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
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of	)	CC Docket No. 96-98
1996	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	
Intercarrier Compensation for ISP-Bound	)	CC Docket No. 99-68
Traffic	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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I. INTRODUCTION

On November 5, 2008, the Federal Communications Commission ("FCC" or "Commission") issued an order on remand,[1] a report and order ("Report and Order"), and a further notice of proposed rulemaking ("FNPRM") in the above-captioned

[1] / In its order on remand, the Commission concludes, in responding to the writ of mandamus granted by the United States Court of Appeals for the District of Columbia, that it has authority to impose rules on traffic bound for Internet Service Providers ("ISP").

proceedings.[2] The New Jersey Division of Rate Counsel ("Rate Counsel") submits these comments in response to the FNPRM.[3]

A. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.[4] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices." The resolution of the complex economic and policy issues that this

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2 / *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, WC Docket Nos. 03-109, 04-36, 05-337, 06-122, Order on Remand and Report and Order ("Report and Order") and Further Notice of Proposed Rulemaking ("FNPRM"), FCC 08-262 (rel. Nov. 5, 2008).

3 / "Comment Dates Established for Comprehensive Intercarrier Compensation and Universal Service Reform," Further Notice of Proposed Rulemaking, DA 08-2486, released: November 12, 2008, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, WC Docket Nos. 03-109, 04-36, 05-337, 06-122. Universal Service Contribution Methodology; High-Cost Universal Service Support; IP-Enabled Services; Lifeline and Link Up; Developing a Unified Intercarrier Compensation Regime; Numbering Resource Optimization; Intercarrier Compensation for ISP-Bound Traffic; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Federal-State Joint Board on Universal Service, 73 Fed. Reg. 66,821 (Nov. 12, 2008).

4 / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

proceeding embraces directly affects the structure of telecommunications markets, and the prices that consumers pay for basic telecommunications service.

Rate Counsel has a long-standing interest in the Commission's efforts to unify intercarrier compensation,[5] reform the high-cost universal service mechanism,[6] and promote the deployment of affordable broadband service.[7] In an earlier phase of this

[5] / Rate Counsel submitted comments regarding intercarrier compensation reform in earlier phases of this proceeding. *See, e.g.*, initial and reply comments, filed October 25, 2006 and February 1, 2007 regarding the original *Missoula Intercarrier Compensation Reform Plan*, and then subsequently on March 19, 2007 and April 17, 2007 regarding amendments to the Missoula Plan. Rate Counsel also submitted initial and reply comments on May 23, 2005 ("Rate Counsel 2005 ICC Comments"), and July 20, 2005 ("Rate Counsel 2005 ICC Reply Comments"), respectively. Rate Counsel addressed related issues in its opposition to AT&T's and Embarq's petitions to unify intrastate and interstate switched access charges pending comprehensive reform. *In the Matter of Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission's Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions*, WC Docket No. 08-160, Rate Counsel initial and reply comments, August 26, 2008, and September 5, 2008. *In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption"* WC Docket No. 08-152, Rate Counsel initial and reply comments, August 12, 2008, and September 2, 2008. See also, Rate Counsel reply comments submitted in WC Docket No. 08-56, June 9, 2008; *Petition for a Declaratory Ruling That USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing To Originate Long Distance Calls*, WC Docket No. 05-276, comments filed November 10, 2005, December 12, 2005, January 9, 2006 and January 26, 2006.

[6] / In 2005, the Federal Communications Commission, issued "Federal-State Joint Board on Universal Service Seeks Comment on Proposals to Modify the Commission's Rules Relating to High-Cost Universal Service Support," Public Notice, FCC 05J-1, August 17, 2005 ("Public Notice"). In response, Rate Counsel submitted initial and reply comments in CC Docket No. 96-45 (September 30, 2005 and October 31, 2005, respectively). See also, *In the Matter of Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195, *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, *Lifeline and Link-Up*, WC Docket No. 03-109, *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Comments of The New Jersey Division of The Ratepayer Advocate, October 18, 2005; *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Comments of the New Jersey Division of The Ratepayer Advocate, March 27, 2006 ("Rate Counsel March 2006 USF Comments"), Reply Comments of the New Jersey Division of The Ratepayer Advocate, May 26, 2006 ("Rate Counsel May 2006 USF Reply Comments"). In 2008, Rate Counsel filed comments in response to the Commission's Notices of Proposed Rulemaking related to the Identical Support Rule, Reverse Auctions, and the Joint Board's Recommended Decision on Comprehensive reform. See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Comments of the New Jersey Division of Rate Counsel, April 17, 2008 ("Rate Counsel April 2008 USF Comments"), Reply Comments of the New Jersey Division of Rate Counsel, June 2, 2008 ("Rate Counsel June 2008 USF Reply Comments").

[7] / See, e.g., In the Matter of Consumer Protection in the Broadband Era, WC Docket No. 05-271, Initial Comments of the New Jersey Division of the Ratepayer Advocate, Initial Comments, January 17, 2006; In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability

proceeding, the Commission indicated that it sought to replace the various existing intercarrier compensation regimes with "a unified arrangement that accommodates competition and new technologies."[8] In its FNPRM, the FCC states that its proposed reforms "are designed to unify and simplify the myriad intercarrier compensation systems in existence today" and that the "unification and simplification will encourage the efficient use of, and investment in, advanced telecommunications and broadband networks, spur intermodal competition throughout the United States, and minimize the need for future regulatory intervention."[9]

B. SCOPE OF FNPRM

The FCC, in two of three proposals included in the FNPRM, "comprehensively reform[s] the high-cost universal service support mechanism, and take[s] steps to ensure that broadband Internet access service is deployed quickly to all areas of the country"[10] and "take[s] the long overdue step of moving toward uniform intercarrier compensation rates . . ."[11] In its third proposal, the "Narrow Universal Service Reform Proposal," the Commission "comprehensively reform[s] the high-cost universal service support

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to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Comments of the New Jersey Division of Rate Counsel, May 16, 2007; In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, Comments of the New Jersey Division of Rate Counsel, June 15, 2007, and Reply Comments of the New Jersey Division of Rate Counsel, July 16, 2007; Rate Counsel April 2008 USF Comments; Rate Counsel June 2008 Comments.

[8] / *In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC CC Docket No. 01-92, *Further Notice of Proposed Rulemaking* (rel. March 3, 2005), at para. 1.

[9] / FNPRM, Appendix A, at para. 157.

[10] / *Id.*, Appendix A, at para. 12; Appendix C, at para. 12.

[11] / *Id.*, Appendix A, at para. 3; Appendix C, at para. 3.

mechanism,"[12] and does not address broadband deployment and intercarrier compensation. The Commission seeks comment on: [13]

- Chairman's Proposal (Appendix A): this proposal reforms universal service, reforms intercarrier compensation, establishes broadband requirements for high-cost fund recipients, and establishes a Broadband Lifeline/Link Up Pilot Program.
- The "Narrow Universal Service Proposal" (Appendix B): this proposal reforms universal service, does not address intercarrier compensation, nor does it address broadband deployment.
- The "Alternative Proposal" (Appendix C): this proposal is similar to the Chairman's Proposal but incorporates changes based on certain *ex parte* presentations, which the Commission includes in Appendix D.[14]

The Commission also seeks comment on two questions:

- Should the additional cost standard utilized under § 252(d)(2) of the Act be the existing TELRIC standard or the incremental cost standard that the draft order describes?
- Should the terminating rate for all § 251(b)(5) traffic be set as a single, statewide rate or a single rate per operating company?[15]

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12 / *Id.*, Appendix B, at para. 12.

13 / *Id.*, at para. 40.

14 / Appendix D of the FNPRM includes *ex parte* filings by Free Press; OPASTCO and Western Telecommunications Alliance; and CTIA-The Wireless Association® ("CTIA"). For the sake of simplicity, these comments include cites to the relevant paragraphs in Appendix A. The language is, in many cases, the same in Appendix A and Appendix C, with the exception of the explicit policy proposal changes enumerated in Appendix C.

