guarantee that carriers compete on even footing, ensuring that consumers make choices based on the cost and value of the various alternative service offerings rather than on false regulatory distinctions. Thus, even setting aside

³⁶ *See id.*

the factual inaccuracies inherent in the Joint Board’s rationale, policy considerations also weigh against reliance on the identical support rule as a basis for abandoning competitive neutrality.

That the “competitive neutrality” principle was adopted by the Commission in no way makes it any less mandatory than any of the other statutory principles in Section 254(b).³⁷ The statute states that “the Joint Board and the Commission *shall* base policies for the preservation and advancement of universal service” on the enumerated principles.³⁸ Section 254(b)(7) permits the Commission to adopt principles in addition to the statutory list, and the Commission has adopted competitive neutrality pursuant to this provision.³⁹ Since the Commission has done so, per the statute, the Commission is required to (“shall”) base universal service policy on that principle in the same way it is required to base universal service policy on any of the other principles in Section 254(b). The Commission may “balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal.”⁴⁰

Indeed, at least ten Senators and members of Congress, including some of the foremost authorities on telecommunications policy in general and universal service policy in particular, have criticized a CETC cap approach as violating competitive neutrality. Senators Rockefeller, Pryor, Dorgan, Klobuchar, and Gordon Smith all oppose any cap, “especially one imposed only

³⁷ Cf. Comments of Verizon and Verizon Wireless, WC Docket No. 05-337 and CC Docket No. 96-45 (filed May 31, 2007) at 11.

³⁸ 47 U.S.C. § 254(b) (emphasis added).

³⁹ The APA defines “rule” to mean an “agency statement of general or particular applicability and future effect.”³⁹ See 5 U.S.C. § 551(4). Federal register notice, an opportunity for participation, and a statement of the basis and purpose of the rule also are required. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 290 n.21 (1974). See also 5 U.S.C. § 552(a)(1). The “competitive neutrality” principle meets this standard. Once adopted, such a rule can only be changed through the APA rulemaking process. See, e.g., *USTelecom v. FCC*, 400 F.3d 29, 38-39 (D.C. Cir. 2005).

⁴⁰ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001).

on certain carriers.”⁴¹ Chairman Markey called the CETC cap as proposed “anticompetitive” and decried it for “den[ying] rural consumers the choices they deserve.”⁴² Senators Sununu, McCain, DeMint, and Ensign “do not support any plan that would cap only one select group of providers but not others,” as they believe “such a fix would unfairly skew the marketplace.”⁴³ Significant legislative proposals currently before both houses of Congress would add “competitive neutrality” to Section 254(b) as an explicit statutory universal service principle.⁴⁴

In this regard, the problem is not solely that the cap results in incumbents and competitors receiving different amounts of support.⁴⁵ Rather, the proposed cap would violate competitive neutrality because it would visit the burden of controlling the size of the fund disproportionately on competitive carriers in general and wireless carriers in particular. As a result, the Recommended Decision urges a departure from the fundamental principle of competitive neutrality – a principle that each Commissioner and numerous members of Congress have strongly supported, and which the Joint Board and the Commission are legally bound to pursue.

In short, a CETC-specific cap would favor one class of carriers over another, without any valid basis for doing so, and would thus violate the competitive neutrality principle.

⁴¹ Letter from Sens. Rockefeller, Pryor, Dorgan, Klobuchar, and Gordon Smith to Comr. Deborah Taylor Tate and Chmn. Ray Baum (dated March 21, 2007).

⁴² Statement of Rep. Markey (May 2, 2007).

⁴³ Letter from Sens. Sununu, McCain, DeMint, and Ensign to Comr. Deborah Taylor Tate (dated April 13, 2007).

⁴⁴ See S.101, 110th Cong., § 203 (2007); H.R. 2054, 110th Cong., § 3 (2007).

