Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

COMMENTS OF
THE NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES
ON THE IDENTICAL SUPPORT RULE

I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these comments on the issues regarding the so-called "identical support" rule, pursuant to the Notice of Proposed Rulemaking ("*Identical Support NPRM*") issued in the above-captioned dockets.[2] The identical support rule awards federal high-cost universal service fund ("USF") support to competitive eligible telecommunications carriers ("CETCs") based on the costs of the incumbent local exchange carrier ("ILEC") in whose territory the CETC seeks support, rather than on the CETC's own costs or some other basis. The Federal Communications Commission ("FCC" or "Commission")

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[1] NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[2] FCC 08-4 (rel. January 29, 2008).

released the *Identical Support NPRM* based, in part, on the conclusions reached in 2007 by the Federal-State Joint Board on Universal Service ("Joint Board") regarding the need to control USF fund growth immediately in order to preserve and protect the future sustainability of the fund. Those concerns continue to exist.

Specifically, on May 1, 2007, the Joint Board issued a recommended decision that requested the Commission place a cap on high-cost fund payments to CETCs.[3] In the *2007 Cap Recommended Decision*, the Joint Board also asked the FCC consider abandoning or modifying the identical support rule in any comprehensive reform it ultimately adopts, stating, "The identical support rule seems to be one of the primary causes of the explosive growth in the fund."[4] In addition, the Joint Board issued a Public Notice that sought comment on comprehensive high-cost reform, including "whether the Commission should replace the current identical support rule with a requirement that competitive ETCs demonstrate their own costs in order to receive support."[5]

At the same time it issued the *Identical Support NPRM*, the FCC also released two other USF NPRMs, one regarding the use of reverse auctions for the high-cost USF[6] and the other addressing more generally other high-cost USF issues raised by the November 2007 Joint Board Recommended Decision.[7] Upon the simultaneous release of

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[3] *High-Cost Universal Service Support*, WC Docket No. 05-337*; Federal-State Joint Board on Universal Service*, CC Docket No.96-45 ("05-337/96-45"), Recommended Decision, FCC 07J-1, 22 FCC Rcd 8998 (Fed.-State Jt. Bd. 2007) ("*2007 Cap Recommended Decision*"), ¶ 1.

[4] Id., ¶ 6.

[5] 05-337/96-45, Public Notice, FCC 07J-2, 22 FCC Rcd 9023, 9026, ¶ 7 (Fed.-State Jt. Bd. 2007) ("*2007 Joint Board Public Notice*"). The Joint Board also sought comment on other possible avenues of comprehensive high-cost reform. Id. at 9024-27, ¶¶ 3-8.

[6] FCC 08-5 (rel. January 29, 2008) ("*Reverse Auctions NPRM*").

[7] FCC 08-22 (rel. January 29, 2008) ("*Comprehensive Reform NPRM*"), requesting comment on Recommended Decision, FCC 07J-4 (Fed.-State Jt. Bd. 2007) ("*Comprehensive Reform Recommended Decision*").

the three companion Public Notices, the Commission has teed up issues that must be dealt with in the near future.

Yet the Commission has not yet imposed a USF high-cost funding cap as recommended by the Joint Board, which would allow adequate time for the Commission to weigh the issues before it, and to make appropriate decisions to protect the universal service funding that guarantees essential telecommunications services for all Americans. It is imperative that the FCC recognize the threat posed by the continuation of funding under the identical support rule, as clearly expressed by the Joint Board in its recommendations, and impose an immediate cap on the high-cost universal service fund ("USF"), in addition to eliminating the identical support rule and ceasing support for duplicative networks as a long-term solution. The FCC should follow up its promise of reform with immediate action to impose an appropriate cap for USF funding until such time as it takes action to truly reform the system.

Meanwhile, the Commission's decision to release three separate Public Notices simultaneously regarding the Joint Board's recommendations for reform, the elimination of the identical support rule and the use of auctions to award future high cost funding represents an essentially disjointed approach to the problem. This despite the Commission's determination to incorporate the records from this Notice, addressing the identical support rule and the Notice on reverse auctions (FCC 08-5) into the broader inquiry on the *Comprehensive Reform Recommended Decision*.[8]

NASUCA's comments here will focus on the fact that the recommendations contained in the *Identical Support NPRM* present irreconcilable differences with the Joint

[8] *Comprehensive Reform NPRM*, ¶ 1.