15 / FNPRM, at para. 41.

Notably absent from the FNPRM, however, is consideration of the *Qwest II* remand.[16] Without addressing these key questions of rate comparability and affordability, the FCC cannot meaningfully reform universal service programs.

Among the FCC's goals in this proceeding should be economic efficiency, preservation of universal service, competitive neutrality, technological neutrality, and compatibility of any proposal with the FCC's legal authority to implement such a plan. Ultimately, the resolution of this complex proceeding will affect consumers' prices and the competitive landscape in New Jersey and throughout the country.

C. SUMMARY OF COMMENTS

The complexity and controversy inherent in the FCC's FNPRM are formidable and the need for regulatory reform is great. Rate Counsel commends the Commission for undertaking the daunting and inter-related challenges of unifying the myriad of intercarrier compensation regimes, reforming an inefficient universal service fund ("USF"), and expanding the availability and affordability of broadband service. However, the complexity of the issues that the FNPRM addresses underscores the need to allow adequate time to review the implications of the proposals not only for the industry, but also for consumers, who are the intended beneficiaries of competition,[17] and also underscores the importance of having comprehensive data related to any proposed changes. For this reason, Rate Counsel is dismayed by the extremely abbreviated

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16 / *Qwest Corp. v. FCC*, 398 F 3d 1222 (10th Cir. 2005) ("Qwest II").

17 / The Preamble to the 1996 Act states that the 1996 Act's purpose is: "To promote competition and reduce regulation *in order to secure lower prices and higher quality services for American telecommunications consumers* and encourage the rapid deployment of new telecommunications technologies" (emphasis added).

comment cycle and the lack of cost, revenue, and demand data associated with the proposals for reform.

Rate Counsel also urges the Commission to resist solutions that shift billions of dollars in carriers' cost recovery to consumers based on speculative predictions of gain and minimal tangible benefits. Under the contemplated proposals, primary residential and single-line business consumers would pay $128 million more in subscriber line charges ("SLC") each month, translating into over $1.5 billion in new annual consumer costs.[18] Multi-line business consumers would face an additional $91 million in subscriber line charges each month, translating into approximately $1.1 billion in new annual costs for multi-line business customers.[19] The total new annual cost to consumers would be approximately $2.8 billion in subscriber line charges.[20]

By contrast, the potential consumer gain from the FCC's proposals would be uncertain and woefully inadequate. One uncertain gain is the remote possibility of a flow-through by carriers of their reduced intercarrier compensation charges.[21] The inadequate gain is the $300 million for Lifeline subsidies for broadband services, which

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[18] / $1.50/per month times 12 months times the sum of 85.8-million residential and single-line business access lines and 9.7-milllion non-primary access lines. The number of SLC-eligible lines is the 2006 Average Monthly Access Lines as reported in FCC, Wireline Competition Bureau, Industry Analysis & Technology Division, *Trends in Telephone Service*, rel. August 2008, at Table 1.3 Interstate Per-Line Access Charges by Carrier. Rate Counsel concurs with the assessment of Free Press that increases in the SLC "could result in an even greater level of over-recovery" of costs. FNPRM, Appendix D, Free Press *ex parte*, at 6. See, also, *id.*, at 7.

[19] / $2.30/per month times 12 months times 39.5-million multi-line business lines. The number of SLC-eligible lines is the 2006 Average Monthly Access Lines as reported in FCC, Wireline Competition Bureau, Industry Analysis & Technology Division, *Trends in Telephone Service*, rel. August 2008, at Table 1.3 Interstate Per-Line Access Charges by Carrier. See, also, FNPRM, Appendix D, Free Press *ex parte*, at 7.

[20] / This includes $1,543,590,000 for residential and single-line business lines; $173,880,000 for non-primary residential lines; and $1,089,951,600 for multi-line business lines.

[21] / For further discussion of this point, see Rate Counsel's initial and reply comments regarding the Missoula Plan, filed October 25, 2006 and February 1, 2007.

is a negligible amount to bring low-income customers to the other side of the digital divide. Also the FNPRM perpetuates the Commission's continuing patchwork approach to broadband deployment, which fails to recognize that it is, in many instances, the non-rural carriers (which receive limited high-cost support) that have failed to deploy broadband to their customers.

Furthermore, the timing of the proposed reforms is inexplicably skewed toward industry, with new consumer burdens occurring immediately in the form of higher subscriber line charges and any benefits being speculative and postponed into an uncertain future. The FCC's proposals also are flawed because they improperly abrogate state rights, misclassify voice over Internet protocol ("VoIP") as information services and unnecessarily create "revenue recovery opportunities."

The Commission's goal that intrastate access charges mirror interstate charges within two years is reasonable, but states, not the FCC should set the pace. As Rate Counsel demonstrates below, the Commission's eleventh hour proposal to abandon TELRIC in favor of a different incremental cost standard is troubling, particularly in light of the extremely abbreviated opportunity for comment.

Furthermore, the proposals lack the underlying cost, revenue, and demand data that would enable Rate Counsel and other interested parties to assess the reasonableness of the rate structures and rate levels encompassed by the FCC's proposed reform. Relevant data should be provided to inform decision-making about proposals such as those contemplated by the FCC, which put billions of consumer dollars at stake. Also, among other things, the proposals are deeply flawed because, like the "Missoula Plan," they improperly assume that ILECs are entitled to the historic revenue stream associated with past demand for switched access charges rather than taking into account the substantial stream of revenues which ILECs enjoy from diverse sources including over-priced interstate special access, dominance in bundled double-play and triple-play packages, and billions of dollars in digital subscriber line ("DSL") revenues, which were not available to them when the FCC last addressed access charges in its *CALLS Order*.[22]

The Commission has concluded that it will not adopt the Recommended Decision[23] put forth by the Federal-State Joint Board on Universal Service ("Joint Board").[24] It is disheartening that the Commission has also apparently abandoned any effort to address the underlying problems of the high-cost fund as outlined by the Joint Board.[25] The Commission has also failed, once again, to address the Tenth Circuit's remand in Qwest II.[26] Instead the proposals outlined as appendices to the FNPRM perpetuate the excessive subsidization of some carriers to the detriment of consumers.

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22 / *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, 12991-93 (2000) ("CALLS Order"), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied, National Association of State Utility Consumer Advocates v. FCC*, 535 U.S. 986 (2002); *on remand, Access Charge Reform; Price Cap Performance Review for LECs; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, Order on Remand, 18 FCC Rcd 14976 (2003) (*CALLS Order on Remand*).

23 / *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Recommended Decision, 22 FCC Rcd 20477 (JB 2007) ("Comprehensive Reform Recommended Decision").

24 / Report and Order, at para. 37.

25 / *See, e.g., Comprehensive Reform Recommended Decision*, at paras. 20-22.

26 / The Commission released an NPRM in 2005 to address the remand, but has yet to act. *In the Matter of Federal-State Joint Board on Universal Service*, FCC CC Docket No. 96-45; *High-Cost Universal Service Support*, FCC WC Docket No. 05-337, *Notice of Proposed Rulemaking*, Rel. December 9, 2005 ("2005 High Cost USF NPRM")

While Rate Counsel commends the Commission for proposing to cap the high-cost fund,[27] the implementation of a cap should be seen as a first step in the reform process.

The Commission's linkage of broadband deployment to high-cost funds simply perpetuates many of the underlying problems of the high-cost fund and continues to ignore the fact that the funds granted to providers do not accurately reflect the actual funds required to serve many areas. Furthermore, the linkage of provider of last resort funds with broadband funds will make it that much more difficult to reduce or sunset high cost payments in the future. Indeed, Rate Counsel continues to support the elimination of high-cost support to Bell operating companies because there is no evidence that they require universal service subsidies in order to provide affordable service.