⁴⁵ See, e.g., Comments of Verizon and Verizon Wireless, WC Docket No. 05-337 and CC Docket No. 96-45 (filed May 31, 2007) at 12 (“there is no legal support for the notion that two providers must receive the same per-line high cost subsidy in order to be treated in a competitively neutral manner”). Verizon’s citation to the *Qwest II* case is inapposite as the quoted passage, in context, refers to contribution obligations, not distribution issues. *Qwest Corp. v. FCC*, 398 F.3d 1222, 1233 (10th Cir. 2005).

IV. THE PROPOSED CAP WOULD VIOLATE THE ACT'S OTHER LEGAL REQUIREMENTS.

Focused closely on the purported “emergency” facing the high-cost regime, the Recommended Decision avoids any discussion of how – or even whether – its proposed solution comports with the Act’s various legal mandates with regard to universal service funding. In fact, the proposed CETC-only cap would violate several of these directives, and would therefore be unlawful.

A. The Joint Board’s Proposed CETC-Only Cap Would Be Inconsistent With the Act’s Mandates Favoring Competition in High-Cost Areas.

A CETC cap would shirk the Commission’s legal duty to promote competition in the provision of telecommunications and information services. The 1996 Act sought to encourage competition in the telecommunications marketplace, and explicitly contemplated the designation of multiple ETCs, even in areas served by rural telephone companies.⁴⁶ Thus, as the courts have held, policymakers may not forget, in pursuing universal service goals, “the directive that local telephone markets be opened to competition.”⁴⁷ Even in very high-cost areas, competition between and among carriers will force providers to improve the quality of the services they receive; carriers unable to compete on the basis of price will compete on the basis of non-price factors. For this reason, “[t]he FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other.”⁴⁸

⁴⁶ 47 U.S.C. § 214(e) (directing state PUCs and the Commission to designate ETCs). *See also* 47 U.S.C. § 214(e)(1) (requiring that all “eligible telecommunications carriers . . . *shall be eligible* to receive universal service support”) (emphasis added).

⁴⁷ *Alenco Communications Inc. v. FCC*, 201 F.3d 608, 614 (5th Cir. 2000).

⁴⁸ *Id.* (emphasis in original).

Accordingly, the courts have admonished the Commission not to erect carrier- or platform-specific barriers to the receipt of support: “[T]he program *must treat all market participants equally* ... so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, this principle is made necessary not only by the economic realities of competitive markets *but also by statute.*”⁴⁹

It should go without saying that the Joint Board’s proposed cap would violate this statutory mandate. Wireless ETCs have forced incumbent wireline providers to compete on the basis of price and service quality, and new wireless infrastructure has given rural consumers the value of mobility, broadband and other unique advantages that urban consumers already enjoy. A cap on support that affected only competitive carriers would blithely sacrifice this competition for rural consumers by providing an unfair financial advantage to wireline incumbents. By separately capping the total amount of support that is available for wireless ETCs, the Commission would effectively ensure unreasonably low levels of support – or no support whatsoever – for wireless carriers in many states. In short, adoption of the cap would violate the core principles set forth in section 214 of the Act. More disturbingly, it would do so without *any* clear showing that universal service goals would be advanced in the process.

B. The Joint Board’s Proposed CETC-Only Cap Would Be Inconsistent With the Act’s Universal Service Principles.

A CETC cap would also repudiate the statutory principles on which the Commission is obliged to base its universal service policies. Section 254(b) of the Act states that “[t]he Joint Board and the Commission shall base policies for the preservation and advancement of universal

⁴⁹ *Id.* at 616 (emphases added).

service on [several enumerated] principles.”⁵⁰ These include, among other things, requirements that: (1) that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services ... that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas” (*i.e.*, that services should be “reasonably comparable”); and (2) that support mechanisms should be “predictable and sufficient.”⁵¹ The Joint Board’s proposed CETC-only cap would conflict with each of these policies.

