

**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
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

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SUMMARY

The principle and complementary objectives of the 1996 Telecommunications Act are the introduction of competition for local service and the promotion and preservation of Universal Service. RICA member rural CLECs responded quickly to the will of Congress by instituting facilities based competitive wireline services in areas long neglected by the large ILECs. Following passage of the 1996 Act, the Commission has continually eroded the financial feasibility of further extension of competitive service by a combination of decisions. First, it adopted the identical support rule, which, in combination with the state average cost rule for non-rural ILECs means that rural CLECs operating in low density, high cost areas of average cost states often receive no support. Then, it reduced NECA access rates by shifting so-called “implicit” support to the USF for pool members, but denied support to rural CLECs using the NECA rate as a benchmark. The result is that the benefits of competitive wireline service are essentially unavailable to many rural communities.

Now the Commission is considering a Joint Board recommendation to eliminate all USF support for wireline CETCs such as rural CLECs, but preserve support for wireless CETCs through a separate mechanism. This recommendation makes no sense as a response to the explosive growth of support to CETCs, since over 90% of that growth is attributable to the wireless carriers. The Joint Board’s recommendation is not only bad public policy that will serve to further degrade service in rural areas and prevent the deployment of broadband capable facilities, but is inconsistent with the intent of Congress expressed in Sections 214 and 254 of the Act. These sections contemplate that multiple ETCs will be eligible for support, at least in the area of non-rural telephone

companies. Even if the Commission had the authority to select a single wireline carrier to receive USF in a given area—and RICA believes it does not—there would be no justification for the Joint Board’s proposal that the ILEC should be conclusively presumed to be the recipient.

RICA does agree that there should be separate USF mechanisms for wireline and mobile wireless carriers. Even though the two technologies have some overlapping service capabilities, each also has unique capabilities and they have very different cost structures. These differences mean that “identical support” is not competitively or technologically neutral.

RICA also believes that ubiquitous deployment of broadband capability is critical to the economic and social success of rural communities, and its members generally offer broadband to all or most subscribers. Unfortunately, adoption of the proposal for a broadband fund would be unlikely to advance the goal of universal broadband service, because the proposal fails to follow the requirements of the 1996 Act. In particular, the Joint Board fails to demonstrate that broadband services are subscribed to by a “substantial” majority of residential subscribers. In addition, a myriad of practical issues are not satisfactorily addressed. The radical proposal to change USF support from a cost recovery mechanism to a grant of capital funds is a recipe for short-term windfalls and long term collapse. Finally, the apparent “top-down” funding estimate of \$300 million shows no connection with any rational attempt to determine how much support for broadband would be “sufficient” and fails to reconcile any amount with the total USF after all revisions, including action on the remand in *Qwest v. FCC*.

RICA has long supported elimination of the identical support rule because it precludes support in many high cost areas and is not competitively neutral. Elimination of the state average rule for non-rural carriers alone would not resolve the lack of support because the Commission's model does not accurately predict the cost of any particular rural area. Conversion to a system of cost-based USF for all carriers will both more accurately target support to where it is needed, and permit meaningful enforcement of the "use of support" requirement of the Act. Cost definition rules and support algorithms should be appropriate for the type of carrier, i.e., separate for wireless and wireline. In this respect the proposals by GVNW and Panhandle Telecommunication Systems, Inc., respectively, are worth of consideration.

The Commission should reject the proposals to deny ICLS and LSS to rural wireline CLECs. The rationales for these proposals are without basis and would provide a competitive bias in favor of ILECs. Nor should rural CLEC support be capped at the per-line support of the competing ILEC, as that would often produce "insufficient" support and effectively reinstate the "identical support" rule by another name. Finally, while states may participate in the process of determining carrier's costs, the Commission does not have clear authority from Congress to delegate any decision making authority in this area.

The proposal to allocate USF support by competitive bidding should also be rejected. The substantial and serious concerns placed on the record over many years have simply not been addressed, or often even acknowledged in the current proposal. There is no guidance as to how to develop the detailed performance specifications to be required of the winning bidder, how contracts would be negotiated, or how performance would be

supervised. Nor is there any discussion of the difficulties associated with auctioning off the revenue stream of entities that have made major capital investment in fixed facilities, as opposed to “Greenfield” situations encountered in developing countries. Finally, competitive bidding for USF support will give the large ILECs the power to destroy any small company they happen to think is in their way, thus rewarding them for their long, documented history of ignoring most rural areas unless a particular one becomes attractive.

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**COMMENTS OF THE
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The Rural Independent Competitive Alliance (“RICA”) files its Comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in these proceedings, FCC 08-22 and the two incorporated NPRMs, FCC 08-4 and FCC 08-5, all released January 29, 2008. The Commission invites comments respectively on the Joint Board’s Recommended Decision, FCC 07J-4, released November 20, 2007; the Commission’s tentative conclusion to eliminate the “identical support” rule; and a proposal to determine high cost support by competitive bidding.