Rate Counsel also opposes the linkage between the high-cost fund and broadband deployment because such a plan limits broadband deployment efforts to high-cost study areas, ignores demand-side issues, and fails to make funds for broadband deployment explicit and targeted. In addition, while implicit in the Commission's decision to require broadband deployment by carriers that receive high-cost fund is the implication that carriers are currently receiving too much money there is absolutely no evidence that adding the requirement to deploy broadband fixes the excessive subsidization problem.

Rate Counsel respectfully disagrees with the Commission's decision to move forward with the widespread use of reverse auctions to grant high-cost (and now broadband) funds. Although the Commission has addressed some of the concerns put forth by commenters earlier this year, numerous difficult implementation issues remain unresolved. Many of the requirements that the Commission proposes to apply may be

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27 / FNPRM, at Appendix A, para. 15

difficult to enforce and monitor and those details have not been identified. Finally, the Commission has punted on one of the most critical issues of all: what to do when no bidder comes forward after the incumbent has declined to commit to deploy broadband. As proposed, the incumbent eligible telecommunications carrier ("ETC") would continue to receive excessive high-cost funds while declining to deploy broadband.

Rate Counsel commends the Commission for its decision to eliminate the identical support rule and to limit the number of ETCs to one per study area. However, Rate Counsel continues to oppose the replacement of the current contribution mechanism with a numbers-based mechanism because low-use customers would be penalized.

Under Section 706 of the Act, states and the FCC have concurrent jurisdiction over advanced services. The directives that the FCC proposes to increase broadband deployment should be modified. Among the proposals' shortcomings are the following:

- By linking support for broadband deployment to the existing High Cost support mechanism, the Commission would focus broadband support only on those areas that already receive High Cost support, which would exclude those areas of the country that are not high-cost areas and yet that lack broadband access. Furthermore, by linking broadband subsidies to the high cost program, the FCC would complicate unnecessarily the implementation of long-overdue reform to the high cost fund.
- The proposed pilot program to subsidize broadband adoption through the Lifeline and Link Up programs is a step in the right direction, but the level of proposed funding is inadequate to the magnitude of the task. Furthermore, in today's economic downturn, there are likely many households that may not qualify for

Lifeline, but that nonetheless confront severe budget constraints. Affordable broadband is essential not only for Lifeline customers, but for all households.

- Ongoing federal and state data gathering and broadband mapping programs should inform the distribution of any broadband subsidies so that broadband support is targeted efficiently to those areas in greatest need of universal service support.
- The Commission should emphasize the importance of identifying the least-cost, most efficient broadband technology for remote and unserved areas, including technologies such as broadband over power lines and wireless broadband.

II. INTERCARRIER COMPENSATION

The FCC should not adopt the intercarrier compensation proposals set forth in the FNPRM.

Rate Counsel supports the replacement of the fragmented intercarrier compensation schemes with a unified payment mechanism that minimizes incentives for regulatory arbitrage, but only provided that the Commission first takes the following considerations into account:

- Haste to adopt unified intercarrier compensation charges should not cloud the FCC's analysis of the various proposals' impact on consumers. Although it may be tempting simply to raise consumers' fixed charges as a way through the thicket of industry proposals, such increases are neither economically efficient nor fair.
- New rates should be based on well-documented, transparent cost studies. Although the magnitude may be small, terminating traffic imposes costs, which should be reflected in rates. If carriers separately wish to enter into bill-and-keep

arrangements, this could occur, but the default rates should correspond with underlying economic costs.

- The FCC should not abandon total element long run incremental cost ("TELRIC") as the cost methodology, and even if, contrary to Rate Counsel's recommendation, it is contemplating another cost methodology, such a significant change should be subject to a much longer comment period than the truncated notice and comment opportunity afforded by the FNPRM.
- The FCC should not increase interstate subscriber line charges. There is no evidence that the present levels fail to recover the interstate portion of the cost of local loops. Indeed, during the years since the FCC issued the *CALLS Order*, the cost of the regulated portion of the local loop has been declining: ILECs have been using the local loop as an essential platform for DSL, and therefore, are able to recover a significant portion of the local loop cost from this new revenue stream.
- In no event, should an *interstate* end user charge be used as a way to recover foregone *intrastate* revenues.
- Any consideration of the recovery of the intrastate portion of the cost of local loops resides properly with state regulators. There is simply no justification for the FCC to increase the SLC.
- Rate Counsel continues to oppose "make-whole" mechanisms for several reasons:
    - Reductions in intercarrier compensation not only lower the revenues that ILECs' local operations *receive* but also lower the charges that ILECs' long-distance affiliates must *pay* for intercarrier compensation. It would

be imprudent, unfair, and inefficient to examine solely the reduction in access charge revenues. The FCC should consider as well the fact that ILECs' long distance operations also will pay less if access charges decline.

  - Using the local networks that consumers have paid for, ILECs are generating billions of dollars in DSL revenues. It would be unfair and anticompetitive to exclude consideration of these revenues in any assessment of the impact of foregone access revenues on carriers' ability to generate a reasonable return on their investment.
  - Competition necessarily alters and erodes historic revenue streams, but also may lead to opportunities for revenues from new sources. The purpose of regulation is not to preserve historic revenue streams.

- FCC guidance for the direction of intrastate access charges is reasonable, but the FCC should not abrogate states' unique responsibility and authority to set intrastate access charges.
- As Rate Counsel has stated in previous filings with the FCC, there is little likelihood that carriers will flow through the reduced access charges to consumers, and therefore, there is no clear consumer benefit.

The proposed "revenue recovery opportunity" penalizes consumers, is not cost-based, and improperly usurps intrastate rate-making authority.

The FCC proposes to increase the interstate subscriber line charge cap for residential and single-line business lines from \$6.50 to \$8.00, for non-primary residential lines from \$7.00 to \$8.50, and for multi-line business lines from \$9.20 to \$11.50,[28] which

[28] / FNPRM, Appendix A, at para. 298.

would generate approximately $2.8 billion in new revenues for ILECs. The FNPRM further proposes that carriers may increase SLCs up to the caps "to recover any net loss in *intrastate* intercarrier compensation revenues, at least on an interim basis."[29] The FNPRM refers "to the Joint Board, among other things, the question of whether, and to what extent, net reductions in intrastate intercarrier compensation revenues should be offset by revenues from interstate end-user charges."[30]

Rate Counsel strenuously opposes any further increases in the SLC, particularly in light of the utter lack of cost justification for such increases. Furthermore, as stated above, ILECs' increasing reliance on the local loop as a springboard for the profitable DSL line of business is evidence that the direction of the SLC should be lower, not higher. Also, it would be entirely improper for an *interstate* SLC to be used to offset *intrastate* rate changes. Instead, the FCC should "leave it to each state to address lost intrastate intercarrier compensation revenues as appropriate under state law"[31] and not require the Separations Board's view on this matter. Intrastate ratemaking unambiguously resides with state regulators, and, it is inconceivable that an interstate SLC should be used for intrastate ratemaking purposes.

The potential consumer benefit is unlikely to occur.

Rate Counsel does not dispute, as an economic matter, the proposition that consumer surplus could result from rate reductions in switched access charges, particularly where excessive rates depress demand. However, that surplus depends critically on the *industry actually lowering prices.* The Commission should afford little

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29 / *Id.*, at para. 299 (emphasis added).

30 / *Id.*, at fn 783.