Reasonably Comparable. The proposed cap would flout Congress’s directive that services in rural and other high-cost areas should be “reasonably comparable” to those in urban areas. By guaranteeing that per-line support from CETCs declines as CETC market shares grow, however, the proposed cap would ensure that consumers in such areas enjoy *fewer* real choices than those in urban areas, and will forfeit the benefits associated with competition. In fact, in states that had no designated CETCs as of the close of whatever base period the Commission might select, the proposed cap would guarantee that wireless and other CETCs would receive *no support whatsoever* for the life of the cap.

Any claim that customers in rural and high-cost areas within such states would enjoy services “reasonably comparable” to those available in urban areas, and at “reasonably comparable” rates and terms, is facetious at best. As the Tenth Circuit has concluded, “Rates cannot be divorced from a consideration of universal service, nor can the variance between rates paid in rural and urban areas. If rates are too high, the essential telecommunications services

⁵⁰ 47 U.S.C. § 254(b).

⁵¹ *Id.*

encompassed by universal service may indeed prove unavailable.”⁵² The proposed cap will deny customers access to reasonably equivalent rates, and to reasonably equivalent services.

Sufficient. The proposed cap would ensure that support to CETCs falls below the level deemed “sufficient” under the otherwise applicable distribution mechanisms. The courts have repeatedly made clear that “sufficiency” must not be defined in relation to the other statutory principles, “including affordability.”⁵³ The proposed cap, however, ignores these other principles, and the sufficiency principle itself. There is no basis for any interpretation of “sufficiency” that takes no account of whether or not support is, in fact, “sufficient.”

In sum, the Recommended Decision’s proposed CETC-only cap would violate Congress’s specific mandates with regard to the universal service program, and would therefore be unlawful. The Joint Board has failed to address these problems, much less resolve them. Moreover, its appeals to slowing Fund growth cannot justify a decision to overlook the section 254(b) requirements. As the Tenth Circuit has stated, the need to curtail distributions from the Fund *cannot* supersede these principles. At most, section 254(b)’s directives “have to be balanced against the burden” placed on contributors.⁵⁴ The Commission may not endorse a regime – “interim” or otherwise – that departs so drastically from Congress’s express requirements.

⁵² *Qwest Communications International v. FCC*, 398 F.3d 1222, 1236 (10th Cir. 2005) (emphasis added).

⁵³ *Id.* at 1234.

⁵⁴ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001).

C. Claims that the Proposed CETC Cap Would Be “Interim” Do Not Mitigate its Legal Deficiencies.

The belief that the Joint Board’s proposed CETC-only cap will be “interim” in nature should not provide the Commission any consolation regarding its legal shortcomings. Time and again, “interim” solutions adopted by the Commission have become “permanent” regulatory frameworks, as efforts to enact permanent reform have stalled. Examples of this phenomenon abound: The Commission’s “interim” USF rules for rural LECs, which permit those carriers to collect support based on their embedded costs, have lasted six years, with no permanent reform in sight.⁵⁵ Its “interim” USF contribution safe harbor, which governs the jurisdictional allocation of wireless carriers’ revenues, was first enacted in 1998, and meant to last only “until [the FCC] develop[ed] final rules.”⁵⁶ The safe harbor, however, lives on, and has indeed been modified twice since its inception to expand wireless carriers’ contribution obligations.⁵⁷ The Commission’s most recent effort to reform the badly broken intercarrier compensation regime, moreover, has languished for almost six years, notwithstanding nearly universal criticism of the current approach.⁵⁸ Under these circumstances, it is not credible that the proposed cap, if adopted, would be either “interim” or “temporary.”⁵⁹

⁵⁵ See generally *Federal-State Joint Board on Universal Service* et al., 16 FCC Rcd 11244 (2001).

⁵⁶ *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 21252, 21257 ¶ 10 (1998).