In recognition of the Commission’s intent to preserve the positions of its members with respect to the particular NPRMs, RICA’s Comments will attempt to address each of the NPRMs in turn. Nevertheless, because the subject matter of each of the three NPRMs is closely interrelated and often overlapping and/or mutually exclusive, it will not be possible to construct completely separate comments.

I INTRODUCTION AND BACKGROUND

RICA members are rural CLECs that provide telecommunications in low-density, high-cost areas that have essentially the same characteristics as the nearby areas served by their affiliated rural ILECs. When Congress amended the Communications Act in 1996 with the intent to permit and promote competition for local exchange service, RICA members answered the call. Their rural ILEC parents had for many years provided service quality well above that available to customers of the neighboring non-rural ILECs which produced constant requests for their service that could not be provided under pre-1996 law. With restrictions on competition removed, the rural ILECs created CLEC affiliates that responded to those service requests by largely overbuilding the non-rural companies' outside plant and quickly obtained substantial majority market share.

RICA members have constructed modern facilities designed to meet the basic and advanced telecommunications needs of the rural communities. In so doing, RICA members have made substantial investments in these areas, but are often not eligible for the Universal Service Support that a rural ILEC would be if it were serving the same communities with the same investment and expenses.¹ Because of the unavailability of USF in circumstances in which it would be available to a rural ILEC, as well as the Commission's arbitrary decision to reduce their access revenues below the level of many

¹ The lack of equivalent support for carriers with equivalent cost was exacerbated in the Commission's *MAG* Order which reduced the NECA common line rate to which most rural CLEC rates were benchmarked, while providing an offsetting increase in USF support to rural ILECs, but not rural CLECs. *Federal-State Joint Board on Universal Service, and Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, and Report and Order in CC Doc. No. 00-256, 16 FCC Rcd 11244 (2001). *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004).

rural ILECs, RICA members have been unable to fulfill their initial promise. As a result many rural areas served by large carriers continue to lag behind urban areas economically and socially because the only telecommunications services available are unreliable and obsolete basic services without broadband capability. RICA urges the Commission to revise its policies in order to comply with the purpose of the 1996 Act so that rural CLECs are better able to make advanced services ubiquitous.

II COMMENT ON THE JOINT BOARD'S RECOMMENDED DECISION

A. The Commission Must Reject the Joint Board's Recommendation to Eliminate Universal Service Support for Wireline CLECs as Bad Public Policy and Contrary to the Communications Act.

Of all the proposals set out for comment in the three related NPRMs, the one obviously of most concern to RICA members is the Joint Board's proposal to exclude wireline Competitive Eligible Telecommunications Carriers ("CETCs") from eligibility to receive any High Cost support.² Instead, the incumbent local exchange carrier ("ILEC") would receive any support due for the particular area. The public policy effects of this recommendation would be devastating to customers in many rural areas because all the benefits of improved communications to the public would be lost and the ILEC would be free to return to ignoring its rural areas. The recommendation is inconsistent with the Act. Sections 214 and 254 of the Communications Act plainly do not contemplate such a result, nor would provision of support to ILECs only be consistent with the principle of Competitive Neutrality that the Commission adopted.

² Recommended Decision at para. 43. The Board suggests the Commission examine continuing support during a transition period, but the end result will be the same: no support. The Identical Support NPRM, however, proposes to eliminate IAS/ICLS and LSS, but retain high cost loop support for CETCs.

The Joint Board provides no rationale for its recommendation other than it believes that its proposed Provider of Last Resort (“POLR”) fund should support only one carrier in any geographic area. There is no apparent recognition that rural CLECs receive only a few per cent of the total USF paid to CETCs. There is no analysis of the impact on rural communities where USF today makes modern service possible, much less any recognition that in the future, rural subscribers will be at the mercy of the large ILECs which have historically provided only obsolete and unreliable 1960s technology communications services and no local contact persons.³

As discussed below, RICA agrees that the Act permits, and may even require, the Commission to treat different types of carriers differently in determining USF support, and has long argued that wireless carriers have material differences in cost characteristics such that basing their support on a wireline carrier’s cost is neither rational nor competitively natural. However, because Section 214(e) requires the designation of additional ETCs in the areas of non-rural ILECs, it cannot be that Congress intended that such carriers could never receive USF support.

RICA does not oppose the separation of wireline and wireless high cost support so long as support is available to rural CLECs. As described below, such support should be based on the carrier’s own cost. Even if, *arguendo*, the Act permitted the Commission to support only one carrier, or one wireline carrier, in an area, there is no justification for automatically selecting the ILEC. In the areas served by RICA member rural CLECs, their service is invariably far superior to that of the ILEC; the CLEC would not exist

³ If the Commission were to adopt the Joint Board’s proposal to make CLECs ineligible for USF support, there would be no need for consideration of the auction or identical support NPRMS with respect to wireline service.

otherwise. If there is to be only one wireline recipient of support, the Commission must first adopt an objective, competitively neutral procedure for selecting the recipient based on an evaluation of which carrier provides the most benefit to the public and resolves the problems of different services areas. As described in Section IV, below, competitive bidding is not the answer to this problem. The Recommended Decision makes no mention of any of these concerns, although all have been previously pointed out to the Joint Board and the Commission on multiple occasions.