31 / *Id.*, at para. 309.

weight to the proponents' analysis of economic benefits because (based on the increasing concentration in today's telecommunications industry) the prospect of carriers *voluntarily* lowering rates is negligible. Carriers can easily "bury" toll rate increases in the prices that they charge for bundled offerings, and use those rate increases to subsidize their video and Internet access offerings. Rate Counsel urges the Commission to reject the implicit proposition that reductions in access charges would be passed through to consumers in the form of lower rates. Furthermore, as Rate Counsel stated in earlier comments in this proceeding,[32] even if carriers were to lower long distance rates, the benefits are limited. First, only those customers who use long distance services frequently stand to benefit. Second, if carriers actually reduce rates, they likely would target any reductions to the prices for high-volume, bundled packages. Theoretically, if rates for bundled packages decline as a result of the access charge reductions, the rate decline could spur more customers to subscribe to bundled packages, and thus to increased usage of the public switched network. Offsetting this potential benefit (that is, increased usage and corresponding benefit from the public switched network), however, are the following factors: (1) because the cable-telecommunications duopoly does not provide effective competition, it is unlikely that carriers would actually *lower* their bundled package prices and (2) by targeting rate reductions to high volume users, carriers would increase the effective burden of intercarrier compensation reform on low-use customers as a result of the proposed SLC increase.

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[32] / *See, e.g.,* initial and reply comments, filed October 25, 2006 and February 1, 2007 in response to: *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, Public Notice, CC Docket No. 01-92, DA 06-1510 (WCB, July 25, 2006)

There is no guarantee, nor are there sufficient competitive pressures to ensure, that long distance prices will actually decline. Furthermore, those customers with low usage would face certain rate *increases.*

Carriers should not receive new revenue streams until the Commission assesses (or remedies) the impact of special access overearnings, mis-applied separations rules, and substantial merger synergies.

No plan should guarantee ILECs their historic revenue stream. In the face of purported competition, which should drive rates closer to cost and which should spur innovation and further cost reductions in production of telecommunications services, *one would expect revenues to decline.*

There are numerous reasons that incumbent carriers should not be entitled to revenue recovery. Industry consolidation has not only thwarted competition, but also has yielded billions of dollars in merger synergies for incumbent carriers. Any consideration of revenue recovery should recognize the significant revenue windfall flowing from recent mergers, which are shown in Table 1.

Table 1[33]
Net Present Value of Merger Synergies

	Synergy NPV	*Date merger consummated*
Verizon/MCI	$7 billion	01/06/2006
SBC/AT&T	$18 billion	11/18/2005
AT&T/BellSouth	$18 billion	12/29/2006
Total Net Present Value of Merger Synergies	$43 billion	

Revenue stream made possible by local loop deployment: Rate Counsel commends the Commission for recognizing the stream of revenues made possible by ILECs' ubiquitous deployment of local loops, but it is unclear if and how the Commission intends to take them into account. The Commission quotes the National Association of State Utility Consumer Advocates ("NASUCA"): "[U]sing their common local loop platform, carriers are now generating billions of dollars in digital subscriber line (DSL) revenues that they did not generate five or ten years ago."[34] In assessing any need for revenue recovery, the Commission should take into account this substantial

[33] / *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Application for Transfer of Control, filed March 11, 2005, Appendix 1: Public Interest Statement, at 3. The merger of SBC and AT&T was originally projected to produce $15 billion in synergies. *In the Matter of Transfer of Control Filed by SBC Communications Inc. and AT&T Corp.*, WC Docket No. 05-65, Description of the Transaction, Public Interest Showing, and Related Demonstrations, filed February 21, 2005, at 44. However, the synergy estimate was subsequently revised from $15 billion to $18 billion earlier this year. Declaration of Kahan (AT&T) in WC Docket No. 06-74, at 19, citing Analyst Meeting Presentation, January 31, 2006, at 51; AT&T Investor Update: 1Q06 Earnings Conference Call, April 25, 2006. *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, Application for Consent of Transfer of Control, filed March 31, 2006, Attachment 1: Description of Transaction, Public Interest Showing and Related Demonstration, at 4. SBC closed its acquisition of AT&T on November 18, 2005. "New AT&T Launches," AT&T News Release, November 18, 2005. Verizon closed its acquisition of MCI on January 6, 2006. *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, *Memorandum Opinion and Order*, released November 17, 2005. *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, released March 26, 2007. AT&T and BellSouth Join to Create a Premier Global Communications Company," December 29, 2006, www.att.com.

[34] / FNPRM, Appendix A, at footnote 812, citing NASUCA's "refresh-the-record" comments, filed July 7, 2008.

stream of revenues. Furthermore, as Rate Counsel has demonstrated in comments submitted in the separations docket, CC Docket No. 80-286, consumers are subsidizing more than $15 billion in mis-assigned and mis-allocated costs in common network facilities that Bells are using to offer unregulated services.[35]

Special access overearnings: In WC Docket No. 05-25, the FCC recognized the extreme rates of return that Bell operating companies are earning, which provides further evidence that the FCC should not presume that the overhaul of the intercarrier compensation systems will prevent ILECs from earning a reasonable rate of return. In its *Order and NPRM* in WC Docket No. 05-25, the FCC notes "the BOCs have earned special access accounting rates of return substantially in excess of the prescribed 11.25 rate of return that applies to rate of return LECs."[36]

This excessive return has continued, unchecked by the FCC. As Table 2 shows, nationwide, the rate of return for the Bell operating companies' special access services increased from 38% in 2001 to 101% in 2007.[37]

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[35] / *See, In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint,* CC Docket No. 80-286, Affidavit of Susan M. Baldwin, on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates, August 22, 2006 ("Baldwin Separations Affidavit").

[36] / *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, Released January 31, 2005, at para. 35. The FCC stated that the "BOCs' collective average special access accounting rates of return over the last six years (1998 - 2003) have been 18, 23, 28, 38, 40, and 44 percent, respectively." *Id.*

[37] / Total interstate rates of return for AT&T, Qwest and Verizon were 35%, 53%, and 25%, respectively, in 2007. Total RBOC interstate rate of return for 2007 was 33%. FCC, ARMIS Report 43-04, Table 1 (data run November 23, 2008).

Table 2[38]

RBOCs' Special Access Rates of Return Continue to Increase

RBOC Special Access Rate of Return

Year	AT&T	Qwest	Verizon	All RBOCs
2001	56.2%	44.7%	22.2%	38.2%
2002	54.3%	57.7%	23.8%	39.7%
2003	63.5%	65.8%	23.0%	42.9%
2004	76.4%	75.1%	31.4%	52.8%
2005	94.5%	109.4%	41.4%	68.0%
2006	99.9%	132.2%	51.4%	77.8%
2007	137.6%	175.4%	62.0%	101.4%

Source: Federal Communications Commission, ARMIS Report 43-04, Table I, data run 11/23/2008.

These high special access returns contradict the supposition that somehow ILECs are entitled to be made whole as a result of modifications to intercarrier compensation.[39]

Consumers would bear all the risk of competition and intercarrier compensation reform.

There is absolutely no guarantee that reduced switched access charges would translate into consumer savings. Based on the lack of competition in the long-distance market and indeed in most telecommunications markets, carriers have no economic incentive to share their savings in access charges. Instead, carriers have demonstrated

[38] / Data for BellSouth are combined with those of AT&T for the years 2001 through 2006 to correspond with ARMIS reporting. AT&T and BellSouth merged on December 29, 2006. "AT&T and BellSouth Join to Create a Premier Global Communications Company," December 29, 2006, www.att.com. Rate of Return is calculated by dividing Net Return by Average Net Investment.

[39] / In 2007, the FCC asked parties to refresh the record in WC Docket No. 05-25, but has not yet addressed the carriers' excessive rates of return, which parties, including Rate Counsel have brought to the Commission's attention. *See, e.g.*, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Initial Comments of Rate Counsel, August 8, 2007, at 18.

their willingness and ability to *increase* long distance rates.[40] The FCC should not expect consumers to be satisfied with speculative savings while carriers would rely on guaranteed revenue recovery. There is no guarantee and indeed it is improbable that carriers will flow through access charge reductions. The Bells' entry into the long distance market has been, and continues to be, enormously successful. The Track 1 carriers' dominance of the long distance market undermines any likelihood of consumers benefiting from the flow-through of reduced access charges.[41] The Commission's decisions that denied Qwest's and Verizon's requests for forbearance relied in part on the Commission's finding that the two ILECs continue to possess market power.[42]

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[40] / *Ex parte* letter from Joel Cheskis, Assistant Consumer Advocate, Pennsylvania Office of Consumer Advocate to Marlene H. Dortch, Secretary, Federal Communications Commission (November 7, 2007); *ex parte* letter from Joel Cheskis, Assistant Consumer Advocate, Pennsylvania Office of Consumer Advocate to Marlene H. Dortch, Secretary, Federal Communications Commission (November 13, 2007).

