

**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 EXCHANGE CARRIER ASSOCIATION, Inc.**

April 17, 2008

Summary

In these comments, the National Exchange Carrier Association, Inc. (NECA) expresses its support for the Joint Board’s recommendation to establish a separate “Provider of Last Resort” (POLR) fund for entities bearing such obligations under applicable federal and state law. NECA also supports the Joint Board’s proposal to leave existing high cost universal service support mechanisms for incumbent local exchange carriers (ILECs) in place for the time being, pending more focused and comprehensive examination of ways to modernize these mechanisms.

The Commission should not, however, impose additional “caps” on existing rate of return (ROR) high cost support mechanisms. Such additional caps are unnecessary, would harm rural broadband deployment efforts, and in any event cannot be implemented without fundamental changes to existing separations and access charge rules – changes that extend well beyond the scope of the Joint Board’s current recommendation.

The “identical support” rule should be replaced with rules that allow competitive Eligible Telecommunications Carriers (CETCs) to receive support based on their own costs of investing in networks and providing service in rural areas. Consistent with a proposal advanced in this proceeding by Panhandle Telephone Company, funding for mobile CETCs should go only to facilities-based wireless network providers, who in turn should be required to make their facilities available to other carriers at cost-based rates.

The Commission should not employ reverse auctions as a mechanism to award support for ILECs. As explained herein, such mechanisms are administratively unworkable and could severely degrade universal service to consumers. Moreover, assuming the Commission implements the reforms described above, the problems reverse auctions are supposed to solve (*i.e.*, unconstrained fund growth, support for multiple

providers in the same area) would largely resolve themselves. There is, therefore, no need for the Commission to engage in such “hyper-regulatory” approaches to universal service reform.

Finally, as it considers various reform proposals set out in the current notices, the Commission must not lose sight of the need to reform existing contribution mechanisms. In particular, the Commission should act as soon as possible to broaden the contribution base to include broadband services.

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I. INTRODUCTION

In separate *Notices of Proposed Rulemaking* released January 26, 2008, the Federal Communications Commission (Commission) asks interested parties to comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) for comprehensive reform of high-cost universal service support;¹ Commission rules governing the amount of high-cost universal service support provided to eligible telecommunications carriers (ETCs), including a proposal to eliminate the “identical support rule;”² and whether and how to implement reverse auctions to determine high-cost universal service support amounts for ETCs serving rural, insular, and high-cost areas.³

In these comments, the National Exchange Carrier Association, Inc. (NECA) expresses its support for the Joint Board’s recommendation to establish a separate

¹ *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) (*Joint Board Comprehensive Reform NPRM*).

² *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (*Identical Support Rule NPRM*).

³ *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (*Reverse Auctions NPRM*).

“Provider of Last Resort” (POLR) fund and to leave existing high cost universal service support mechanisms for incumbent local exchange carriers (ILECs) in place for the time being. The Commission should not adopt the Joint Board’s recommendation insofar as it seeks to impose additional “caps” on existing rate of return (ROR) high cost support mechanisms. Such additional caps are unnecessary, would harm rural broadband deployment efforts, and in any event, cannot be implemented without fundamental changes to existing separations and access charge rules – changes extending well beyond the scope of the Joint Board’s current recommendation.

NECA also supports replacement of the “identical support” rule with rules that allow competitive eligible telecommunications carriers (CETCs) to receive support based on the actual costs of investing in their own network facilities and providing service in rural areas.

Reverse auctions should not be used as a mechanism to determine universal service high cost support. Reverse auctions have been shown to be administratively unworkable and would degrade universal service to consumers. Moreover, because the reforms described above should address the problems reverse auctions are intended to solve (*i.e.*, excessive support levels, payments to multiple recipients in the same area), reverse auctions are unnecessary.

Finally, as it considers various “basis of support” reform proposals, the Commission must not lose sight of the need to reform existing contribution mechanisms. In particular, the Commission should act as soon as possible to broaden the contribution base to include broadband services.

II. THE COMMISSION SHOULD ADOPT THE JOINT BOARD'S RECOMMENDATION FOR A SEPARATE "PROVIDER OF LAST RESORT" FUND.

The Joint Board has recommended high-cost USF support be available through three separate High Cost funds, one each for Broadband, Mobility and Provider of Last Resort.⁴ The POLR Fund would support wireline carriers who provide service on a "last resort" basis, and would be composed of the sum of all existing ILEC support mechanisms.⁵ Except for certain possible modifications discussed in the Joint Board's Recommended Decision, these mechanisms would be left intact for the present.⁶

Importantly, the Joint Board's Recommended Decision recognizes the extent to which existing high cost loop funding supports the capital costs of providing broadband-capable loop facilities in rural areas. These mechanisms, in the Joint Board's words, have enabled rural incumbent local exchange carriers (RLECs) to do a "commendable job" of providing broadband service to nearly all their customers.⁷ It appears the Joint Board therefore intends the new POLR Fund to continue to facilitate deployment of multi-use, broadband-capable networks in areas served by rural ROR carriers, notwithstanding the potential availability of grant-based funding for specific broadband projects under the new Broadband Fund.

The proposed Mobility Fund would be tasked primarily with providing support for the construction of new wireless facilities in unserved areas, and secondarily with providing operating support to carriers serving areas where service is essential but where usage is so low a plausible economic case cannot be made to support construction and

⁴ *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477 (2007), at ¶ 11 (*Recommended Decision*).

⁵ *Id.* at ¶ 19.

⁶ *Id.*

⁷ *Id.* at ¶ 30.

ongoing operations.⁸ The Broadband Fund would provide grants for the construction of new broadband facilities in currently unserved areas and for new construction to enhance broadband service in areas with substandard broadband service.⁹

In the Joint Board's view, the proposed three-fund approach will eliminate much of the current duplication of support by ultimately providing support to only one wireline, one wireless, and one broadband provider in any given area, once the transition is complete.¹⁰ Each of these funds is proposed to operate with separate budgets but with a combined overall funding cap of \$4.5 billion per year.¹¹ During the transition period to this new structure, the Joint Board further recommends each of the five major existing high cost support mechanisms be separately capped at their 2007 levels to minimize unintended redistributions among support mechanisms and to avoid duplication of support.¹² The Joint Board further recommends the current definition of USF supported services be revised to include broadband Internet service and mobility service, although carriers are not required to offer all supported services.¹³

A. Separate “Provider of Last Resort Fund” Recognizes the Special Obligations Placed on ILECs and Will Help Resolve Controversies Underlying Existing USF Mechanisms.

The Joint Board's proposal to separate POLR funding from mobility funding recognizes the special carrier-of-last-resort (COLR) obligations and burdens placed on

⁸ *Id.* at ¶ 16.

⁹ *Id.* at ¶ 12. The Joint Board recognized that a “significant portion” of broadband fund support would likely go to non-rural carriers because these carriers serve the majority of rural customers to whom broadband services are not currently available. *Id.* at n. 50.

¹⁰ *Id.* at ¶ 37.

¹¹ *Id.* at ¶ 26.

¹² *Id.* at ¶ 32.

¹³ *Id.* at ¶ 56.

most incumbent wireline local exchange carriers by federal and state statutes and regulations. It also acknowledges the different financial and marketplace realities faced by wireline LECs and wireless carriers.

The nature of the obligations imposed on COLRs can vary, but as a general matter these carriers face regulatory obligations that significantly exceed those imposed on other ETCs, especially wireless carriers.¹⁴ As providers of last resort, wireline COLRs are “expected to provide service to all customers in a service area, whether or not it is economically beneficial to do so.”¹⁵ The wireline COLR is typically the ILEC.