B. RICA Supports the Creation of Separate Funding Mechanisms, At Least for Wireline and Wireless, but each Fund Must Itself Meet the Act's Requirements.

The Recommended Decision proposes splitting High Cost USF Support into three separate funds: Broadband, Mobility and Provider of Last Resort (“POLR”).⁴ Each fund would have its own distribution method and funding allocations. RICA agrees with this approach on a public policy basis, however as discussed in Section B 1, below, there are legal and practical problems with a separate broadband fund that the Recommended Decision fails to resolve. On the other hand, separation of mobile and wireline carrier support should be relatively straightforward and would greatly improve competitive neutrality as opposed to the present system.

RICA member rural CLECs, like their affiliated rural ILECs, have consistently been in the forefront of finding innovative means to create a level of broadband deployment that greatly exceeds that of the large ILECs in rural areas.⁵ RICA

⁴ Recommended Decision, para. 11.

⁵ In some cases the large carriers to provide broadband, usually using DSL technology, in rural towns, but the service is hardly ever available outside of the towns. As RICA has explained before, farmers in the United States generally live on their farms and so get no benefit from town-only services.

member companies' management lives in the rural communities they serve and understands that full participation of rural residents and businesses in the information age is possible only with access to high speed Internet services made possible by broadband services.

RICA members have a vital interest in ensuring that any broadband specific USF program functions in a way that it actually enables deployment of broadband in more rural areas over the long haul, and will survive any legal challenges. Because broadband is so critical to the economic and social health of the communities they live in, RICA member rural CLECs' incentives to ensure its availability are qualitatively and quantitatively different from that of the management of a large corporations headquartered in distant cities, often in another state, that has as its first priority optimizing the return on its shareholders' investment. Of course, no business can invest in facilities and provide broadband service if it has no opportunity to earn a return on its investment, but given a rational regulatory framework RICA members can substantially contribute to meeting the national goal of widespread deployment of broadband in rural areas. The large companies have demonstrated over 120 years that they will always minimize rural investment to no more than is explicitly required and strictly enforced. To accept the Joint Board recommendation to provide USF to these companies and not rural CLECs would be to totally ignore this history and make a mockery of the purposes of the 1996 Act.

1. **The Proposed Broadband Fund Would Not Be Consistent With the Act**

Section 254(c) establishes four criteria for designation of telecommunications services that are supported by USF: essential to education, public health or public safety;

have been subscribed to by a substantial majority of residential subscribers; are deployed in public telecommunications networks by telecommunications carriers; and are consistent with the public interest convenience and necessity. Although the question was raised a few years ago whether broadband is “essential,” RICA believes that given the educational, health and safety services now being deployed, broadband can legitimately be termed essential. In addition, there is no question telecommunications carriers are deploying broadband services in public telecommunications networks, even though broadband services are also being widely deployed by non-carriers. Finally, for reasons described above, deployment of broadband is certainly consistent with the public interest, convenience and necessity as that term has been understood historically.

The problem for the Joint Board’s proposal is the third requirement for subscription by a “substantial” majority of residential subscribers. The Joint Board states the substantial majority test is met because “[m]ore than half of the households in the United States currently subscribe to “broadband Internet service.” The Recommended Decision cites the Commission’s October, 2007 status report, without specifying on what it relied for the conclusion that there is a substantial majority.⁶ Whatever “substantial majority” means, it must mean more than “more than half”. Substantial in this context at least means “considerable in quantity.”⁷

⁶ Recommended Decision at para. 59. The table cited refers to the number of zip codes with broadband service, not the percentage of residential households with broadband service. A recent study concluded that forty nine percent of U.S. adults have a broadband connection in their household, which is not the same measure as the percentage of households with broadband. *See*, Scarborough Research, The Need for Internet Speed: Broadband Penetration Increased More Than 300% Since 2002, April 15, 2008, www.scarborough.com.

⁷ The Commission has previously addressed the closely related term “substantially” in the context of CALEA and Section 251(h)(2) of the Act, with somewhat different

The Joint Board apparently also intends that the Commission not require recipients of broadband support to offer all of the supported services.⁸ Section 214(e) states, however, that ETCs “shall....offer the services that are supported by Federal universal service support mechanisms.” Perhaps the Joint Board concluded that “offer the services” doesn’t mean offer all the services, but it doesn’t say so, it says only that is not what it intends. At best the Commission cannot adopt this recommendation without developing a statutory analysis as to whether there can be multiple differing lists of supported services under the Act and whether carriers can receive support by providing only the services on one list.