[41] / *See, In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint,* CC Docket No. 80-286, Affidavit of Susan M. Baldwin, on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates, August 22, 2006 ("Baldwin Separations Affidavit"), at para. 136 and Appendix E for more discussion and analysis of Bells' dominance of the long-distance market.

[42] / *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, FCC WC Docket No. 06-172, *Memorandum Opinion and Order*, FCC 07-212, released December 5, 2007, *pet. for review pending*, No. 08-1012 (D.C. Cir. filed Jan.14, 2008). The FCC determined, among other things, that Verizon continues to possess exclusionary market power (that is it can raise the cost of inputs upon which its rivals rely). *Id.*, at para. 45. The FCC declined to grant Verizon the requested forbearance from the nonstructural safeguards of *Computer III*, stating:

> The record here does not demonstrate that Verizon no longer possesses exclusionary market power, and thus as in the *Section 272 Sunset Order*, we must assume that Verizon still possesses such market power. Verizon's exercise of exclusionary market power could both lead to "charges, practices, classifications, or regulations . . . for[] or in connection with" Verizon's interexchange services are unjust, unreasonable, or unjustly or unreasonably discriminatory" and could harm consumers. Such results would be contrary to the public interest. We thus are unable to find on this record that forbearance from the *Computer III* requirements satisfy any of the criteria of section 10(a).

Id., at para. 45. Exclusionary, or "Bainian", market power is defined as "the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output." *Id.*, at footnote 144. See, also, Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, Memorandum Opinion and Order, rel. July 25, 2008, *pet. for review pending*, No. 08-1257 (D.C. Cir. Filed July 29, 2008), at para. 44.

In contrast with the vague possibility of long distance rate reductions, the increases that the FCC proposes in the subscriber line charge would be definite. The proposals do not provide sufficient evidence of benefits to consumers yet they include undeniable, tangible new costs for consumers.

There is no evidence to suggest that the proposed SLC increases are cost-based or fair, and indeed any evidence that exists suggests the opposite.

At a time when ILECs are generating substantial and growing revenues from new lines of business made possible by their long-standing position in the market and ubiquitous deployment of local loop infrastructure, consumers are being asked to pay yet more for the local loop. The plans lack any evidence that an *increase* in the SLC is economically efficient or fair. The Commission should reject outright any proposal that would increase the SLC before carriers have provided comprehensive and detailed cost data, including information about the way that they assign and allocate the cost and expense of common plant to unregulated services.

The FCC should not adopt any plan which would preempt State authority over intrastate rates and charges.

Rate Counsel reiterates its position, stated in its initial comments in this proceeding: "States are in the best position to assess the affordability of basic service and to examine carriers' need, if any, to adjust rates as a result of modified intercarrier compensation regimes. States, similarly, have jurisdiction over intrastate access charges and also are in the best position to design and implement plans for revising these rates."[43] There is absolutely no policy or legal basis for the Commission to interfere with state rate-making, particularly in light of the fact that the Commission's delay in correcting

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[43] / Rate Counsel 2005 ICC Comments, at 9.

carriers' accounting treatment of common plant used for services such as DSL results in overstated intrastate revenue requirements and rates.

As tw telecom inc. and One Communications Corp. explained in an *ex parte* filing:

> In *La. PSC v. FCC*, the Supreme Court held that Section 2(b)'s limitation of the FCC's jurisdiction over rates "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes" even if such denial undermines a unified federal scheme for depreciation. *La. PSC v. FCC*, 476 U.S. at 373. This was because the FCC found that it was "possible" to separate intrastate costs from interstate costs for purposes of depreciation, even though the FC could not achieve absolute precision in this regard (as the Court explained, "the realities of technology and economics belie such a clean parceling of responsibility" between the FCC and the states *see id.*, 476 U.S. at 360). The same is true for intercarrier compensation rates.[44]

The Commission should not overstep its jurisdictional authority in its efforts to reform intercarrier compensation.

Contrary to the FNPRM, VoIP is not an information service.

In the Free Press *ex parte* attached as part of Appendix D to the Commission's FNPRM, Free Press expresses concern related to the Commission classification of VoIP traffic as information services. Free Press suggests that this decision "has substantial implications for the ability of VoIP providers to obtain reasonable interconnection arrangements with other carriers" and argues that there is "no parallel regime under Title I to ensure competitive access." Rate Counsel has filed comments on this issue numerous times. In Docket No. 08-56, addressing Vermont Telephone's petition to clarify the interconnection rights of VoIP providers, Rate Counsel stated that though the petition

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[44] / *Ex parte* letter from Jonathan Lechter, Willkie Farr & Gallagher LLP, on behalf of tw telecom inc. and One Communications Corp. to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, Re: WC Dkt. Nos. 05-337, 99-68, & 04-36; CC Dkt. Nos. 01-92 & 96-45, Presentation Regarding Reform of Intercarrier Compensation and Universal Service (October 1, 2008) filed October 2, 2008, at 3.

would likely be dismissed because of errors: ". . . the uncertainty regarding the applicability of the Commission's policies, rules, and various regulatory regimes to VoIP providers continues to be problematic and to invite self-help measures by incumbent local exchange carriers ("ILECs"). The Commission should, in no uncertain terms, rebuff efforts by the ILECs to make policy determinations on their own and, in the process, thwart competition."[45] Despite assertions by some that Sections 251 and 252 are clear that only telecommunications carriers are granted interconnection rights, Rate Counsel agrees that Section 251 is intended to only address telecommunications carriers but posits that the 1996 Act does not limit the Commission's authority to require ILECs to interconnect with other types of providers.[46]

However, as Rate Counsel has previously suggested, the regulatory classification of carriers must be consistent, and to the extent that a carrier seeks interconnection it must also be required to pay its fair share for the use of the public switched network. Rate Counsel commends the Commission for finally moving forward with a resolution

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[45] / *Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, FCC WC Docket No. 08-56, Reply Comments of the New Jersey Division of Rate Counsel, June 9, 2008, at 3.

[46] / *See, In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, FCC WC Docket No. 06-55, *Memorandum Opinion and Order*, rel. March 1, 2007 ("Time Warner Interconnection Order"), at para. 13 and 35, citing Section 706 of the Act. *See, also, Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, FCC WC Docket No. 08-56, Comments of Feature Group IP, May 19, 2008, at 6, stating: "Carriers also have interconnection rights under §201 and §332(c)(1)(B). Further, non-carrier entities have 'interconnection' rights under other portions of the Act and Commission precedent." *See, id.*, at 6-7. Also, to the extent that the interconnected VoIP providers (i.e. cable companies) are also wholesale telecommunications carriers and their affiliates provide the VoIP service, the Wireline Competition Bureau has already made clear that those entities have a right to interconnection. See, e.g., *Time Warner Interconnection Order*, at para. 9 (cites omitted) stating: ". . . the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under those provisions of the Act. We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251."

though respectfully disagrees with the proposed classification of VoIP services as information services.[47] Although carriers should be given interconnection rights (which in turn increases options for consumers), they should also share the cost of the network. As stated previously:

> Technological innovation can lead to greater choice and lower prices for consumers, but the Commission should not condone providers using such innovation as a means to avoid paying a fair share of the cost of the network. One set of consumers should not be forced to subsidize another set of consumers. Certainly, the Commission should refrain from adopting any plan which conveys upon the ILEC the position of final arbiter as to who is responsible for access charges.[48]

As stated in its VTel (Dkt 08-56) comments Rate Counsel agrees with the Vermont Department of Public Service that VTel's petition appears to ask the Commission to "overreach into a state commission's authority to implement state and Federal law . . . [t]he Commission cannot question a state commission's determination that an entity is both qualified to offer local exchange service and has the right to request interconnection from other telecommunications carriers."[49] Rate Counsel's position remains unchanged. The Commission, in its proposals in the instant proceeding (both Chairman Martin's and the Draft Alternative) preempts "any state efforts to impose

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47 / See FNPRM, at Appendix A, para. 209 and Appendix C, para. 204 classifying as information services "those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks ("IP/PSTN" services)."