In 1980, the Commission adopted rules that classified carriers as either “dominant” or “non-dominant” based on their market power, and subjected non-dominant carriers to much less regulation or even granted them forbearance from certain rules and regulations.¹⁶ All incumbent wireline telephone companies, including small “independent” companies, were classified as dominant.¹⁷ This left ROR carriers, including even the smallest rural telephone companies serving only a few customers, subject to the full panoply of Title II regulations.¹⁸ For example, they must file interstate

¹⁴ This is true whether a rural LEC is considered a “fully subject” common carrier or a “connecting carrier” under section 2(b)(2) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. §152(b)(2). A rural LEC that either operates interstate lines or that is affiliated with another carrier that operates interstate lines would be considered a “fully subject” carrier. *See, e.g., Petition of the Continental Telephone Company of Virginia for a Declaratory Ruling that it is not Fully Subject to the Commission’s Jurisdiction Under the Communications Act of 1934*, Memorandum Opinion & Order, 4 FCC Rcd 7737 (1988) (*Contel of Virginia*).

¹⁵ *Classic Tel., Inc., Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion & Order, 11 FCC Rcd 13082 (1996), at ¶7, n.24; *See also Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc. Concerning Sections 36.611, 36.612, 61.41(c)(2) and the Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules*, Memorandum Opinion & Order, 12 FCC Rcd 10309 (1997), at ¶7; *Bellsouth BSE, Inc. v. Tennessee Reg. Authority*, M2000-00868-COA-R12-CV, *slip op.* (Tenn. App. Feb. 18, 2003).

¹⁶ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report & Order, 85 FCC 2d 1 (1980).

¹⁷ *Id.* at ¶ 65.

¹⁸ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report & Order, 95 FCC 2d 554 (1983), at ¶40 (*Competitive Carrier*

access charge tariffs in compliance with the detailed conventions contained in Parts 32, 36, 61, 64 and 69 of the FCC’s rules, and in many cases must file tariffs at the state level as well. Tariffs obligate ILECs to provide service to all customers on equal terms. Since there are no wireless carrier tariffs, there can be no FCC or state PUC tariff reviews or investigations for wireless operators, as there are for ILECs. Wireless carriers are free to deal – or not deal – with customers on an individual basis in accordance with their business plans.¹⁹

Far from relaxing traditional regulatory burdens on existing wireline carriers, the 1996 Act added even more regulatory burdens by defining these carriers as “incumbent” and subjecting them to stringent local interconnection requirements. These include a duty to negotiate interconnection agreements with competitors; to negotiate reciprocal compensation for the transport and termination of local traffic;²⁰ to interconnect network

Fourth Report). The FCC initially treated carriers providing cellular radio services as dominant, as their status was not considered in the rulemaking proceeding, (*Id.* at ¶40), but eventually granted non-dominant status to CMRS providers. *Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services*, Second Report & Order, 9 FCC Rcd 1411 (1994). *See also*, *Orloff*, 352 F.3d at 421.

¹⁹ *Orloff v. Vodafone AirTouch*, Memorandum Opinion and Order, 17 FCC Rcd 8987 (2002) (*Orloff Complaint Order*); *aff’d sub. nom.*, *Orloff v. FCC*, 352 F.3d 415 (DC Cir. 2003) (*Orloff Appeal*), *cert. denied*, 542 US 937 (2004) (affirming the FCC’s rejection of a complaint by a consumer against a wireless carrier for allegedly violating sections 201 and 202 of the Act by offering discounts and other inducements to certain customers taking service under the carrier’s calling plans that it did not make available to the complainant.) The appeals court rejected arguments that wireless carriers were bound by the same restrictions against price discrimination that applied to dominant carriers. It discussed the rules applicable to dominant carriers as follows: “Allowing those carriers to grant discriminatory concessions would have undermined the regulatory scheme then in effect. Filed tariffs are pointless if the carrier can depart from them at will. Permitting a dominant carrier to discriminate would give it the power to control its customers’ economic fates, thus defeating one of the main purposes of common carrier regulation.” 352 F.3d at 421, However, those rules are inapplicable to non-dominant wireless carriers. *Id.*

²⁰ 47 U.S.C. §251(c)(1). Wireless carriers now have the obligation to negotiate interconnection agreements with LECs upon the latter’s request. 47 C.F.R. § 20.11(e). However, wireless carriers are not obligated to negotiate interconnect agreements with other carriers (e.g. CLECs and CMRS), in compliance with section 252 of the Act, and do not have the other section 251(c) duties that are imposed on ILECs.

facilities with competing carriers;²¹ to provide nondiscriminatory access to unbundled network elements;²² and to offer services for resale at wholesale rates.²³

While the 1996 Act contains an exemption from interconnection requirements for “rural” telephone companies, that exemption is good only until a company receives a bona fide request for interconnection and the state public utility commission (PUC) determines such a request is not unduly economically burdensome, is technically feasible, and is consistent with the Act’s universal service provisions.²⁴ Acting under this authority, state PUCs have, on numerous occasions, terminated RLEC exemptions from interconnection requirements,²⁵ leaving many small RLECs with interconnection obligations equal to those of the former Bell Operating Companies and far exceeding those imposed on large wireless carriers and competitive wireline carriers.

When it developed new rules to implement the universal service provisions of the 1996 Act, the Commission recognized these regulatory differences imposed more

²¹ 47 U.S.C. §251(c)(2).

²² *Id.*, at §251(c)(3).

²³ *Id.*, at §251(c)(4). ILECs are subject to numerous other special obligations under the 1996 Act, including requirements to provide public notice of network changes, *id.*, at §251(c)(5), and to provide space in central offices for collocation of competitors’ interconnection equipment, *id.*, at §251(c)(6).

²⁴ *Id.*, at §251(f)(1). Similarly, a state public utilities commission can suspend or limit section 251(c) interconnection obligations for small telephone companies under certain conditions. *Id.*, at §251(f)(2).

²⁵ *See, e.g., Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation*, Findings of Fact, Conclusions of Law, and Order, Case No. PU-05-451, *slip op.* (N.D. PSC, April 26, 2006); *In the Matter of the Application and Petition of The Western Reserve Telephone Company in Accordance with Section II.A.2.D of the Local Service Guidelines*; and *In the Matter of the Application and Petition of Alltel Ohio, Inc. in Accordance With Section II.A.2.D of the Local Service Guidelines*, Entry, Case No. 99-1542-TP-UNC and Case No. 00-430-TP-UNC. *slip op.* (Ohio PUC, May 18, 2000); *Petition of Fairpoint Communications Corp., for Negotiation/Mediation Pursuant to Section 252(a)(2) of the Telecommunications Act of 1996, and for Approval of any Resulting Interconnection Agreement*, Order Requiring Interconnection and Adopting Implementation Plan and Establishing Additional Proceeding, Case 99-C-1337, *slip op.* (N.Y. P.S.C. June 6, 2000) (removing Alltel’s rural exemption); *Petition of Sprint Communications Company, L.P. to Terminate Rural Exemption as to Consolidated Communications of Fort Bend Company and Consolidated Communications of Texas Company*, Order, PUC Docket No. 32582, *slip op.* (Texas PUC, August 14, 2006); *NTS Communications Request for Removal of Rural Exemption of South Plains Telephone Cooperative, Inc.*, Order, PUC Docket No. 29248, *slip op.* (Texas PUC, Sept. 15, 2004).

burdens and costs on ILECs,²⁶ but nevertheless decided to award the same per-line universal service support dollars to CETCs.²⁷ And even though the loss of individual customers does not relieve wireline ILECs, as carriers of last resort, from regulatory obligations to maintain their networks or to stand ready to serve customers throughout their service territories,²⁸ the Commission determined per-line support should be “portable” between ETCs.²⁹ This “support portability” approach was based on the assumption that consumers would substitute one ETC’s services for another’s.³⁰

Since the universal service provisions of the 1996 Act were implemented, the Commission has found itself embroiled in controversy over ETC designations. For example, in 2004 the FCC approved, in part, a wireless carrier’s request for designation as an ETC for portions of rural Virginia despite the fact the wireless carrier did not serve the entire service area nor did it carry the same regulatory burdens as RLECs serving the territory.³¹ While the Commission has often expressed confidence CETCs would provide universal service “throughout the service area for which the designation is received,”³² actual experience suggests otherwise. In June 2006, for example, several ILECs filed a

²⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997), at ¶ 144 (*First Report and Order*). For example, wireless carriers have never been required to provide equal access for interexchange calls while LECs are so compelled. This not only permits wireless carriers to avoid the additional network investment and expenses to provide equal access, but also insulates these carriers from competition for interexchange services. Yet both receive the same level of universal service support. The Joint Board and Commission have so far rejected adding equal access as a requirement for receipt of USF.