Even if some ETCs can be required to provide only a subset of the total list of supported services, an additional problem is raised by the requirement that an ETC offer the supported services “throughout the service area for which the designation is received.”⁹ This requirement standing alone might provide for states (and the Commission) to designate broadband specific services areas, however it is constrained by Section 214(e)(5) in the case of areas served by rural telephone companies which at least requires separate proceedings before both the state and the Commission, and apparently a Joint Board recommendation.¹⁰ Should the Commission determine to proceed along this

results, but in both cases there was no implication that substantial could mean any amount above 50%. See, *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, 21 FCC Rcd 11506 (2006) at para 15 and n. 44. The Commission there cited a Dictionary definition of substantial as “pertaining to the essence of a thing,” but the alternative dictionary definition “considerable in quantity” is by context and statutory intent the appropriate meaning.

⁸ Recommended Decision para. 68.

⁹ 47 U.S.C. 214(e)(1).

¹⁰ The authority in Section 214(e)(5) of the Commission and the States to adopt a different definition of “service area” than the study area of a rural telephone company is

route, it should develop specific guidelines for state broadband ETC designations as it has for CMRS providers to minimize the opportunity for cream skimming.

The Recommended Decision on the one hand states that the fund would be used for grants to construct new broadband facilities,¹¹ but that the additional supported service would be “broadband Internet service.” Section 254(c) limits support to “telecommunications services,” but Internet service is an information service, not a telecommunications service.¹² It is thus questionable whether the fund can provide support to facilities dedicated solely to information services.

The Joint Board recognizes the potential for problems of duplication by having both a broadband fund, and a fund that provides support to wireline carriers for costs of facilities which also have broadband capabilities.¹³ No real solution is offered for this problem however other than to say regulators must “exercise care.”

Although RICA member rural wireline CLECs provide nearly ubiquitous broadband services, it is not clear whether the Joint Board’s intent to exclude them from USF support applies only to their voice grade services (which are usually provided over the same facilities as their broadband). Even if CLECs are not intended to be excluded, *per se*, from the new broadband support mechanism, because they have diligently worked

subject to the requirement that they take “into account recommendations of a Federal-State Joint Board....” The Commission concluded that the Joint Board’s recommendation of a process for it to act jointly with the states on such redesignations complies with the Act and that a separate Joint Board recommendation is not required in each case. *See, Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997), para. 187. It is not clear that the 1996 Joint Board recommendation was intended to apply to broadband services, however, and a new recommendation may be required.

¹¹ Recommended Decision, paras. 36, 53.

¹² *Nat’l Cable & Telecom. Assn. V. Brand X Internet Services, Inc.* 545 U.S. 967 (2005); *Amer. Coun .on Ed. v. FCC* 451 F.3d 226 (DC Cir. 2006). *IP-Enabled Services*, 19 FCC Rcd 4863 (2004)

¹³ Recommended Decision, para. 53.

to meet the needs of their rural communities by providing broadband, they would apparently not qualify under a program that provides only grants of capital funding in areas without broadband. Exacerbating this “no good deed goes unpunished” scenario would be that fact that the large ILECs that have almost never deployed broadband in rural areas would now get free capital to construct facilities, but rural CLECs that already invested their owner’s capital would not receive support for “provision, maintenance and upgrading” of their facilities and services.¹⁴

It would be a serious mistake to adopt the concept that the broadband fund would provide “construction grants,” but apparently not support the ongoing operating, maintenance and depreciation costs of providing the service. In capital intensive industries, the long term provision of service requires more than a one-time capital investment, facilities must be operated, maintained and constantly replaced as a result of wear and obsolescence. In low-density areas, it is not just the capital costs that are higher than in urban areas. Also, obsolescence is particularly significant in an industry, such as telecommunications, which continues to experience rapid technological change.

Conversion of the USF to a capital grant program would be a major break from historic USF practice beginning well before the 1996 Act, but is introduced with little explanation or analysis, and leaves many questions unanswered.¹⁵ The Recommended Decision does say grants should be awarded only when “demand side stimulation, state incentives, and borrowing are demonstrably inadequate” and recognizes that such grants should not

¹⁴ See, 47 U.S.C. 254(e).

¹⁵ USF was created in the early 1980s when the then variable separations formula of the Ozark plan was replaced with a fixed 25% interstate allocation plus an additional interstate expense adjustment for high cost telephone companies. For rural ILECs USF remains a method of cost recovery that is integral to their rate of return regulation. See, 47 C.F.R. 36.601-631.

duplicate or preempt the rural development programs administered by the Department of Agriculture.¹⁶

An initial question is whether grants administered by regulators are a prudent and effective use of USF funding. The RUS (previously REA) program provided loans to rural telephone companies for many years without any default because all loans were carefully analyzed for financial feasibility and were subject to continuous oversight. Once RUS expanded into broadband it quickly learned that it faced significant challenges.¹⁷ Of course grants do not ordinarily “default”, but unless there is strict evaluation of the feasibility of each particular proposal and continuous oversight, the inevitable result will be USF funds will be expended for projects that may be constructed, but cannot be maintained, operated and upgraded as required. The Recommended Decision provides no adequate discussion of these issues, nor of the basic question of whether it is the proper role of a regulator (as opposed to a lender) to become deeply involved in the business plans of its regulatees. Wherever a grantee is charged with failing to meet its ETC obligations, it will undoubtedly argue, and perhaps with good reason, the problem was created by the decisions of the regulator.