⁵⁷ See generally *Universal Service Contribution Methodology* et al., 21 FCC Rcd 7518 (2006); *Federal-State Joint Board on Universal Service* et al., 17 FCC Rcd 24952 (2002).

⁵⁸ See generally *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

⁵⁹ See generally RD, Dissenting Statement of Commissioner Michael J. Copps (“In the best-case scenario under the proposed cap, even if the Joint Board acts within six months on fundamental reforms and the FCC then proceeds to adopt some version of those reforms in a year, it will be 18 months – autumn of 2008 – before we even have a strategic long-term plan from the FCC for (continued on next page)

V. THE PROPOSED CETC-ONLY CAP WOULD NOT BE TECHNOLOGICALLY NEUTRAL.

The Commission has consistently and repeatedly made clear the value it places on technological neutrality, both in general and with regard to universal service policy in particular. Chairman Martin has stated that “[r]egulation must not have the effect, unintended or otherwise, of favoring the adoption of certain technologies over others.”⁶⁰ Commissioner Copps has emphasized that “[t]he role of government” in an age of intermodal competition “is not to pick winners and losers,” because “[g]overnment is poorly equipped for that job.”⁶¹ Commissioner Adelstein has also cited the importance of “adopt[ing] a consistent approach” for providers of broadband Internet access services.⁶² Commissioner Tate has expressed her goal of “work[ing] to create and maintain a regulatory landscape that is fair and technology neutral”⁶³ and of placing

universal service reform. If the past is prologue, coming to FCC consensus may take far longer than that, not to mention any legislative changes that may be suggested.”).

⁶⁰ Remarks of FCC Chairman Kevin J. Martin, TELECOM 05 Conference, United States Telecom Association, Las Vegas, NV; Delivered via Satellite from Washington, DC, 2005 FCC LEXIS 5797 (October 26, 2005) (emphasis added). *See also* Remarks by Commissioner Kevin J. Martin Federal Communications Commission to the Santa Fe Conference of the Center for Public Utilities Advisory Council, Santa Fe, New Mexico, 2003 FCC LEXIS 1797 (March 18, 2003) (citing Commission’s agreement with the principle that “the government should not pick winners and losers among rival technologies or industries”).

⁶¹ Remarks of Commissioner Michael J. Copps, OECD Conference on the Future Digital Economy, Rome, Italy, 2006 FCC LEXIS 576 (January 30, 2006).

⁶² *See United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006), Concurring Statement of Commissioner Jonathan S. Adelstein (“*BPL Order*”).

⁶³ “A Rewrite for the 21st Century,” Tennessee Telecommunications Association; Commissioner Deborah Taylor Tate, 2006 FCC LEXIS 2156 (May 2, 2006). Commissioner Tate also praised the Commission’s 2006 *Contribution Order* on the ground that it would “ensur[e] that services are treated in a technology-neutral manner.” *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7667 (2006) (“2006 *Contribution Order*”), Statement of Commissioner Deborah Taylor Tate.

competing services “on a level playing field.”⁶⁴ Finally, Commissioner McDowell has noted the importance of “ensur[ing] that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor.”⁶⁵

For these reasons, the Commission has stated that it “is committed to the principle of technological neutrality in its regulatory requirements.”⁶⁶ The Commission has applied this principle in the universal service context since its very first order interpreting Section 254. In that order, the Commission adopted competitive neutrality as an explicit guiding principle for universal service reform: “Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules *neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.*”⁶⁷ Indeed, the Commission expressly cited the importance of promoting entry by intermodal competitors:

By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective.... We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers,

⁶⁴ *BPL Order*, Statement of Commissioner Deborah Taylor Tate, 21 FCC Rcd at 13298.

⁶⁵ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (rel. Mar.5, 2007), Statement of Commissioner Robert M. McDowell. *See also id.* (“We should never let government inaction create market distortions.”).

⁶⁶ *Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones*, 18 FCC Rcd 16753, 16783 ¶ 76 (2003).