48 / *Petition of the SBC ILECS for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges (filed Sept. 21, 2005); Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination (filed Aug. 20, 2004)*, FCC WC Docket No. 05-276, Reply Comments of Rate Counsel, December 12, 2005, at 4-5, 11.

49 / *Petition for Declaratory Ruling Whether Voice over Internet Protocol Services Are Entitled to the Interconnection Rights of Telecommunications Carriers*, FCC WC Docket No. 08-56, Reply Comments of the New Jersey Division of Rate Counsel, June 9, 2008, citing Vermont Department of Public Service, May 19, 2008, at 6.

'traditional telephone company regulation' as they relate to IP/PSTN information services as inconsistent with our generally unregulated treatment of information services."[50]

The National Telecommunications Cooperative Association ("NTCA"), in a November 18, 2008 *ex parte* filing, expresses concern that the classification of IP/PSTN services as information services exempts "interconnected VoIP service from paying access charges in rules buried" in the footnotes of the draft orders.[51] The footnotes to which NTCA refers read:

> As discussed above, we classify IP/PSTN services as "information services." We note, however, that information services, by definition, are provided "via telecommunications," enabling us to bring IP/PSTN traffic within the section 251(b)(5) framework. 47 U.S.C. § 153(20). Moreover, given that we retain independent authority under section 201, we find it reasonably ancillary to that authority to regulate IP/PSTN services in this regard, consistent with our efforts to ensure uniform treatment of all traffic on the PSTN for intercarrier compensation purposes. Thus, IP/PSTN traffic ultimately will be subject to the final uniform reciprocal compensation rates established pursuant to the methodology adopted in this order. We maintain the status quo for this traffic during the transition, however.[52]

Rate Counsel urges the Commission to clarify that all providers should pay for the use of the public network.

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[50] / FNPRM, Appendix A, at para. 211 and Appendix C, at para. 206. The Commission notes that states can require contributions to state universal service or telecommunications relay service "through methodologies that are consistent with federal policy" and will "allow" states to establish rates for reciprocal compensation in accordance with FCC policy. See, e.g., Appendix C, at footnote 527 and para. 206.

[51] / Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Daniel Mitchell, Vice President Legal and Industry, National Telecommunications Cooperative Association, Ex Parte Notice: In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Universal Service Contribution Methodology, CC Docket 96-45, and IP-Enabled Services, WC Docket 04-36, November 18, 2008 ("NTCA Nov 18 Ex Parte"), at 5, citing footnote 564 of Appendix A and 555 of Appendix C, respectively.

[52] / FNPRM, at footnote 564 of Appendix A and 555 of Appendix C, respectively.

B. COST STANDARD

The Commission's proposals (set forth in Appendices A and C) contemplate the use of the "traditional economic definition of incremental cost, as applied to multiproduct firms" rather than the Commission's existing TELRIC standard, which the FNPRM asserts "deviates from this more efficient version of incremental cost, and is likely to lead to rates that significantly exceed efficient levels."[53] Rate Counsel concurs that incremental costs are those that result from an increase in output (i.e., additional costs) or a decrease in output (i.e., avoidable cost).[54] Aligning rates with the incremental cost yields efficient levels of output and consumption.

Rate Counsel further concurs with the FNPRM that forward-looking costs should guide pricing.[55] However, Rate Counsel disagrees with much of the Commission's reasoning and directives in the FNPRM regarding the appropriate cost methodology. As described in the FNPRM, TELRIC methodology includes "the full forward-looking cost of the local switch, tandem switch, and shared interoffice transmission facilities, including a reasonable allocation of common costs, to be recovered through usage-based charges"[56] and the incremental cost of a single service "excludes all common costs."[57] Rate Counsel disagrees that the Commission should now depart from its long-standing use of TELRIC to adopt a marginal cost approach. Under the alternative that the Commission proposes, one computes the cost of producing a set of products, indexed by the set N = {1, …., n} where the entire cost of producing all products could be denoted as

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53 / *See, e.g.*, FNPRM, Appendix A, at para. 240.

54 / *Id.*, at para. 241.

55 / *Id.*, at para. 243

56 / *Id.*, at para. 250.

57 / *Id.*, at para. 251.

C(n). One then isolates the incremental cost of any particular product "j" by comparing the cost of producing all the products with the cost of producing all the products except "j". In other words, one subtracts C(N-j) from C(N) to determine the incremental cost of producing j. The FCC further explains that one could compute the firm's common cost by comparing the cost of the entire firm with the sum of the incremental costs of each of the services.[58] As the FCC has observed, where a firm has significant shared facilities, the common costs may be significant.[59] As a result, the use of incremental cost methodology as proposed by the FCC could yield rates significantly below those yielded by TELRIC (which includes some common cost allocation).

The FCC further acknowledges that it is possible for a firm to set a usage charge at or close to marginal cost and to recover the residual costs through a fixed charge.[60] The use of the FCC's proposed incremental cost methodology could become an excuse for raising the SLC. More importantly, however, abandoning TELRIC with so little notice is arbitrary and unduly hasty.

Rate Counsel urges the Commission *not* to "end [its] reliance on the TELRIC methodology"[61] and rather to include an appropriate share of common cost in cost calculations, consistent with its existing policies. If the Commission is seriously considering abandoning the TELRIC standard that has guided its rate-setting in the approximate dozen years since the enactment of the Telecommunications Act, the Commission certainly should provide far more time than the abbreviated period

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58 / *Id.*, at para. 248.

59 / *Id.*

60 / *Id.*, at para. 252.

61 / *Id.*, at para. 267

encompassed by this comment cycle to allow interested parties to address more thoroughly the merits of such departure. Pulling the rug out from beneath the years of TELRIC precedent at the eleventh hour in order to adopt a new cost standard is unfounded and imprudent. Rate Counsel recommends that the Commission not adopt the language which directs states to set final reciprocal compensation based on the proposed new incremental cost standard.[62]

Rate Counsel also recognizes that not only does the FNPRM address cost methodology, but also it addresses network assumptions, including assumptions about the deployment of softswitches. Rate Counsel defers consideration of the switching equipment assumptions at this time, but urges the Commission to issue detailed data requests to industry members regarding switching costs to provide up-to-date cost data, and to make that information available, subject to any necessary confidential treatment, to enable informed decision-making about switching costs.

C. TERMINATING RATE

The FCC seeks comment on whether the terminating rate for all § 251(b)(5) traffic should be set as a single, statewide rate or a single rate per operating company.[63] In some instances (*e.g.*, Massachusetts), relatively few ILECs serve a state and in other jurisdictions, there are as many as 150 independent telephone companies (*e.g.*, Iowa). Rate Counsel recommends that the Commission defer to state regulators the question of whether a single rate should apply throughout a state or whether rates should be carrier-specific because state regulators are in the best position to assess any unique aspects of

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[62] / See, e.g., *id.*, at paras. 271 through 275.

[63] / FNPRM, at para. 41.

companies' operations, and to assess the impact of rate changes on companies' ongoing ability to provide basic local service at affordable rates.