Board recommendations in the *Comprehensive Reform Recommended Decision*. NASUCA opposes the adoption of the detailed proposals for elimination of the identical support rule contained in the NPRM, until the Commission has acted on the far-reaching reform proposals submitted by the Joint Board. This includes the Joint Board's recommendation on ceasing to support duplicative networks.[9]

Should the Commission decide to abandon its goals for long-term reform as put forth by the Joint Board, including no longer supporting duplicate networks, the FCC's proposals for basing ETC funding on each individual carrier's actual costs are a clearly inferior alternative. In that event, however, the proposals in the *Identical Support NPRM* appear to be generally palatable. Whether or not the Commission considers moving forward with substantive, long-term USF reform, the Commission should make it clear that its proposals regarding the elimination of the identical support rule will constrain the funding that is currently being received under the existing high-cost rules.

II. DISCUSSION

The *Comprehensive Reform Recommended Decision* recommends changing the current high-cost fund into three separate funds: a Broadband Fund, a Mobility Fund, and a Provider of Last Resort ("POLR") Fund.[10] The services supported by the funds would be different, with the POLR Fund supporting wireline telephone service.[11]

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[9] *Comprehensive Reform Recommended Decision*, ¶ 35.

[10] Id., ¶ 11.

[11] Id.

Crucially, however, the Joint Board recommended that the POLR Fund be limited to high-cost support for incumbent carriers.[12] Under these circumstances, there would be no need for an identical support rule at all, because support would be limited to "only one carrier in any geographic area."[13] Thus it would not be necessary to calculate support for carriers other than the incumbent under the POLR Fund.

That aside, NASUCA agrees with the conclusions of the FCC that there is no basis for providing CETC support based on the incumbent's cost.[14] However, the replacement of the dollars awarded to CETCs under the identical support rule with actual CETC carrier costs fails to deal with the larger issues at stake here, including the fundamental question whether the Universal Service Fund should be supporting duplicate networks within geographical areas that are presumably unable to support a single network without support. Likewise, the rule changes proposed in this Notice ignore the recommendations of the Joint Board that existing wireless ETC funding should be capped and transitioned to a new mobility fund over a period of time.[15]

The Commission correctly points out that, in hindsight, the Joint Board and the Commission erred in 1996 and 1997 when they each recommended the identical support rule to achieve competitive neutrality.[16] The FCC also correctly points out that the Joint Board and the FCC both erred in assuming that ETCs and incumbent LECs would engage

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[12] Id., ¶¶ 19, 43.

[13] Id., ¶ 43; see also id., ¶ 37.

[14] *Identical Support NPRM*, ¶ 5.

[15] Id., ¶ 1; *Comprehensive Reform Recommended Decision*, ¶ 28.

[16] *Identical Support NPRM*, ¶¶ 8-9. NASUCA would remind the Commission that the goal of competitive neutrality for the USF, which spawned the identical support rule, was a Joint Board and FCC construct that was not specified in the 1996 Act. Id., ¶ 2.

in a vigorous competition to become the sole provider of telecommunications services to customers.[17]

NASUCA agrees with the Commission that both bodies erred in their assumptions regarding competition. NASUCA's view is that the combination of the identical support rule and the support of multiple terminations within the same household provided a built-in magnet for CETCs to engage in uneconomic market exploitation at the expense of the customers who are burdened with the funding of the program. The CETCs who benefited from the identical support rule -- principally wireless carriers -- were simply following the incentives afforded by the regulatory process.

Further, the Commission accurately states that "rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service *in addition to* a customer's existing wireline service."[18] Wireless service is not generally a substitute for wireline basic telecommunications services.[19] Indeed, preservation of future wireless telecommunications services depends significantly on the availability of major portions of the existing wireline telecommunications network. As such, given the interdependency of wireline and wireless networks in responding to the telecommunications needs of today's customers, the Joint Board has recommended

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[17] Id., ¶ 9.

[18] *Identical Support NPRM*, ¶ 9 (emphasis added).