An additional question regarding the role of the states is whether the Act permits the Commission to delegate to states broad discretion as to which carriers receive

¹⁶ Recommended Decision para. 54.

¹⁷ Rural Utilities Service, *Rural Broadband Access Loans and Loan Guarantees*, Proposed Rule, 72 Fed. Reg. 26742, May 11, 2007. (“...the Broadband Program has encountered challenges in administering the program and learned from them. The challenges include the competitive nature of the broadband communications industry, the fact that many applicants are start-up organizations with limited resources to meet equity requirements, the rapid pace of technology advancement and increases in demand for bandwidth, and the need for increased transparency in providing communities and incumbent providers with information on new market entrants.”)

grants and how much. The Commission’s delegation of similar powers to the states to administer UNEs was found unlawful by the court in a decision of great interest and significance to state regulators, yet the issue of legality of the proposed delegation is not even discussed in the Recommended Decision.¹⁸ The Commission argued in the UNE case that it had inherent authority to subdelegate decisions to state commissions given the states’ independent jurisdiction over the general subject matter, the magnitude of the regulatory task, and the need for close federal-state cooperation. The court found this position to be “based on a fundamental misreading of the relevant case law....the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”¹⁹ The Recommended decision ignores this presumption and points to no such affirmative showing.

2. The sufficiency and source of funding for the broadband fund are unclear.

Finally, the Joint Board proposes to fund broadband support at a level of \$300 million per year, but provides no information or analysis as to how this amount compares with what is needed to make broadband deployment universal, or even attempts to recommend a realistic definition of “broadband.” In fact, the Recommended Decision acknowledges that there is no really reliable information about where broadband is not available today, much less what the capital and operational costs of ubiquitous deployment would be. The Joint Board also recognizes there are questions about how the fund would be allocated, and assumes this question is to be decided on a state by state basis (rather than carrier by carrier). No coherent answers are provided to the allocation question however.

¹⁸ *United States Telecom Association v. FCC*, 393 F.3d 554 (D.C. Cir. 2004)

¹⁹ *Id.*

Rather, the proposed funding level appears to have been a “top down” number based on estimates of how much could be raised by taking funds away from current recipients (such as all of the support now provided to RICA’s member rural CLECs) with perhaps some state matching funds, but with no material increase in overall high cost support. In addition, the Joint Board intends to cap all USF high cost funds, except that it recognizes that the Commission’s response to the remand in *Qwest v. FCC* may well add significant amounts to the fund. In that event, and assuming the political need to at least avoid increasing the contribution rate remains, it is not at all clear whether there is any realistic expectation that funding will be available to support broadband by more than a token amount at the current contribution level.

The failure of the recommend decision to address the remand in *Qwest v. FCC*, combined with the failure to develop any estimate as to the *need* for USF support for broadband, leaves unanswered issues that are fundamental to the function and size of the high cost fund.

III RICA ENDORSES ELIMINATION OF THE IDENTICAL SUPPORT RULE AND SHIFTING CETC SUPPORT TO A COST BASED SYSTEM

- A. The Identical Support Rule Results in Insufficient Support for Wireline CLECs Operating in the High Cost Areas of Large ILECs While Providing a Windfall to Some Wireless Carriers.
 - 1. The combination of the identical support rule and the statewide average rule often results in no support for a high cost rural CLEC.

RICA has frequently pointed out that where a rural CLEC seeks to provide improved service to consumers in the high cost area of a large company with average study area cost there is no USF support available, even though the same area,

served by a rural ILEC at the same cost might well qualify for support.²⁰ This result has the effect of excluding much of the rural population from exactly the benefits of comparable service that Congress intended in Section 254. The denial of support is a consequence of both the identical support rule and the non-rural state wide average rule.

While in theory elimination of only the state wide average rule would provide support based on the cost of the area, in the real world this would often not occur. “Cost is as cost is defined,” and for non-rural carriers cost is defined as the cost predicted by the Commission’s model. The Rural Task Force Report demonstrated without serious contradiction that the model does not accurately predict forward-looking cost for any particular rural exchange or small area.

The aggregate results of this study suggest that, when viewed on an individual rural wire center or individual Rural Carrier basis, the costs generated by the Synthesis Model are likely to vary widely from reasonable estimates of forward-looking costs. As a result it is the opinion of the Task Force that the current model is not an appropriate tool for determining the forward-looking cost of Rural Carriers.²¹

The model was developed many years ago when technology and component costs were quite different, and, in any event, its outputs were never validated even as to non-rural carriers.

2. Because wireless cost structures are materially different from wireline, identical support is not competitively neutral

Wireless carriers and their advocates often claim that “identical support” is required by the Competitive Neutrality principle that the Commission adopted. These claims turn the concept of neutrality on its head. Neutrality exists when similarly situated

²⁰ RICA Comments in CC Doc. 96-45, Oct. 15, 2004, p.2.