²⁷ *Id.*

²⁸ *Id.* at ¶¶ 287-289, 311-313.

²⁹ *Id.* at ¶¶ 287-288. The portability rule states “A competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC’s service area.” 47 C.F.R. § 54.307(a).

³⁰ *Identical Support Rule NPRM* at ¶ 8.

³¹ *Federal-State Joint Board on Universal Service Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier*, Memorandum Opinion & Order, 19 FCC Rcd 1563 (2004) (*Virginia Cellular*).

³² 47 C.F.R. § 54.201(d).

petition asking the Commission to revoke Sprint/Nextel's ETC designation in Virginia, alleging Sprint/Nextel has not met the build-out commitments it made four years ago when it was granted ETC status, has not expanded coverage in rural and unserved areas, and is serving only a fraction of the study areas in which it is designated.³³ The Commission has also been presented with studies showing there is no evidence wireless carriers actually use USF dollars provided under the equal support mechanism to build out coverage to areas that otherwise would not be served and that wireless carriers receiving support actually provide less coverage than unsupported companies in the same areas.³⁴

In now proposing to separate support for wireline COLRs from wireless mobility support, the Joint Board appears at last to have recognized the extent to which wireline and wireless carriers are treated differently under federal and state laws and regulations. Just as important, both the Commission and the Joint Board clearly recognize the marketplace views the services offered by wireline and wireless ETCs as complementary.³⁵ In the Commission's current view,

“[W]ireless competitive ETCs do not capture lines from the incumbent LEC to become a customer's sole service provider, except in a small portion of households. Thus, rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely

³³ *Federal-State Joint Board on Universal Service*, Petition for Revocation of Sprint/Nextel's Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, Petition of the Rural ILECs (June 4, 2007) (“According to information obtained from USAC, Sprint/Nextel has sought disbursement for a grand total of 4 lines (i.e., four customers) in the three Rural ILECs study areas since its designation in 2004. . . . Because all four lines are located in one study area, there is no evidence that Sprint/Nextel has provided service to any customers at all in the remaining two Rural ILECs study areas.” *Id.* at 9.

³⁴ Nicholas Vantzelfde, *The Availability of Unsubsidized Wireless and Wireline Competition in Areas Receiving Universal Service Funds*, (Jun. 13, 2007) at 13-14, available at <http://www.criterioneconomics.com/docs/Criterion%20CETC%20Service%20Availability%20Paper%20Final.pdf>.

³⁵ *Identical Support Rule NPRM* at ¶ 9.

provide mobile wireless telephony service in addition to a customer's existing wireline service.”³⁶

In hopes of preserving the current irrational identical support mechanism, wireless ETCs frequently argue that consumers are increasingly “cutting the cord” and substituting wireless for wireline services. In a February 4, 2008 *ex parte* presentation to the FCC, for example, CTIA presented the findings of two reports to the Commission that supposedly show “wireless cut-the-cord substitution is prevalent and accelerating across most demographic groups and that steep wireline access line decline is underway.”³⁷

At least one of the studies referenced by CTIA, however, notes that “[s]ubstitution is more prevalent among urban residents than of rural ones.” and contains data indicating the demographics of those more likely to “cut the cord” match a population subset that resides in urban rather than rural areas.³⁸ In fact, current line count data shows wireless substitution is a relatively small phenomenon in rural high cost areas. Between 2003 and the end of 2007, for example, rural ILECs' subscriber line counts nationwide went from approximately 11 million lines to 10 million lines.³⁹ During the same period, wireless carriers' “lines” (*i.e.*, subscribers) in the same study areas went from approximately 1.4

³⁶ *Id.*

³⁷ Letter from Paul W. Garnett, CTIA, to Marlene H. Dortch, FCC, CC Docket No. 96-45, WC Docket No. 05-337 (Feb. 5, 2008), at 1.

³⁸ See Morgan Stanley, Telecom Services: Cutting the Cord: Wireless Substitution is Accelerating, Sept. 27, 2007. The “cord cutters” are likely to be found in an urban versus a rural setting, *i.e.*, single adults without children, renters, 18-29 year olds, and students in college. (*Morgan Stanley Report*).

³⁹ See *Federal Universal Service Support Mechanism Fund Size Projections for Second Quarter 2008*, Universal Service Administrative Company Universal Service Administrative Company, Appendix HC-09 (Feb. 1, 2008). This report details Interstate Common Line Support (ICLS) and is perhaps the best indicator of wireless penetration in serving territories where the wireline service is provided by a rural rate of return carrier.

million to 3.25 million – increasing by almost two lines (subscribers) for every wireline line “lost.”⁴⁰

The fact that wireless subscriber counts have increased far more rapidly than ILEC lines are “lost” suggests customers are subscribing to both services, and often apparently order wireless service for multiple family members in the same household. Indeed, virtually every wireless carrier operating in rural markets offers so-called “family plans” of bundled wireless minutes that can be shared among members of a single household.⁴¹ Undoubtedly, some rural ILEC customers have substituted wireless for wireline services, but loss of lines in rural telephone company areas is more likely attributable to other factors, such as the replacement of second lines by broadband and cable (where available) for connection to the Internet, not wholesale substitution of wireless for landline service.⁴²

In light of these findings, the Joint Board’s proposal to establish separate funds for providers of last resort and for mobility services makes sense. This approach recognizes the legal, regulatory, and economic differences between wireline POLRs and wireless service providers, as well as the different, albeit complementary, marketplace positions each holds. Accordingly, NECA strongly supports the Joint Board’s proposal

⁴⁰ *Id.* Despite expectations that the “identical support rule” might produce comparable levels of per-line support for ILECs and CETCs operating in the same areas, annualized ICLS support to be received in 2Q 2008 by CETCs for service provided in rural areas will be \$120.48 per line per year on average. The RLECs on whose costs these payments are based are expected to receive \$93.22 per line per year for serving the same areas.

⁴¹ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, WT Docket No. 07-71 (Terminated), 23 FCC Rcd 2241 (2008), at ¶108, Chart 2. “[A]ll the nationwide carriers also offer some version of a family plan.” *Id.* at ¶112.

⁴² *Morgan Stanley Report* notes that only 42.3% of lines lost for the entire country in the past year represent primary lines. New wireless technology may come to rely upon the customer’s broadband connection. Wireless companies have begun testing “femtocells” which allow wireless calls made within the home to be routed over the customer’s broadband connection rather than over the wireless carrier’s own network. *See Peter Svensson, Cell Phone Boosters Coming for the Home*, Apr. 2, 2008, available at <http://apnews.myway.com/article/20080402/D8VQ0H180.html>

in this regard and recommends the Commission take action quickly to implement this portion of the Joint Board's Recommended Decision.

B. Standards for POLR Status Must be Defined by Rule.

To preserve the integrity of high cost universal service funding mechanisms going forward, the Commission should establish rules strictly limiting the availability of POLR funds to providers bearing the full panoply of traditional common carrier regulatory and legal burdens.

Carriers defined as "incumbent" local exchange carriers under the Act are, and should be initially designated as, the POLR in their existing study areas.⁴³ As noted above, wireline ILECs are generally required to serve all parts of their service territory, subject only to state limits on line extension obligations,⁴⁴ and are subject to numerous federal and state regulatory requirements. These carriers must "stand ready" to act as the consumers' safety net and provide services to customers presently served by other carriers who choose to cease operations.⁴⁵ As carriers of last resort, ILECs are also responsible for deploying network facilities to provide service, as well as maintaining in-place networks to handle "just-in-case" situations in the event a customer opts to drop

⁴³ As the Joint Board recognized, this single carrier recommendation eventually would exclude existing CETCs, some of whom are wireline CETCs. It therefore recommended the Commission examine the possibility of continuing support to these entities (both wireline and wireless CETCs) during the transition period. *See Recommended Decision* at ¶ 43.