[19] The *Identical Support NPRM* cites a 2005 study to the effect that approximately 8% of total U.S. households relied exclusively on wireless service. Id., n.27. More recent data indicates that 13.6% of **wireless** households have no wireline phone. Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January – June 2007," Division of Health Interview Statistics, National Center for Health Statistics (rel. December 10, 2007), accessible at www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200712.pdf. (This does not translate into 13.6% of total households having only a wireless connection.) The vast majority of households under either estimate still rely principally on wireline service.

separate funding for both traditional wireline telecommunications services and mobility services. NASUCA agrees with that recommendation.[20] Yet if wireless is not a substitute for basic local service, then that service should not be considered for universal service funding under the current mechanism, which effectively includes the burden of assuming the carrier of last resort obligation within any area where ETC authorization is received.[21]

In this NPRM, the Commission seemingly ignores the notion of separate funds by endorsing the concept that identical support within a single fund be replaced by support based on actual carrier costs.[22] This appears to assume the support of multiple networks in any single area. In the Joint Board's recommendation regarding comprehensive USF reform released on November 20, 2007, the Joint Board stated, regarding the identical support rule:

> The Joint Board recognizes that the identical support rule has resulted in the subsidization of multiple voice networks in numerous areas and greatly increased the size of the high-cost fund…. We believe it is no longer in the public interest to use federal universal service support to subsidize competition and build duplicate networks in high-cost areas…. [W]e recommend that the Commission eliminate the identical support rule.[23]

If the Commission is going to accept the expert opinions of its own Joint Board, then the FCC should have moved in this Public Notice not only to eliminate identical support, but also to eliminate support for duplicate networks in high-cost areas. In the *Identical Support NPRM*, the Commission, in reaching this conclusion, has failed to make it clear

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[20] As will be seen in the comments in response to 08-4, the details of the proposal remain up in the air.

[21] 47 U.S.C. § 214(e)(1).

[22] Id., ¶ 11. NASUCA also consistently supported the use of actual carrier costs for CETCs *in the context of the current unified fund*. See, e.g. 96-45, NASUCA ex parte (April 6, 2007), Appendix A at 5. If the fund remains unified, this concept grows in importance.

[23] *Comprehensive Reform Recommended Decision*, ¶ 35.

how it intends to address both the reform issues and the limited "fix" that would be provided by elimination of the identical support rule.

In order for the Commission to extract itself from the quandary it has created, NASUCA would suggest that the Commission clarify that elimination of the identical support rule under these proposed regulations would apply only to the funding (which should be capped) that is being received by ETCs under the current rules. In other words, in order to continue to receive support under the existing rules, and subject to all other future actions such as capping of support or transitioning to a mobility fund, the maximum support provided to ETCs should be their actual costs. Based on the other reform possibilities that may be adopted by the Commission, the actual funding provided to ETCs in the future could be less than their actual costs, but not more.

It should also be mentioned that there is one specific aspect of the high-cost support mechanism where equal support makes less than no sense. That is the interstate access support ("IAS") mechanism, which arose from the CALLS Order.[24] IAS was designed to replace the revenue losses resulting from reductions in interstate access charges. Providing IAS to CETCs that never depended on those access revenue streams, and to wireless carriers especially, **which do not receive access charges at all**, elevates support for competition beyond any reason.

Overall, if there is to be more than one carrier funded in a particular area, however, the funding to CETCs should also be capped at the ILECs' cost.[25] It makes no economic or other sense for the Commission to subsidize competition in a high-cost area.

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[24] *In the Matter of Access Charge Reform*, CC Docket No. 96-262, et al., Sixth Report and Order, et al., FCC 00-193, 15 FCC Rcd 12962 (2000) ("*CALLS Order*") ("CALLS" stood for the so-called Coalition for Affordable Local and Long distance Service.)

[25] See, e.g. 96-45, NASUCA ex parte (April 6, 2007), Appendix A at 11.

If the Commission is to achieve true USF reform, it should be considering both elimination of the identical support rule and reining in the support of duplicate networks in high cost areas, at the same time and in the same order. That would be consistent with the Joint Board's November 2007 recommendations.

Concerning the remainder of the FCC's NPRM, NASUCA would defer at this time to the input regarding the specific procedures used for future calculation of ETC costs to the comments that will be received from stakeholders and others.[26] If the other more substantive and crucial reforms to the USF are not adopted, NASUCA tentatively concurs in the Commission proposals, but would like to see how others will respond to those proposals before commenting on them.

Respectfully submitted,

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[26] On January 25, 2008, Panhandle Telecommunications Systems, Inc. filed such a proposal.