²¹ *Federal-State Joint Board on Universal Service*, Recommended Decision, FCC 00J-4, Dec. 22, 2000, Appendix A, Rural Task Force Recommendation, p. 18.

carriers are subject to the same rules. The neutrality principle is violated, however, when carriers with materially different cost structures are treated as if they had identical cost structures. There can be no justification for provision of support to any carrier except where the support makes possible achieving the objectives of the Act.²²

As the Mercatus Center recently explained, a determination of whether changes in USF rules will accomplish the objectives of ensuring access to telecommunications and information services at rates reasonably comparable to urban rates cannot be made without:

...a plausible theory explaining how the expenditures will affect the outcomes, and empirical evidence suggesting that the theory is actually true.²³

The rule that provides support to one carrier based on another carrier's significantly different cost structure has neither plausible theory underlying it, nor empirical evidence in its support. The rule serves no purpose except to encourage waste, while failing to provide support to carriers that operate in the high cost areas of average cost states. The Commission has been fully aware of this problem for many years, yet has failed to take corrective action.

3. "Identical support" makes enforcement of the "use of support" requirement difficult if not impossible.

The Act and Commission rules require that USF support be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.²⁴ Under the "identical support" rule support received has no causal connection to the recipient's cost of providing the service. Although certification

²² 47 U.S.C. 254(e).

²³ George Mason University, Mercatus Center, Regulatory Studies Program, Public Interest Comment on High Cost Universal Service Support, Mar. 27, 2008, p. 4.

²⁴ 47 U.S.C. 254(e).

of compliance with Section 254(e) is required, because all carriers have multiple categories of expenses and multiple sources of revenue there is no clear logical mechanism to determine how a carrier spent any particular number of dollars.²⁵

B. The Commission's Proposed Cost Study Rules Are Generally Acceptable

The NPRM correctly concludes that competitive ETCs should file cost data showing their own per-line costs.²⁶ The significant issue that follows that conclusion is: how are costs to be determined for carriers not subject to rate of return regulation or the Commission's accounting rules? Any such cost determinations must either be sufficiently comparable to the cost determinations of ILEC that support eligibility can be determined from the current benchmarks, or new benchmarks must be developed.²⁷

These are not easy tasks, but ones that must be faced in order to bring the program into compliance with the statute.

The NPRM makes a good start on resolving these questions. RICA agrees, for example, that carriers not following the Commission's accounting rules should use GAAP, with certain modifications, including an 11.25 rate of return and application of the corporate overhead limitations. The proposal to allow the same depreciation amounts as used in financial filings, however, is an example of the potential for non-

²⁵ Rate of return regulated carriers can show that they are not exceeding the prescribed return, but that metric alone says nothing about where or how one source of revenue was spent. High Cost Support is a direct result of prior investment and expense amounts, amounts, however, and so its recipients are best able to demonstrate 254(e) compliance.

²⁶ Identical Support NPRM at paras. 13-22.

²⁷ The NPRM requests comment (para. 16) on how to require disaggregation in order to compare cost components of CETCs to those of ILECs. With the exception of carriers like RICA member CLECs that operate very similarly to their ILEC affiliates, a valid match may not be possible with other carriers. Even if possible, it is probably not desirable to force all carriers to organize themselves similarly to ILECs because of the inhibitions on innovation, and the retention of vestiges of the identical support rule.

comparable results which would prevent such costs from being averaged with carriers subject to regulatory depreciation prescriptions. RICA also believes the WiCAC proposal provides a good starting point for establishing an accounting system that would provide appropriate information for conducting cost studies by wireless CETCs.

In this area, as in others, it is important for the Commission to distinguish between rural CLECs and wireless CETCs. Rural CLECs should be allowed to perform cost studies using the identical rules that rural ILECs use, and the same algorithms and benchmarks should determine their support. The question is more difficult for wireless carriers or CLECs that do not maintain their books and calculate their costs on the same basis as ILECs. The recent proposal by Panhandle Telecommunication Systems, Inc. provides one possible answer that is worthy of consideration.²⁸

Panhandle's proposal begins with the requirement that a wireless CETC receiving high cost support must provide access to its network to other carriers at a rate equivalent to the national average cost per minute modified by a factor to recognize carrier size as discussed below. The Commission would compute this average cost based upon submissions from all carriers. It seems likely that this requirement could minimize the number of wireless USF applicants because all carriers would have the benefit of support provided to any carrier.

This national average would also be used to determine support for eligible carriers. In order to recognize the differences in economies of scale and scope, the national average cost per minute would be multiplied by a factor that declined in proportion to carrier size. Thus Tier I carriers would have a larger multiplier than Tier II

²⁸ Letter from Kenneth C. Johnson on behalf of Panhandle Telecommunication, Inc. to Marlene H. Dortch, FCC, Jan. 11, 2008 in CC Doc. 96-45.

carriers, and so on. Within each tier, a carrier would compare its own cost per minute with the value for that tier, and receive support based on the difference, subject to a cap of ten times the national average, which could be waived in appropriate cases.²⁹ The value of the multipliers would be adjusted based upon the total amount of support determined to be necessary to achieve the objectives of the Act.