⁴⁴ Some states have fairly specific requirements for providers of last resort. Oklahoma, a state that defines "carriers of last resort" as incumbent LECs, *see* Okl. Adm. Rule § 165:55-17-29, generally requires a carrier of last resort to "extend its distribution plant to furnish permanent service to any applicant located within one-quarter (1/4) mile of its existing facilities without requiring a construction charge," *Id.*, at § 165:55-13-12.

⁴⁵ *See, e.g.,* Kelly, Matt, *CLEC Bankruptcy Gives N.E. Customers Headaches and Sector a "Black Eye"*, Mass High Tech: The Journal of New England Technology, July 30, 2004, available at <http://masshightech.bizjournals.com/masshightech/stories/2004/08/02/story7.html>

service from the competitive service provider.⁴⁶ If the POLR program is to work, it must be limited to carriers that actually act as the consumers' safety net.

This is not to suggest carriers currently designated as "incumbent" wireline providers should retain eligibility for POLR funding indefinitely. The 1996 Act contemplates, for example, that existing ILECs may be supplanted by other carriers, who may then assume the burdens associated with incumbency.⁴⁷ Further, to the extent a state PUC has imposed significant carrier of last resort obligations on competitive wireline providers, the Commission may wish to specify rules permitting such providers to have POLR status for universal service funding purposes as well.⁴⁸ To avoid recurrence of the same problems plaguing current mechanisms, however, any POLR funding made available to competitive wireline carriers should be conditioned strictly on full compliance with defined provider of last resort requirements as well as reasonably comparable cost reporting standards.

⁴⁶ See e.g., *General Investigation to Develop a Plan Regarding the Unexpected Withdrawals from Service by Competitive Local Exchange Carriers*, Commission Order, Case No. 01-1152-T-GI, slip op. W.V. P.S.C., Feb. 24, 2004), available at http://www.psc.state.wv.us/imaged_files/Orders/2004_02/ord20040224155553.pdf; "Mass Migration Guidelines," at § VIII (N. Y. D.P.S., November 28, 2001), available at <http://www.dps.state.ny.us/MassMigGuidelinesNov14final.PDF> ("When an exiting CLEC serves its customers through resale, Verizon is the default carrier that is obligated to continue a customer's local service.")

⁴⁷ 47 U.S.C. § 251(h)(2). The Act contemplates replacement of the existing ILEC as a result of marketplace change. 47 U.S.C. § 251(h)(2)(B). For example, the FCC has authorized the replacement of Qwest Communications (formerly known as US West Communications) by the Mid-Rivers Telephone Cooperative as the ILEC serving the Terry, Montana exchange for section 251 requirements. Universal service and access charge considerations are still pending as the Commission said that it would handle those issues in the context of a study area waiver petition. *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)*, Report & Order, 21 FCC Rcd 11506 (2006).

⁴⁸ For example, Cox Communications has been found to have carrier of last resort obligations in California. See generally, "Office of Consumer Advocate's Review of the California High Cost Fund B, at 10 (2004), available at <http://www.caltelessn.com/reports/ORAOonCHCF-B.pdf>. See also, FLA. STAT. § 364.025(5) ("permitting CLECs to petition to become a carrier of last resort for its territory").

C. Existing Cost-Based Support Mechanisms for Rural ROR Carriers Should Be Maintained Pending Broad, Comprehensive Review of POLR Universal Service Policies.

As noted above, the Joint Board recommends the Commission leave existing high cost support mechanisms for ILECs intact for the time being, and instead focus its attention on developing a “unified” POLR mechanism. The Joint Board notes in this regard present support mechanisms are substantially different for rural and non-rural carriers, with the result that “support for customers served by one kind of carrier can be significantly more generous than for comparably situated customers served by the other kind of carrier.”⁴⁹

The Recommended Decision points to several other anomalous situations in current support mechanisms. For example, the Joint Board points to the rule freezing support upon sale of an exchange, and the fact that while rural carriers receive substantial support for loop costs, they do not receive comparable support for switching costs and receive no support for transport costs, a problem the Joint Board recognizes “can significantly harm remote carriers.”⁵⁰

The Joint Board also identifies ways in which current high-cost universal service mechanisms need to be modernized. The Joint Board states that current rules fail to reflect the way competition tends to develop only in denser portions of study areas; the extent to which competitive providers depend on ILECs for backhaul and interconnections; the fact that existing mechanisms may not adequately reflect line losses due to competition or the increased importance of non-regulated revenues; and finally,

⁴⁹ *Recommended Decision* at ¶ 20.

⁵⁰ *Id.* at ¶ 21.

the adverse effects caused by the existing cap on High Cost Loop support.⁵¹ In the Joint Board’s view, the Commission should address these problems by establishing “a process and a timetable” to review and modernize existing high-cost mechanisms for rural and non-rural carriers, with the objective of developing a coherent system that can be applied to all incumbent carriers in the future.

NECA agrees with the Joint Board that existing high-cost mechanisms should be retained for ROR ILECs for the present time. As the Joint Board notes, these programs have been successful in facilitating deployment of multi-use, broadband-capable networks throughout rural carriers’ serving areas and should be allowed to continue unchanged pending further review.

The various modernization and “cost saving” concepts described in the Recommended Decision should not, however, be the primary focus of further proceedings on ILEC high cost reform. Existing ILEC high cost programs were designed for traditional circuit-switched telephone networks. With broadband deployment now a key national priority, the Commission needs to take a more comprehensive and forward-looking view of high cost support programs.

Internet usage levels are exploding.⁵² Estimates indicate that digital traffic on the global Internet is growing about 50 percent a year, and Cisco Systems has projected that the increased amount of data on the Internet will cause user demand to overwhelm

⁵¹ *Id.* at ¶ 22. In a later portion of the Recommended Decision, the Joint Board offers additional suggestions for changes to existing programs intended to reduce program costs. These include applying a “rates test” as a condition or an adjustment to cost-based support; combining existing programs for loop and switching costs; considering unregulated revenues in calculating carriers’ need for support; adjustments to the Local Switching Support mechanism; further limiting existing caps on operating expenses; targeting support to only one service provider in an area; and reducing or eliminating, over time, support to areas with multiple providers. *Id.* at ¶ 31.

⁵² Pew Internet & American Life Project reported in 2006 that internet penetration among adults in the U.S. has hit an all-time high, increasing from 45% in 2000 to 73% in 2006. Available at http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf.

available capacity by the year 2011.⁵³ Every day, new services and features are made available to “connected” urban and suburban Americans, who enjoy Internet connections capable of speeds some rural consumers only dream about. The Commission has recently taken steps to refine its ongoing broadband data collection to obtain new information on the availability of broadband services at various speeds throughout the nation.⁵⁴ These data are likely to show the extent to which broadband connectivity varies among rural and urban Americans. Following resolution of immediate problems with high-cost universal service mechanisms (specifically, stabilizing the Fund by replacement of the “identical support” rule and expansion of the contribution base), the Commission clearly should examine existing ILEC support rules – but with a view towards designing universal service programs to accommodate tomorrow’s broadband networks.

In this regard, the Recommended Decision acknowledges that current support mechanisms do not recognize transport costs.⁵⁵ While transport costs have not been a barrier for small LECs in providing traditional voice telephony services, the high cost of transport to the Internet backbone often makes it difficult or impossible for small LECs to offer true high-speed access in rural areas.⁵⁶ A forward-looking review of existing ILEC high-cost programs must consider not only transport costs but also ways of obtaining access to Internet content at speeds and prices comparable to those available in urban areas.⁵⁷

⁵³ See, e.g., Steve Lohr, *Video Road Hogs Stir Fear of Internet Traffic Jam*, N.Y. Times, March 13, 2008, available at http://www.nytimes.com/2008/03/13/technology/13net.html?_r=1&oref=slogin (Lohr article).

⁵⁴ See *FCC Expands, Improves Broadband Data Collection*, WC Docket No. 07-38, News Release, (rel. Mar. 19, 2008).

⁵⁵ *Recommended Decision*, at ¶ 21.