⁶⁷ *First Universal Service Order*, 12 FCC Rcd at 88901 ¶ 47. Similarly, in its recent order classifying BPL-enabled Internet access services as “information services,” the Commission asserted that “saddling this service with conditions that do not apply to other competing forms of broadband Internet access services would create a regulatory disparity antithetical to our creation of a level playing field for all modes of this service.” *BPL Order*, 21 FCC Rcd at 13290-91 ¶ 16.

including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms if we had interpreted universal service eligibility criteria so as to favor particular technologies.⁶⁸

Any regime that rejected this principle, the Commission has since recognized, would result in “[u]nequal funding [that] could discourage competitive entry in high-cost areas and stifle a competitor’s ability to provide service at rates competitive to those of the incumbent.”⁶⁹

Notwithstanding virtually ubiquitous support for technologically neutral policy, the Joint Board has put forth a recommendation that takes aim squarely at wireless providers. The Joint Board’s suggestion that its proposed CETC-only cap is not “based on the ETC’s chosen technology” is mistaken: While carriers using any platform might be eligible for ETC designation, nearly all high-cost support distributed to CETCs is collected by *wireless* providers. According to USAC data, wireless providers received about 95 percent of all CETC high-cost support distributed between 1998 and 2005 (but still only about 5 percent of all high-cost support disbursed in that period). In contrast, there are *no* wireless incumbent LECs. Thus, the burdens associated with any CETC cap (interim or otherwise) will be borne almost exclusively by wireless providers, and those wireless providers will enjoy none of the benefits associated with maintaining existing support levels for incumbent LECs. The Commission should make no mistake: A CETC cap would disproportionately affect wireless ETCs.

VI. EVEN IF THE COMMISSION WERE TO ADOPT A CAP, IT WOULD FIRST NEED TO CURE SEVERAL CRITICAL DEFICIENCIES.

If the Commission were to adopt a cap notwithstanding the legal and policy concerns addressed above, it would first need to remedy several serious problems relating to the cap’s

⁶⁸ *USF First Report and Order*, 12 FCC Rcd at 8802-03 ¶ 50.

⁶⁹ *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432, 20480 ¶ 90 (1999).

implementation. Rather than a CETC-only cap, the Commission would better adopt a cap on all recipients of high-cost support. Barring that, the Commission would need to correct the arbitrary retroactive “base period” proposed by the Joint Board, and permit capped CETCs to amend their service improvement plans without penalty. The Commission also should guarantee by rule that an interim cap is in fact interim by sunseting the cap one year from adoption.

A. Any Cap Must Apply Equally to All Recipients of High-Cost Support

As discussed above, one of the primary reasons the proposed cap violates so many statutory and policy precepts is that it would apply only to CETCs. If the Commission concludes that a cap is necessary in order to control the size of the fund in the near term, it could avoid many of the problems with the CETC cap proposal by adopting an overall cap on high-cost support, equally applicable to all funding recipients. Most significantly, an overall cap would be both competitively neutral and technologically neutral, as it would not fall by design only on a particular class of providers (CETCs) that overwhelmingly use a particular technology (mobile wireless) in order to provide the supported services.⁷⁰

If adopted, the nondiscriminatory cap would be set at the total amount of high-cost support (*e.g.*, high-cost loop support, safety net and safety valve support, local switching support, interstate common line support, model-based support, and interstate access support) currently provided to *all* ETCs (including incumbent LECs and competitive ETCs alike) in the state. Support would be apportioned within each state quarterly based on total lines served within the state. Consider, for example, a state that currently is served by an incumbent LEC serving 10,000 lines and receiving \$5,000 per month in support, and two wireless competitive ETCs,

⁷⁰ Applying an overall cap would be equitable in conjunction with the existing caps applicable to certain support mechanisms. RD at ¶ 5.