C. Rural Wireline CETCs Should Receive ICLS

The NPRM proposes that competitive ETCs should no longer receive Interstate Access Support (IAS) or Interstate Common Line Support (ICLS) because CLECs are not subject to SLC caps and so can (theoretically) recover their common line costs from end users.³⁰ This proposal would not be competitively neutral and should be rejected. While it is true that rural CLECs are not subject to SLC caps, the issue is not so simple. ILECs with which rural CLECs compete are subject to the caps, and receive IAS or ICLS that recovers part of their common line cost above the cap. The ability to recover a portion of their common line costs from the USF provides ILECs with a substantial competitive advantage with respect to end user pricing. Because CLECs are competitively constrained as to end user pricing, the provision of IAS or ICLS to the ILEC but not the CLEC in a given market is a heavy regulatory thumb on the competitive scale that would have the real world effect of discouraging competition.

Prior to the Commission's MAG decision, rural CLECs recovered a portion of their common line cost through a CCL charge. This practice was continued in the *CLEC Access Order* which allowed rural CLECs to file access tariffs at the NECA rates. In the

²⁹ Panhandle also proposes a cap on wireline CETCs of 1.5 times the average high cost per line average for the state.

³⁰ Identical Support NPRM at para. 23.

MAG decision, however, the Commission eliminated the CCL charge from the NECA rates and replaced it with ICLS for rural ILECs, but not for rural CLECs.³¹ This is a substantially different history from that of the wireless CETCs that never had interstate-switched access rates. It is the wireless carriers, however, as noted above, that constitute the great majority of the CETC recovery of IAS and ICLS.³²

D. Rural Wireline CETCs should receive LSS.

The NPRM also proposes to eliminate LSS for all CETCs on the presumption that the assumptions regarding switching costs, such as economies of scale and scope underlying LSS “are not likely to be accurate for competitive ETCs.”³³ No factual support of any kind is stated or cited for this conclusion, which is demonstrably invalid for RICA member rural CLECs that operate at essentially the same scale and scope as their ILEC affiliates. The assumptions underlying LSS, formerly DEM weighting, were of course not based on any consideration of the cost levels or structure of the mobile wireless carriers that receive the majority of CETC support, but that is no reason to exclude rural CLECs from LSS.

E. Rural CLEC support should not be capped at the per-line support received by the ILEC in a wire center.

The proposal in the NPRM to cap CETC per-line support should be rejected for several reasons. First, as explained in A. 1, above, where the ILEC receives HCMS, based on the Commission’s model, there is no factual basis for the conclusion that the predicted forward looking cost for any particular wire center is accurate.³⁴ Since rural

³¹ See, n. 1, *supra*.

³² See, USAC, 2d Quarter Appendices – 2008, HC08, HC09.

³³ Identical Support NPRM at para. 24.

³⁴ See, n. 21, *supra*.

CLECs operate in only a few exchanges, such a cap would often result in “insufficient” support, because the model failed to recognize the level of actual costs to provide service. Second, unless the study area average method of calculating support is eliminated, in many cases the result will be that the cap precludes all support, just as it does today. Third, such a cap would not be logically consistent with a decision eliminating the identical support rule and going to a cost based system, but would, in many cases, simply be the identical support rule under a new, and misleading, name.

- F. States may assist with cost review, but cannot be delegated decisional authority.

The NPRM proposes that cost studies would be submitted to the state commission for approval, except where the ETC designation was granted by the Commission.³⁵ State commission approval would be a prerequisite to submission of the cost data to USAC for payment of support. The NPRM does not address the presumption against authority to subdelegate discussed in section A 1, above, or the clear lack of affirmative Congressional authority for states to determine the amount of federal support individual carriers receive. One way to address the lack of specific authority would be for the Commission to retain approval authority, but request states to review the filings and point out any issues. Even if authority to subdelegate to states were found, there would still have to be criteria established as to what entitles a cost study to be approved and a time restraint established beyond which approval would be deemed granted. The NPRM contains no discussion of what tests would be applied for a cost study to be approved.

³⁵ Identical Support NPRM at para. 13

IV COMPETITIVE BIDDING SHOULD NOT BE ADOPTED

A. The NPRM Fails to Address the Serious, Valid Concerns Identified in the Several Previous Rounds of Comment

RICA submitted comments and reply comments to the Joint Board late in 2006 that explained in detail why adoption of a competitive bidding process to allocate USF support in rural areas would not serve the public interest or promote the availability of universal telecommunications services.³⁶ RICA's comments pointed out that while competitive bidding is often the preferable means of choosing a supplier of goods or services, the successful employment of this method requires (1) precise specification by the buyer of the goods or services desired (such as through an RFP), (2) negotiation of a detailed contract with the winning bidder, and (3) the buyer's detailed supervision and inspection of the product or service. Neither this Commission, nor the state commissions generally have the resources or ability adequately to perform these functions.