⁵⁶ See *The Packet Train Needs to Stop at Every Door*, NECA (June 2006) (*Packet Train Study*); NECA’s *Middle Mile Broadband Cost Study* (Nov. 2001) (*NECA Middle Mile Study*).

⁵⁷ The Joint Board notes in this regard that the Commission’s current definition of “broadband” is outdated and that a more rigorous requirement may be justified. *Recommended Decision* at ¶ 56. NECA agrees that

For all the above reasons, NECA supports the Joint Board's recommendation to leave existing ILEC high-cost mechanisms in place while focusing on near-term priorities (*i.e.*, reform of existing CETC programs and expansion of the contribution base). The Joint Board and the Commission may then reasonably evaluate ways to reform existing POLR support mechanisms to meet the needs of 21st Century consumers in rural and high cost areas.⁵⁸

D. The Commission Should Not Impose Additional Caps on POLR High Cost Funding Mechanisms.

The Commission should not adopt the Joint Board's recommendation to impose additional caps on existing POLR high cost programs.⁵⁹ First, additional caps are unnecessary. The Commission has recognized recent historic growth in high-cost funding mechanisms has been driven by increases in support payments to CETCs, particularly to wireless carriers, and not by increases in ILEC support.⁶⁰ The Joint Board likewise notes "support to most if not all RLECs has been flat or has even declined since 2003."⁶¹ No factual basis therefore exists for imposing additional caps on existing ILEC high-cost funding mechanisms.

additional work is required to determine comparable upload and download capacities and that such determinations should be subject to regular review.

⁵⁸ The Commission may also need to evaluate ways to reform existing access charge rules, as found in Part 69 of the Commission's rules, for example, to accommodate IP-based networks.

⁵⁹ The annual amount of high cost loop support available to rural ILECs and the Corporate Operations Expense dollars permitted to be included in an individual study area cost per loop calculation are limited by sections 36.603 and 36.621 of the Commission's rules, respectively. The amount of Interstate Access Support available to rural price cap carriers is limited by an overall \$650 million cap in support for this program as described in 47 C.F.R. § 54.806,

⁶⁰ This has led the Commission to impose individual caps on wireless carriers in the context of reviewing merger agreements, and to propose a much-needed cap on overall CETC funding. *See, e.g., Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee For Consent To Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, 22 FCC Rcd 19517 (2007), at ¶ 9. *See also 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, 22 FCC Rcd 9705 (2007).

⁶¹ *Recommended Decision* at ¶ 39.

Additional caps would also harm rural broadband deployment efforts. As the Joint Board correctly notes, existing high-cost programs have enabled RLECs to do a “commendable job” of deploying broadband-capable networks in rural areas.⁶² The Recommended Decision makes no attempt to analyze the adverse impacts additional caps might have on such deployment. A key factor enabling the installation of new high-capacity networks in rural areas is the assurance that the additional costs of such networks can be recovered via a combination of end user charges, access charges, and universal service funding. With increasing negative pressure on access charge mechanisms due to “phantom traffic” and other forms of access avoidance,⁶³ small companies increasingly rely on the availability of universal service funding to recover investments in updated network facilities. Additional caps on universal service support will remove that assurance and likely bring broadband deployment in RLEC serving areas to a screeching halt.⁶⁴

Moreover, as discussed above, the Commission must redefine high cost programs to accommodate the needs of 21st Century rural broadband consumers, in addition to narrowband voice users. At this stage, little is known about the levels of support needed to accomplish these goals, but it is certainly possible, indeed likely, that existing ILEC funding levels will be inadequate to accomplish the nation’s broadband goals, especially in the short term. Imposing additional caps on funding will only exacerbate the difficulties of making ubiquitous broadband service available throughout rural America.

⁶² *Id.* at ¶¶ 30, 39.

⁶³ *See, e.g.*, Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Mar. 27, 2008); Letter from Joe A. Douglas, NECA, to Kevin J. Martin, Chairman, FCC, CC Docket No. 01-92 (Nov. 13, 2007); Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 16, 2007); Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (July 25, 2007); and Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (May 2, 2007).

⁶⁴ *See, e.g.*, Ad Hoc Telecom Manufacturer Coalition, WC Docket Nos. 08-8 and 07-256, at 2.

Finally, as NECA previously explained in this proceeding,⁶⁵ an overall cap on universal service support levels for rural ROR companies would conflict with existing telephone company separations and access charge rules. Under existing regulatory mechanisms, ROR companies are required to allocate costs between the jurisdictions in precise ways, and may recover those costs only through specific rate elements and universal service mechanisms. For example, the Commission's Part 36 separations rules assign twenty-five percent of the cost associated with the subscriber loop to the interstate jurisdiction for recovery, with the remaining seventy-five percent assigned to the state jurisdiction.⁶⁶ To the extent the company's average total cost to provide a subscriber loop exceeds 115% of the national average cost per loop,⁶⁷ a portion of the state-assigned dollars are shifted to the interstate jurisdiction and recovered via the high cost loop fund. ILECs recover interstate common line costs through a combination of interstate end user charges, including the subscriber line charge, and (for ROR carriers) the Interstate Common Line Support (ICLS) universal service mechanism.

Should the Commission adopt the Joint Board's recommendation for imposing an additional cap on universal service funding, it would need to consider ways to revise existing separations and access charge rules. To the extent those rules continue to allocate costs of outside plant and related facilities to the common line element, for example, imposition of caps on ICLS funding will require raising existing caps on subscriber line charges, or reinstating some form of interstate carrier common line (CCL) charge.

⁶⁵ NECA Comments, WC Docket No. 05-337 (Oct. 10, 2006), at 9-12 (*NECA Reverse Auction Comments*).

⁶⁶ 47 C.F.R. § 36.154(c).

⁶⁷ As adjusted to reflect the current "caps" on high-cost loop support and corporate operations expenses. See 47 C.F.R. §§ 36.603 and 36.621.

Neither of these approaches seems desirable from a public policy perspective. Subscriber line charges are already at high levels in rural areas. Reinstitution of CCL charges would represent a major about-face in direction for policies established under the CALLS and MAG proceedings.⁶⁸ While other reform approaches could be considered, including changes in the way existing accounting and separations rules assign costs between jurisdictions, these approaches extend well beyond the scope of the Joint Board's current recommendation and would require considerable modeling and analyses to avoid unexpected, negative impacts on carriers and customers.

For all the above reasons, NECA urges the Commission to refrain from adopting additional caps on ILEC high-cost programs at the present time. Instead, the Commission should resolve immediate concerns with CETC high-cost universal service mechanisms, as discussed above. The Joint Board and the Commission can then initiate the necessary proceedings to consider reform of ILEC mechanisms in a comprehensive way, without jeopardizing continued deployment of modern rural wireline networks.

E. The Commission Should Favorably Consider the Joint Board's Proposal for a Separate Mobility Fund.

Consistent with the Joint Board's recommendation, NECA encourages the Commission to establish a separate fund designed specifically for the unique

⁶⁸ See *Multi-Association (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001)(*MAG Order*) and *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Low-Volume Long Distance Users*, CC Docket No. 99-249, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249 and Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

characteristics of wireless networks.⁶⁹ The Joint Board finds 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.”⁷⁰ A separate fund designed to address both the construction of new wireless networks in unserved areas, as well as support for ongoing wireless carrier operations in high cost, low-density areas, can with proper design avoid or at least minimize duplication of support. This Fund should incorporate whatever mechanism is developed to replace the “identical support” rule for wireless networks in rural areas. Possible approaches to developing cost-based support for mobile carriers are discussed in the following section.

A separate fund to support the provision of broadband Internet access in unserved areas may also be a worthy proposal for consideration, but any allocation of overall universal service funds to broadband grant programs should not result in reductions in existing support to rural high cost companies or impede the development of cost-based mobility funding. In this regard, the Joint Board’s Recommended Decision recognizes the extent to which existing mechanisms permit RLECs to make significant progress in deploying broadband-capable facilities in rural areas.⁷¹ It would be arbitrary for the Commission to move funds from a successful program to a new, untested fund without careful consideration of goals and objectives.⁷²

⁶⁹ *Recommended Decision* at ¶ 16.