Wireless Carrier A serving 2,500 lines and receiving \$1,250 per month and Wireless Carrier B serving 3,000 lines and receiving \$1,500 per month. The support cap for that state would be the total support received by all three carriers, or \$7,750 per month. Each quarter, if any of these three carriers' line counts changed, the total support of \$7,750 per month would be reallocated based on all three ETCs' line counts. If an additional ETC was designated in the area in a subsequent quarter, its line counts would be added to the equation, and the \$7,750 in support would be divided proportionally among the four ETCs. The Interstate Access Support mechanism is a model for how such a cap would operate over time. In contrast, it is unclear how Interstate Access Support would be apportioned under the cap proposed by the Joint Board.

An overall cap would serve the same purposes as the proposed CETC cap – it would stop further growth in the fund, to the extent that is necessary,⁷¹ and provide time for the Joint Board to formulate a recommendation for further reform.⁷² Furthermore, it would do so in a competitively and technologically neutral manner. Given that such an alternative exists, it would be difficult for the Commission to adopt a CETC-only cap, given the considerable problems with such a proposal.

B. Adoption of the Proposed 2006 Base Period Would Be Arbitrary and Capricious.

First, even setting aside other flaws in the proposed cap, adoption of the 2006 base period proposed by the Joint Board⁷³ would be arbitrary and capricious. In many or most states, this approach would reduce the amount of support below that received in 2007. In states where the

⁷¹ See generally Comments of CTIA-The Wireless Association®, WC Docket No. 05-337 (filed May 31, 2007) at 3-4.

⁷² See RD at ¶ 5.

⁷³ See RD at ¶ 13.

number of CETCs grew during 2006 or 2007, moreover, the retroactive base period would have the effect of reducing all CETCs' support levels. Although PUCs can decide going forward whether designation of additional ETCs is appropriate during the effectiveness of a cap, the use of a 2006 year-long average will result in immediate, varied, and arbitrary reductions in support in any area where any designations have occurred in 2007 or even the latter part of 2006, which states are powerless to mitigate. Even in states with no new CETCs, the results would still be arbitrary and capricious: Far from a "cap," the policy recommended by the Joint Board would represent a *reduction* in support. That reduction, furthermore, would have no rational basis whatsoever – the Joint Board appears to have selected the 2006 base simply because it would further reduce support to CETCs.

If the Commission opts to impose the Recommended Decision's proposed cap, therefore, it must revise the base period urged by the Joint Board to reflect funding levels that are "current" as of the cap's effective date. CTIA proposes use of support levels in the most recent full quarter preceding the cap's effective date. This base period would be consistent with the Joint Board's concern that support should be based on "actual support amounts, rather than ... USAC projections," while also mitigating the arbitrary and capricious reductions in funding that would stem from a less recent base period.

C. Whatever Base Period Is Selected, the Commission Must Permit CETCs to File Revised Service Improvement Plans if it Adopts a Cap.

If an artificial CETC-only cap is adopted, wireless ETCs should be permitted to revise their buildout plans to reflect significant reductions in current and future high-cost funding. Under the proposed base period, the proposed cap would significantly reduce CETC funding from the amount that would otherwise have been received this year. Even if the base period is corrected as proposed above, the position of CETCs will deteriorate over time: The gap between

the amount a CETC expected to collect from the Fund and the amount it actually received will grow, as will the difference between the amount collected by the CETC and the amount collected by the incumbent against which it is attempting to compete. Under these circumstances, CETCs cannot be expected to adhere to network buildout plans conceived before the cap was enacted. Those plans presumed a regime that will have ceased to exist. The Commission should permit CETCs subject to the cap to refile their service improvement plans to reduce or eliminate planned network buildout without penalty – and it should require state PUCs to do the same.

CONCLUSION

For the reasons described above, the Commission should reject the Joint Board's Recommended Decision, and move immediately toward long-term, competitively neutral reform of the high-cost distribution mechanism.

Respectfully submitted,

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