The FCC proposes a ten-year transition plan for achieving uniform terminating rates "with separate stages, designed to reduce rates over a sufficient period to minimize market disruptions and to cushion the impact of our reform on both customers and carriers."[64] The FCC further proposes that "[a]t the end of the transition period, all telecommunications traffic will be treated as falling within the reciprocal compensation provisions of section 251(b)(5)," and that states will set default reciprocal compensation rates based on the FCC's new proposed methodology.[65] The Commission proposes a ten-year "glide path" toward uniform reciprocal compensation rates, with the following stages, relative to the effective date of a Commission order:

Stage 1:

- First two years: states must adopt a state-wide interim, uniform reciprocal compensation rate applicable to all carriers (except carriers whose rates are below the interim, uniform rate, in which case, those carriers' rates shall be capped at those lower, existing rates).

Stage 2:

- Third year: all LECs must reduce their terminating rates by 50 percent of the difference between their current terminating rate and the interim, uniform reciprocal compensation rate established by the state.

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64 / *Id.*, Appendix A, at para. 190.

65 / *Id.* See Rate Counsel's separate discussion of the Commission's proposed use of a non-TELRIC cost methodology.

- Fourth year: all LECs must reduce their terminating rates by the remaining 50 percent of the difference between their current terminating rate and the interim, uniform reciprocal compensation rate established by the state so that their terminating rates equal the state-set interim, uniform reciprocal compensation rate.

Stage 3:

- Years five through ten: downward transition to the final uniform reciprocal compensation rate, which the states set, consistent with the FCC's proposed incremental cost methodology. If a carrier's rate is below the rate specified in the glide path, such carrier cannot raise its rates, but is subject to the trajectory when the interim rate equals that carrier's rate.

At the end of ten years, all the terminating rates of all carriers in each state would be the new final, uniform reciprocal compensation rate established by each state.[66]

The Commission indicates that it expects that state regulators, in applying the Commission's new proposed cost standard, "will set final reciprocal compensation rates at or below $.0007 per minute-of-use."[67] Rate Counsel does not share the Commission's expectation that a proper cost study necessarily would yield terminating per-minute rates of $0.0007. As Rate Counsel explains above, the Commission should not abandon its TELRIC methodology. Rather than pre-judge the results of such a cost study, Rate Counsel recommends that parties be afforded the opportunity to examine any proposed cost study, including the underlying assumptions, and data. Furthermore use of the

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[66] / *Id.*, at paras. 192-194.

[67] / *Id.*, at para. 202.

"additional cost" methodology that the Commission proposes could lead to improper cross-subsidization. As set forth in Section 254(k) of the Act:

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

The Commission's proposed cost standard for terminating traffic (which would *exclude* joint and common costs) would result in some services bearing an unfair share of the joint and common costs, in violation of the Act.

In summary, Rate Counsel supports the gradual transition to cost-based uniform terminating charges for intercarrier compensation. Rate Counsel, however, opposes the Commission's proposed new cost standard. Furthermore, although the Commission could establish a recommended time frame and suggested guidelines for achieving such a transition, ultimately, states should determine the pace and direction of rates for intrastate traffic.

III. UNIVERSAL SERVICE REFORM

The Commission proposals do little to reform the high-cost fund and instead perpetuate the current excessive subsidization in perpetuity.

Rate Counsel commends the Commission for determining that the high cost fund must be capped and for concluding that it is necessary to "cap this mechanism to ensure that unsubsidized users who contribute to the fund are not harmed by excessive subsidization."[68] However, capping the fund should be seen as only a first step. Rate

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68 / *Id.*, at para. 15.

Counsel has supported a high-cost fund cap and the transition of funds to the Mobility Fund, Broadband Fund, and Provider of Last Resort Fund as envisioned by the Joint Board.[69] The Commission's proposals in the FNPRM, however, do not address some of the major underlying problems of the high-cost fund that the Joint Board described. Among other things, the Joint Board concluded that:

- Support mechanisms presently differ for rural and non-rural carriers, with support for consumers varying depending on which carrier serves them, which, in turn, "can exacerbate the differences in treatment between comparable situated customers."[70]

- Support mechanisms do not recognize all costs, and, for example, although support is substantial for loop costs, it is less so for most switching costs, and "nonexistent for transport costs."[71]

- The high-cost support mechanisms "need to be modernized in several ways."[72]

Rate Counsel concurs with the Joint Board that none of "the mechanisms in place reflect the increased importance of non-regulated revenues generated by telecommunications plant."[73] The way in which ILECs assign and allocate common plant and expenses harms consumers because they bear the full cost of plant and yet ILECs use the common platform to provide lucrative unregulated services, the revenues from which flow to shareholders. The Commission proposes to "fix" this problem by requiring providers that

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69 / Rate Counsel April 2008 USF Comments, at 10.

70 / *Comprehensive Reform Recommended Decision*, at para. 20. See also footnote 22 in which the Joint Board observes that "[i]ndeed, the Commission has repeatedly failed to demonstrate to the courts that funding for the customers of non-rural carriers is sufficient," citing to *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ("Qwest I"); *Qwest II*.

71 / *Id.*, at para. 21.

72 / *Id.*, at para. 22.

73 / *Id.*

receive high-cost funds to deploy broadband, but the Commission's approach still does not reflect accurately the actual funds required to serve the area.

Furthermore, the FCC's proposals appear not to acknowledge that costs should go down over time: the major barrier to providing service in unserved and underserved areas is the initial sunk cost (particularly for new broadband deployment), and so once that initial investment has been made, the need for high cost support should decline significantly.[74] Instead, the FCC's proposal to combine the broadband and provider of last resort funds would make it difficult to reduce or eliminate payments in the future, and therefore would contribute to the unending USF entitlement program for carriers. As Rate Counsel discussed in earlier comments,[75] the theory that carriers cannot lower urban rates to meet competition without eroding implicit support for rural areas, although superficially appealing, has not been proven. If competition exists, ILECs should be voluntarily *lowering* rates in urban areas to meet competition, and yet Rate Counsel is unaware of ILECs lowering local exchange rates as a result of receiving high cost support. Rate Counsel has previously advocated and continues to support the sunset of the non-rural high cost fund.[76] Rate Counsel urges the Commission to ensure that the high cost fund does not become an unwarranted revenue windfall for ILECs. The Commission should establish clear sunset dates to avoid creating any expectation that the funding will be of indefinite duration, possibly with a provision that the date can be extended by the Commission only if certain specific circumstances are met.

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[74] / *See, e.g.,* discussion of the rural high cost fund in comments previously filed by Rate Counsel. Rate Counsel June 2008 USF Reply Comments, at 57-58, citing, among others, ITTA, at 15 and Time Warner Telecom Inc., at 14.

[75] / Rate Counsel April 2008 USF Comments, at 45-47.

[76] / *See, e.g.*, Rate Counsel April 2008 USF Comments, at 46; Rate Counsel May 2006 USF Reply Comments, at ;3 and Rate Counsel 2006 USF Initial Comments, at 4-5.

Rate Counsel further reiterates its recommendation that high cost support be eliminated for Bell operating companies.[77] As Rate Counsel stated previously:

> . . . the non-rural high cost fund (designed to "protect" ILECs) has become an anachronism, and the FCC should immediately take steps to impose a sunset date for this fund. Congress, with the 1996 Act, did not foresee that seven regional Bell operating companies would dwindle to three (or that the RBOCs would eliminate GTE and Southern New England Telephone Company as stand-alone ILECs), nor did it envision that the RBOCs would acquire AT&T and MCI, their chief competitors. Congress anticipated robust local competition and, with the universal service provisions, sought to protect RBOCs from the erosion of implicit support in the wake of much-anticipated local competition. Instead RBOCs now have the best of all worlds – they continue to dominate the local market, they have rapidly gained long distance market share, *and* they receive the non-rural high cost fund support. Furthermore, the RBOCs have failed to demonstrate that, without such high cost support, they would be unable to offer service at affordable rates. The Commission should end the present regime whereby consumers' phone bills support a seeming black hole of high cost support.[78]

As Rate Counsel has discussed in comments earlier this year, the Bell operating companies (and likely all non-rural price cap carriers) do not require high-cost support to provide affordable service.[79] By adding broadband to the existing high-cost fund, the Commission simply perpetuates the flaws in the existing USF mechanisms.