⁷⁰ *Id.* at ¶ 35.

⁷¹ *Id.* at ¶ 30.

⁷² *See id.* at ¶ 29 (“Possible changes to these legacy programs should be evaluated by considering whether moving dollars from legacy programs to the Broadband Fund would more effectively advance the nation’s universal service goals.”)

III. THE “IDENTICAL SUPPORT RULE” SHOULD BE REPLACED WITH COST-BASED SUPPORT FOR MOBILITY PROVIDERS.

In a brief *Public Notice* issued in September 2007, the Joint Board made clear the current “identical support” rule should not be a part of future universal service funding mechanisms.⁷³ Based on extensive review by the Joint Board, the Commission has now tentatively concluded the goal of universal service will be better served if the identical support rule is eliminated and future support for CETCs is based on their own costs.⁷⁴

The Identical Support Rule NPRM describes how prior attempts to treat wireline and wireless services as marketplace substitutes has created problems for the fund and undermined, rather than advanced, universal service:

First, instead of competitive ETCs competing against the incumbent LECs for a relatively fixed number of subscriber lines, the certification of wireless competitive ETCs has led to significant increases in the total number of supported lines. Because the majority of households do not view wireline and wireless services to be direct substitutes, many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund. In addition, the identical support rule fails to create efficient investment incentives for competitive ETCs. Because a competitive ETC’s per-line support is based solely on the per-line support received by the incumbent LEC, rather than its own network investments in an area, the competitive ETC has little incentive to invest in, or expand, its own facilities in areas with low population densities, thereby contravening the Act’s universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas. Instead, competitive ETCs have a greater incentive to expand the number of subscribers, particularly those located in the lower-cost parts of high-cost areas, rather than to expand the geographic scope of their networks.⁷⁵

⁷³ *Federal-State Joint Board on Universal Service Statement on Long-Term, Comprehensive High-Cost Universal Service Reform*, WC Docket No. 05-336, CC Docket No. 96-45, Public Notice, 22 FCC Rcd 17236 (2007).

⁷⁴ *Identical Support Rule NPRM* at ¶ 12.

⁷⁵ *Id.* at 10 (emphasis added).

In his separate statement on the Commission's NPRMs, Commissioner Copps more succinctly said:

[I]t is clear to me that the costs of investing and maintaining wireless and wireline infrastructure are inherently different. I believe that wireless can and should be a part of Universal Service, but the time has come to put an end to the irrational and costly system of supporting wireless carriers based on the cost of wireline incumbents.”⁷⁶

NECA agrees. Providing wireline telecommunications services on a “carrier of last resort” basis to areas with rugged terrain and sparse population is a challenging and costly endeavor. It is likely wireless service providers face issues specific to their technology that may make it challenging to provide wireless service to rural customers. Support mechanisms for rural wireless networks should be designed specifically for the unique characteristics and costs of providing and maintaining those networks.

A separate mobility fund should address both the construction of new networks in unserved areas as well as support for ongoing operations in high cost, low-density areas. Support based on the “identical support” rule should be replaced with support based on a wireless carrier's own costs.

Costing rules need not be burdensome. As the Commission suggests, CETCs could file cost data periodically with the Commission or relevant state commission as a condition of receiving high cost support, and could periodically update costs to reflect current data.

However, there is a need for the Commission to create clear rules regarding what costs are appropriate for inclusion, as well as cost review procedures and accountability mechanisms regarding how the money is spent. In this regard, the Commission requests

⁷⁶ *Joint Board Comprehensive Reform NPRM*, Statement of Commissioner Michael J. Copps, at 50.

comment on whether and to what extent CETCs should disaggregate costs into categories and among geographic service areas and how to deal with wireless-specific costs such as spectrum. The Commission tentatively concludes that CETCs should subscribe to Generally Accepted Accounting Principles (GAAP) to report costs, using accounting methodologies similar to those already in place to provide information to external parties such as auditors.⁷⁷

NECA agrees with the Commission's suggestion that wireless costs should be examined independently from wireline LEC costs for purposes of determining high cost support,⁷⁸ particularly insofar as wireless carriers have different cost components and network configurations than small ILECs.

In developing cost-based methods for determining wireless CETC support, the Commission should carefully consider a proposal advanced in this proceeding by Panhandle Telecommunications Company.⁷⁹ Under Panhandle's approach, mobility funding would go only to facilities-based wireless network providers, who in turn would make their facilities available to other wireless carriers at cost-based rates.⁸⁰ While the Panhandle proposal does allow for multiple wireless carriers in the same region to receive support when they invest in network facilities, it contains an economic incentive for wireless carriers to use other carriers' networks. Carriers receiving support would be required to provide roaming on a non-discriminatory basis to other wireless carriers and

⁷⁷ *Identical Support Rule NPRM* at ¶ 18.

⁷⁸ *Id.* at ¶ 22.

⁷⁹ See Letter from Kenneth C. Johnson, Bennet & Bennet (on behalf of Panhandle), to Marlene H. Dortch, FCC, CC Docket No. 96-45 (Jan. 11, 2008) (attaching "Federal USF Distribution Proposal for Multiple ETCs", at 2) (*Panhandle Proposal*). Note that Panhandle's proposal also recommends that wireline CETCs receive support based upon their own cost studies.

⁸⁰ *Id.*

their customers at a reduced rate. This “local wholesale rate” would be based on the supported wireless carrier’s costs.

Panhandle correctly states in this regard:

[T]he receipt of high cost universal service comes with an obligation, both ethical and fiscal, to use high cost support for the express provision of high cost universal service. Wireless carriers who directly or indirectly benefit from high cost support used to build out wireless networks in rural regions where multiple networks are cost prohibitive should be required to provide roaming on a non-discriminatory basis to other wireless carriers in their area and their customers. With the receipt of high cost support for wireless build out comes the obligation to share the high cost network with *all* customers who need access to the network.⁸¹

Panhandle also suggests support for wireless carriers could be determined based on a formula.⁸² As NECA understands the proposal, individual wireless carriers’ costs would be compared to a national average cost, avoiding the highly-regulated and detailed cost accounting methods currently required of ILECs. The formula would produce differing levels of support depending upon the size of the company.⁸³

NECA generally concurs with Panhandle’s approach to avoid burdening wireless carriers with a complex cost accounting mechanism designed solely for the purpose of determining support. Whatever cost-based mechanism the Commission adopts for determining Mobility Fund support payments, however, careful advance consideration should be given to audit and review procedures and mechanisms.⁸⁴

⁸¹ *Id.* at 2.

⁸² *Id.* at 3.

⁸³ NECA supports the proposed interim cap on CETC support pending the outcome of this effort to reform the CETC support mechanism. *See* NECA Comments, WC Docket No. 05-337, CC Docket No. 96-45 (June 6, 2007). However, it appears the Commission and the Joint Board are not yet in a position to determine whether and to what extent wireless mobility funding should be limited or capped. The Commission will need to determine the precise goals of a wireless mobility fund and collect enough data from wireless carriers to make at least a preliminary determination as to the costs of accomplishing those goals. It may well be, for example, that demands for cost-based support for rural wireless funding are considerably lower than support produced under current identical support methods.

⁸⁴ The *Identical Support Rule NPRM* asks, for example, whether the Commission’s existing “use” certifications are sufficient to assure that universal service support payments to CETCs are being used only

In considering ways to evaluate the validity of CETC-reported costs (both wireless and wireline), the Commission should bear in mind the extensive, multi-layered review and audit procedures employed to evaluate existing ILEC data submissions. NECA has previously provided the Commission with a detailed summary of the procedures it currently uses to review RLEC cost data submissions, including those used to determine RLEC high-cost fund payments.⁸⁵

In conducting its reviews, NECA relies upon certified financial data, opinions issued to companies by their independent auditors, and data certified by company officials pursuant to the Commission's Part 69 rules. These processes are designed to ensure data used for developing interstate access tariffs, administration of access charge settlements, as well as high cost universal service funding, are in compliance with Commission rules.