In the absence of such specification and supervision, the competitive bidding process would inevitably result in one or more of the following scenarios: (1) support is awarded to the carrier that intentionally or otherwise agrees to provide service at a level for which the total revenues do not cover the costs, with the result that either the service is not delivered at the level contracted for or the carrier fails financially; (2) support is awarded to a large carrier that wants to eliminate competition from a smaller company and thus bids support at a level that is infeasible for the small company, but the large company can absorb the loss; or (3) a carrier makes an unrealistically low bid which

³⁶ RICA Comments in WC Doc. No. 05-337, Oct. 10, 2006, Reply Comments, Nov. 8, 2006. RICA previously commented on Sep. 30, 2005 and Oct. 15, 2005.

drives its competitors from the market, then petitions for more support under threat of bankruptcy.

The NPRM fails to address these concerns and, in particular, to address the practical problems described at length by Professor Dale Lehman in a paper attached to the October 2006 NTCA Comments. Professor Lehman pointed out that there have been a few examples of the successful use of competitive bidding to award support for telecommunications facilities in developing countries, but in all these cases there was no significant existing infrastructure. That is not the situation in most of the area subject to the Commission's jurisdiction. To the contrary, there is a massive amount of investment by ILECs and CLECs that was prudently made under the current rules.

A more recent paper by Steve Hanke suggests that competitive bidding may be appropriate in the case of water utilities because their technology is well known and relatively static, and service and quality standards can be readily formulated. Hanke recognizes however, that it may well not be possible for a regulator to select a winning bidder, and negotiate and police contracts where the technology is complex and rapidly changing.³⁷ The Telecommunications industry is both complex and rapidly changing.

The difficulties of resolving in an unbiased manner the issues certain to be raised by owners of stranded investment are very great, yet the NPRM proposes no solutions.

³⁷ Steve Hanke, *In praise of private infrastructure*, www.globeasia.com/index.php?module=columnist&action=detail&id_selected=78, visited Apr. 1, 2008. Hanke also points out that in any bidding process where there is a previous supplier, that supplier is almost certain to be better informed about cost and demand conditions; that long term contracts require some formula to allow for rate changes as costs, demands and technologies change over time; that the agreement with the winner will not be self enforcing, but must be policed; and that as the end of the contract approaches, the provider may curtail maintenance and limit new investment.

B. The Initial Regulatory Flexibility Analysis Fails to Recognize that Auctions Necessarily Give Large Companies the Power to Destroy Small Companies, Yet Large Companies Have a Poor Record of Serving Rural America

Assuming, *arguendo*, that the various practical problems such as specification, supervision, stranded investment, and overlapping service areas could be resolved with enough effort and resources, in the end a certain result in many areas will be the loss of small, locally owned service providers and their replacement by large companies with thousands of times their resources. Although the Commission's focus is properly first on assuring service to public at the most reasonable terms, a very long history shows that in most rural areas quality services, including advanced services, are made available only when a small company with roots in the area is the service provider. Because these small carriers can never hope to outbid a rival with thousands or millions of times their resources, the small companies will only be successful bidders in areas that no one else wants.

The Initial Regulatory Flexibility Analysis ("IRFA") fails to recognize the potentially severe impact on small rural CLECs of rules which would empower large carriers with thousands of times their resources to forego a material portion of their federally regulated revenue stream and thereby eliminate the rural CLECs as competitors.³⁸ The IFRA fails to incorporate a meaningful discussion of significant alternatives that would minimize the impact on small entities. Instead, it merely discusses variations on the rule such as size of the area to be auctioned.³⁹

³⁸ Competitive Bidding NPRM, Appendix A.

³⁹ Id. at para. 18

V CONCLUSION

There is no question that reform of the current USF mechanism is urgently needed. The current rules provide excessive support to some carriers without demonstration of need, while denying support to others in high cost areas rural areas that do not have access to modern telecommunications services “comparable” to those available in urban areas. The failure to match need to support, including resolution of *Qwest v. FCC*, is accompanied by a contribution rate that is becoming politically unsustainable, and an environment that calls for more support to promote broadband deployment. The Joint’s Board’s Recommended Decision proposes to address these issues by eliminating the nearly *de minimis* amount of support that now goes to rural CLECs. This recommendation ignores both the fact that facilities based rural CLECs, such as RICA’s members, have brought modern telecommunications services and a local presence to areas long neglected by the large ILECs and the clear contemplation of Congress that there should be multiple ETCs in the areas of non-rural telephone companies.

RICA does agree there should be separate wireline and wireless support mechanisms, and that ubiquitous deployment of broadband service is critically important. Unfortunately, the Recommended Decision does not provide a broadband support mechanism consistent with the governing statute. RICA strongly supports elimination of the identical support and its replacement by a cost-based mechanism, which should include access to the same common line (ICLS) and local switching support available to ILECs.

Finally, the proposal for an auction-based system of allocating USF support should be rejected. The proposal fails to address the many serious, valid concerns that have been repeatedly raised over the last several years and would give the large carriers the power to crush any small carrier that happened to be in its way.

Respectfully submitted

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