Comparable levels of scrutiny may not be necessary to validate CETC-reported costs, particularly insofar as the Commission relies on simplified accounting structures and less complex methods of determining support payments. The Commission should, however, seek to establish CETC review and auditing mechanisms that are reasonably necessary to assure compliance with the requirements of section 254(e) of the Act. The Commission should also seek to balance audit burdens between ILECs and other types of CETCs so as not to unduly burden any class of high-cost fund recipient.

for the provision, maintenance and upgrading of supported services, as required by section 254(e) of the Act. *Identical Support Rule NPRM* at ¶ 26.

⁸⁵ NECA Comments, WC Docket Nos. 05-195, 02-60 and 03-109 and CC Docket Nos. 96-45, 02-6 and 97-21 (Oct. 18, 2005), at 6-13.

IV. THE COMMISSION SHOULD NOT EMPLOY REVERSE AUCTIONS TO DETERMINE SUPPORT FOR INCUMBENT LOCAL EXCHANGE CARRIERS.

NECA has previously chronicled the Commission's 10-year quest to develop some form of competitive bidding mechanism to determine universal service support.⁸⁶ After multiple rounds of comments and replies in this proceeding, the record still shows reverse auctions would harm universal service and consumers in rural and high cost areas. The following points, among others, have been made:

- Reverse auctions would not provide incentives for network build-out or promotion of advanced service offerings in rural America. Rural consumers will therefore not receive universal access to advanced broadband services.
- Auctions would eliminate the financial stability required by financial institutions helping to fund network build-out in rural areas. Thus, reverse auctions would place in jeopardy the objective of universal access to broadband Internet service in rural America.
- Quality of service would be degraded as the lowest bidder could provide service only at the level funded.
- There would be no incentive to build-out robust networks to support public safety, homeland security, and disaster recovery systems.

Recent reverse auction proposals⁸⁷ provide more details on how reverse auctions might work but fail to address these key concerns. This is not surprising – the record strongly suggests reverse auctions are fundamentally unsuited for pricing complex

⁸⁶ *NECA Reverse Auction Comments* at 2-3.

⁸⁷ *See, e.g.*, Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 05-337 and CC Docket No. 96-45 (Feb. 9, 2007) (attaching letter to Deborah Taylor Tate, FCC and Ray Baum, State Chair, Federal State Joint Board on Universal Service, containing reverse auction proposal); Reply Comments of CTIA, WC Docket No. 05-337 and CC Docket No. 96-45, Appendix (Controlling Universal Service Funding and Promoting Competition Through Reverse Auctions, by James Stegeman, Dr. Steve Parsons, Robert Frieden, and Mike Wilson) (filed Nov. 8, 2006) (*CTIA proposal*); and Letter from Gene DeJordy, Vice President Regulatory Affairs, Steve R. Mowery, Vice President Public Policy, and Mark Rubin, Vice President Federal Government Affairs, Alltel, to Deborah Taylor Tate, FCC, and Ray Baum, State Chair, Federal-State Joint Board on Universal Service, WC Docket No. 05-337 and CC Docket No. 96-45 (attaching Alltel Universal Service Reform Proposals) (Feb. 16, 2007) (*Alltel Proposal*).

telecommunications network services in rural high-cost areas.⁸⁸ Unlike spectrum rights or other fungible commodities, the provision of “universal service” in a particular area is subject to a variety of individual circumstances, and entails obligations that can change rapidly as new technologies are deployed or circumstances change (such as damage from storms or other natural disasters). Such changes could increase costs and force selected providers to seek to renegotiate contracts, reduce service quality, or both.

Administration of “universal service contracts” would likely be a complex enterprise for the Commission and state regulators, and be subject to multiple court challenges. As Commissioner Copps pointedly asks in his dissent to the Commission’s reverse auctions proposal:

[H]ow do we ensure that the winning bidder provides adequate quality of service? What happens if the winner later decides it is no longer profitable to continue its operation? And who will be responsible for establishing the rules and enforcing them? Ironically, this purportedly market-based approach strikes me as hyper-regulatory.⁸⁹

As an example of “what can go wrong” when low-ball bids are accepted for the provision of vital telecommunications services, the Commission should consider the experiences of several states in selecting Telecommunications Relay Service (TRS) providers via competitive bidding processes.

In 1998, for example, both California and Massachusetts began using the services of a relay provider selected on the basis of competitive bidding. Similar to proposals for “multiple-winner” reverse auctions in this proceeding, California adopted a multi-vendor approach to relay service, where each vendor desiring to provide service was paid at the

⁸⁸ See e.g., Lehman, Dale E, Ph.D. “The Use of Reverse Auctions for Provision of Universal Service,” September, 2006; M.L. Emiliani, Ph.D., Central Connecticut State University, *citing* research conducted by the Center for Lean Business Management, available at <http://www.theclbm.com/research.html>.

⁸⁹ *Reverse Auction NPRM*, Statement of Commissioner Michael J. Copps, at 24.

rate of the lowest bidder.⁹⁰ Unfortunately, none of the other carriers were interested in providing service at the rate proposed by the winning bidder (\$0.699 per conversation minute). Thus, the “multiple provider” competitive bidding program initially resulted in a single-carrier offering.

In its first 50 days as the California TRS provider, the low-price bidder received nearly 2,100 complaints about the quality of service (over 40 complaints per day). Calls were not being answered in a timely manner and conversations were being garbled. Low wages paid to communication assistants inevitably led to labor troubles and attendant service quality declines, with turnover at the facility reportedly averaging between 80-90%.⁹¹ The situation deteriorated to the point where the California Public Utilities Commission (CPUC) authorized a second provider to offer relay service at \$0.89 per conversation minute. Service improved immediately, but the following year the secondary provider announced plans to exit the market unless the rate was increased to \$1.09 per conversation minute.⁹²

TRS users in Massachusetts experienced similar results after the same provider was awarded a competitively-bid TRS contract. According to a complaint filed by 230 relay-using consumers and four disability rights groups, Massachusetts customers “missed appointments because of wrong messages. Family and friends couldn't communicate during a crisis. Some people simply gave up using relay.”⁹³ Eventually, a settlement agreement was reached with the Massachusetts Department of

⁹⁰ See *Resolution T-16262. To Amend the Amended Master Agreement for California Relay Services to Increase the Per Conversation Minute Rate Paid to MCI telecommunications Corporation*, (Cal. P.U.C., Dec. 17, 1998), available at http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/4681.doc

⁹¹ *Id.*

⁹² *Id.*

⁹³ Relay Users Win Over MCI; available at <http://www.ragged-edge-mag.com/0598/a598drn.htm>

Telecommunications and Energy calling for monetary sanctions against the provider if it continued to fail to meet mandated quality standards in delivering relay services in the state.⁹⁴

In Florida, the same provider was ordered to pay \$1.285 million in damages as a result of poor service to people with hearing and speech impairments.⁹⁵ Less than six months later, the Florida PSC assessed additional liquidated damages on the provider.⁹⁶

Having witnessed these problems with TRS providers selected by means of competitive bidding, the New Hampshire Commission determined:

We are not persuaded that a bid process will result in lower costs or better service. We see no need to risk this important means of communication for the mere possibility that costs may be lower or service better. In addition, transition from one service provider to another can result in significant disruptions to the community of TRS users who rely so heavily on this service.⁹⁷

The above examples illustrate the difficulties regulatory agencies have encountered managing the quality of communications services provided by vendors under competitively-bid contracts. While other states have successfully used competitive bid processes to select TRS vendors, this may be due to the fact most costs for providing TRS are expense-related, with very little fixed, capital costs.⁹⁸ That is, most TRS costs relate to salaries for communications assistants and telecommunications services purchased from underlying network providers.

⁹⁴ *Id.*

⁹⁵ Palm Beach Post Staff and Wire Services, *MCI Assessed for Poor Disabled Service*, The Palm Beach Post, March 30, 2000, available at <http://www.highbeam.com/doc/1P1-25627022.html>

⁹⁶ Florida Relay: Development of the Telecommunications Access System, Florida Public Service Commission, available at <http://www.psc.state.fl.us/utilities/telecomm/relay/tasa.aspx>

⁹⁷ *Sprint Communications Company, L.P. Petition to Increase Price for Telecommunications Relay Service, Order Approving Increase in Price for Telecommunications Relay Service*, Order No. 23,178 (N.H. P.S.C. Mar. 30, 1999).

⁹⁸ Presentation by NECA to the TRS Advisory Council, (Mar. 29, 2007), available at http://www.neca.org/media/2007_Interstate_TRS_Fund_Filing.pdf

This makes it relatively easy for TRS vendors to enter and exit markets and for state regulators to find competitive alternatives to replace unqualified providers.

Deploying multi-use wireline networks in rural areas, on the other hand, is extremely capital-intensive, particularly where service is to be provided on a “carrier of last resort” basis. The process of managing “universal service contracts” awarded pursuant to competitive bids for wireline networks is likely to entail far more complex administrative problems and to generate more litigation than other, more easily-provisioned services. Moreover, the Commission can expect to have far fewer options or alternatives when misguided or unscrupulous operators “low ball” a bid and subsequently fail or decide to exit a market. The real losers will be the consumers receiving (or more likely, not receiving) expected services.

For all the reasons listed above, as well as those identified in prior phases of this proceeding, the Commission should not move forward with proposals to determine universal service support pursuant to reverse auctions.

If, however, contrary to comments filed at earlier stages of this proceeding, the Commission decides to adopt a reverse auction mechanism for determining ILEC universal service support, it should bear in mind that limiting universal service support for ROR ILECs to fixed contract amounts determined pursuant to reverse auctions would also result in cost recovery shortfalls that ultimately will put upward pressure on end user rates and interstate access charges. Thus, adoption of a reverse auction model for ROR ILECs would require simultaneous changes to existing separations or access charge rules in order to deal with likely revenue shortfalls associated with fixed contract

amounts. Resolving such issues will take additional time and does not appear to be contemplated within the scope of the current NPRMs.

Moreover, should the Commission implement the reforms described above (*i.e.*, establishment of separate funds for POLRs and mobility providers; replacement of “identical support” payments with cost-based support to wireless network providers; and imposition of resale requirements on all support recipients), it may well find reverse auction mechanisms are unnecessary. Reverse auctions are primarily intended to address problems of uneconomic fund growth and subsidization of multiple universal service providers in a given area, which the above-noted reforms would address.⁹⁹

As explained above, support payments to ILECs under current ILEC mechanisms have remained relatively stable, and payments to CETCs may be sharply curtailed when identical support payments are replaced with support based on actual cost data. As the Joint Board notes, limiting payments to a single POLR and a single mobility provider should resolve problems with paying multiple providers for universal service in geographic areas where it may be uneconomic for even one network provider to offer service.¹⁰⁰ If so, there may be no need for the Commission, the Joint Board and the industry to spend another ten years figuring out how to make reverse auctions “work” for the universal service high cost fund.

⁹⁹ *Reverse Auction NPRM* at ¶ 14.

¹⁰⁰ As discussed above, limiting payments to facilities-based CETCs, and imposing wholesale resale requirements as a condition of receipt of USF support may have the same effects.

More importantly, consumers in high cost areas will not experience the potential service disruptions and service quality problems that could result from a reverse auction mechanism.

V. THE CONTRIBUTION BASE SHOULD BE EXPANDED TO ENCOMPASS BROADBAND SERVICES

In 2006, the Commission took critical action to ensure the stability and sufficiency of the Fund by raising the interim wireless “safe harbor” from 28.5 percent to 37.1 percent and by imposing universal service contribution obligations on providers of interconnected Voice over Internet Protocol (VoIP) services.¹⁰¹

More fundamental questions relating to the existing revenue-based contribution method have been pending since at least 2003.¹⁰² During that time, Congress has occasionally considered legislation that would permit the Commission to use both interstate and intrastate revenues to determine contribution shares.¹⁰³ The current revenue-based contribution mechanism has remained largely unchanged, however, since its inception.

¹⁰¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, *Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size*, CC Docket No. 92-237, NSD File No. L-00-72, *Number Resource Optimization*, CC Docket No. 99-200, *Telephone Number Portability*, CC Docket No. 95-116, *Truth-in-Billing and Billing Format*, 98-170, *IP-Enabled Services*, WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), at ¶16 (*Contribution Methodology Order*).

¹⁰² *Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, NSD File No. L-00-72, Public Notice, 18 FCC Rcd 3006 (2003).

¹⁰³ *See, e.g.*, Universal Service Reform Act of 2007, H.R. 2054, 110th Cong. § 3(d)(1)(A). While the Commission originally sought to base universal service contributions on both interstate and intrastate revenues, the Fifth Circuit court found it lacks jurisdiction to do so. *See Texas Office of Public Utility Counsel, et. al. v. FCC*, 183 F.3d 393 (5th Cir. 1999).

The Commission should not lose sight of this important aspect of USF reform. Overall demand for interstate telecommunications and information services remains strong, but end-user switched interstate telecommunications revenues, on which current contributions are based, are generally declining. Demand is shifting to “bundled” service packages and/or broadband services that replace to some extent traditional interstate telephony services (e.g., voice mail, instant messaging, web-based services, etc.).¹⁰⁴ Customers are increasingly subscribing to telecommunications services, including voice telephony, that are provided as part of an advanced broadband service package (e.g., “triple play” packages). Yet in rural areas, the networks upon which these services depend continue to rely on universal service funding.

The Commission needs to ensure USF assessments keep pace with the market. It should therefore take action soon to expand the contribution base to include some form of contribution from facilities-based broadband providers.¹⁰⁵ As demand continues to migrate to these services, expansion of the contribution base becomes more and more critical to maintaining the stability of the overall fund.¹⁰⁶

¹⁰⁴ Broadband connections are increasingly carrying telephony voice calls, and not just from interconnected VoIP providers. See *supra* n. 42 for further discussion.

¹⁰⁵ These reform efforts must soon address, for example, disparities between contribution requirements from broadband services provided on a Title II basis and those provided under Title I as permitted by the Commission’s Wireline Broadband Order. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 and 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 02-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) at ¶ 113.

¹⁰⁶ The Commission has determined it has the authority under section 254(d) of the Act to require such contributions. *Contribution Methodology Order* at ¶¶ 38-42.

VI. CONCLUSION

The Commission should adopt the Joint Board’s recommendation to establish a separate universal service POLR fund for entities bearing such obligations under applicable federal and state law. Existing high cost universal service support mechanisms for incumbent local exchange carriers (ILECs) should be left in place for the time being, pending more focused and comprehensive examination of ways to modernize these mechanisms. The Commission should not, however, impose additional “caps” on existing rate of return (ROR) high cost support mechanisms. Such additional caps are unnecessary, would harm rural broadband deployment efforts, and in any event cannot be implemented without fundamental changes to existing separations and access charge rules.

The “identical support” rule should be replaced with rules that require CETCs to receive support based on the actual costs of providing service in rural areas. Consistent with a proposal advanced in this proceeding by Panhandle Telephone Company, funding for mobile CETCs should go only to facilities-based wireless network providers, who in turn should be required to make their facilities available to other carriers at cost-based rates.

The Commission should not employ reverse auctions as a mechanism to award support for ILECs. Such mechanisms are likely to result in severely degraded universal service to consumers, and in any event are administratively unworkable. If the Commission implements the separate fund approach outlined in the Joint Board’s Recommended Decision and replaces the identical support rule with cost-based support for CETCs, the problems reverse auctions are supposed to solve may well resolve

themselves. There is, therefore, no need for the Commission to engage in such “hyper-regulatory” approaches to universal service reform.

Finally, as it considers various reform proposals set out in the current notices, the Commission must not lose sight of the need to reform existing contribution mechanisms. In particular, the Commission should act as soon as possible to broaden the contribution base to include broadband services.

Respectfully submitted,

April 17, 2008

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Comments was served this 17th day of April, 2008 by electronic filing and by e-mail to the persons listed below.

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