The Commission should reconsider its proposal to link provider of last resort funds to broadband deployment.

Rate Counsel opposes the Commission's proposed "reform" of the high-cost fund. The Commission proposes to require carriers that receive high-cost support to provide

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[77] / Rate Counsel April 2008 USF Comments, at 63; Rate Counsel June 2008 USF Reply Comments, at 5, 7, 47-50. Also Rate Counsel recommended in 2006 that the Commission discontinue non-rural high cost support for AT&T and BellSouth as a condition of any approval of the pending merger. *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Transfer of Control,* WC Docket No. 06-74, Initial Comments of the New Jersey Rate Counsel, June 5, 2006, at 22. See, also, Time Warner Telecom Inc. Initial Comments April 17, 2008, at 1-5.

[78] / Rate Counsel April 2008 USF Comments, at 53, 63.

[79] / Rate Counsel June 2008 USF Reply Comments, at 47-50.

broadband Internet access services. Specifically, all ETCs would be required to certify that they will provide broadband to all subscribers in their supported service area by the end of five years to receive funds.[80] If existing ETCs do not make this commitment, the Commission proposes using reverse auctions and the winning bidder would be required to deploy broadband to all subscribers in the study area by the end of a ten-year period and to take on carrier of last resort obligations.[81] Rate Counsel opposes the linkage of high-cost support and broadband deployment. First, as discussed in more detail below, the Commission should not limit its broadband deployment efforts to high-cost study areas: the Commission also should devote resources to the demand side of the equation (*i.e.*, affordability). Furthermore funds for broadband deployment should be explicit and targeted. Third, the high-cost fund is flawed and therefore, rather than embroil it further with a new broadband requirement, broadband support should occur in a targeted manner. Certainly, capping the high-cost fund (either at 2008 levels as proposed in the Chairman's Draft Proposal and the Draft Alternative[82] or at 2007 levels as proposed in the Narrow Proposal[83]) and requiring carriers to deploy broadband based on current support suggest that the Commission has made a finding that the high-cost fund is overpaying ETCs to provide currently supported services. Furthermore, the Draft Alternative Proposal contemplates allowing rural rate-of-return carriers to continue operating as they do for

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[80] / FNPRM, Appendix A, at para. 20.

[81] / *Id.*, at para. 31. Under the Chairman's Draft Proposal, competitive ETCs will have the opportunity to commit to broadband deployment and support will be based on their own costs compared to a benchmark level. FNPRM, Appendix A, at para. 17. By contrast, the Draft Alternative Proposal eliminates support for competitive ETCs over a five year period. FNPRM, Appendix C, at para. 17.

[82] / *Id.*, Appendix A, para. 12. The Commission fails to provide any rationale as to why it rejects the Joint Board's recommendation for a freeze at 2007 levels and simply adopts a December 2008 level on an annualized basis as "more appropriate." *Id.*, at para. 16.

[83] / *Id.*, Appendix B, at para. 16.

universal service mechanism purposes through 2010.[84] Finally, if incumbents commit to deploy broadband they are guaranteed current high-cost fund levels even if there is no justification for support at that level on an ongoing basis.

Furthermore, the linkage of the current high-cost fund for basic exchange services and new broadband deployment may put current services in high-cost areas at risk. This could be in the traditional way that commenters, the Courts, and the FCC have recognized[85]: through excessive subsidization and raising the cost to unsupported consumers. In addition, there may be areas where broadband deployment is uneconomic: the addition of broadband to basic service within the current level of high-cost funds is simply not feasible and carriers would face removal from the system entirely (thus putting the availability of basic services to consumers at risk).

Using the high-cost fund (which granted a total of $4.3 billion in support in 2007) for high-cost areas and then adopting a pilot program for low-income end users with $300 million over three years is insufficient. This becomes more of a perpetuation of the high-cost system and has nothing whatsoever to do with the projected marginal cost of deploying broadband in those areas. Rate Counsel is concerned that some carriers will simply walk away from high-cost areas if they are required to deploy broadband and that the funds will be insufficiently targeted and explicit.

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84 / *Id.*, Appendix C, at para. 16.

85 / *See, e.g., Qwest II*, at 1234, citing *Qwest I*, at 1200. *Comprehensive Reform Recommended Decision*, Statement of Commissioner Deborah Taylor Tate, at 30, stating: "we must remain mindful that it is consumers who ultimately pay universal service contributions and any increase in the fund size will increase the burden on consumers."

Reliance on reverse auctions continues to be risky.

Rate Counsel continues to oppose the use of reverse auctions on anything but a pilot basis.[86] While Rate Counsel has supported reverse auctions as a means to distribute targeted support for broadband deployment in unserved and underserved areas, Rate Counsel does not support reverse auctions as part of the "linked" approach that that Commission is contemplating in the Chairman's Draft Proposal and the Draft Alternative Proposal.[87] There is nothing in the record to contradict the following observation put forth by NASUCA:

> It is unreasonable to think that the FCC can orchestrate the auction of existing high-cost rural territories currently served by incumbents who have invested billions of dollars to provide quality services to their customers, and have carrier of last resort . . . responsibilities in those areas, without causing irreparable harm to the rural customers who were promised universal availability of quality communications services at affordable and reasonably comparable rates by the 1996 Telecommunications Act.[88]

As stated in prior comments, the Commission "should not ignore the numerous difficult issues related to the implementation of auctions and drawbacks of the Commission's current proposals, including (but not limited to) the following issues:

- Carrier of Last Resort obligations;
- Stranded and/or duplicate network investment;
- Reserve Prices; and

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[86] / Rate Counsel April 2008 USF Comments, at 10, 57.

[87] / *See, e.g.*, *id.*, at 10.

[88] / *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of the National Association of State Utility Consumer Advocates on Using Reverse Auctions to Determine High-Cost Universal Service Support, April 17, 2008, at 2.

- Complexity and cost of the unresolved implementation details and regulations."[89]

The Commission, in its draft proposals, has attempted to address some, but by no means all, of these concerns. The Commission proposes to set the auction reserve price at the current ILEC high-cost support level.[90] The Commission further proposes that the winning bidder provide all supported services as a carrier of last resort and meet the ETC requirements enumerated in the *ETC Designation Order*.[91] The Commission adds two additional requirements: the competitive ETC must offer broadband Internet access service to all customers in the unserved study area and must "offer supported services at a retail price comparable to the retail price charged by the incumbent LEC in that same study area for the same or equivalent service."[92] The Commission concludes: "In this manner, we ensure that competitive ETC receiving high-cost support will continue to make supported services at least as affordable and available as they are today."[93] Yet, the Commission does not explain how such a requirement will be monitored or enforced. Rate Counsel echoes Commissioner Copps' observation that the Joint Board's review of reverse auctions raised "many more questions than it answered." Commissioner Copps continued:

> For instance, how 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.[94]

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89 / Rate Counsel June 2008 USF Reply Comments, at 66-67, citing Wyoming OCA (re Reverse Auctions), at 3 6; Qwest, at 8; Embarq, at 17; RCA, at 68.

90 / FNPRM, Appendix A, at para. 36.

91 / *Id.*, at para. 39.

92 / *Id.*, at para. 40.

93 / *Id.*.

94 / *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rulemaking*, FCC 08-22, rel.

This observation continues to apply.

The Commission's plan for transferring funding to the auction winner is flawed in that it relies upon the incumbent LEC for the unserved study area to identify the "distribution of support by geographic areas" and thus the winning ETC is required to build out its network by geographic area and receive portions of support accordingly.[95] It is important to ensure that the winning bidder has the incentive to build out the entire study area and therefore, not receive all funds up front. However, a winning ETC may not, in fact, do business in the same manner and/or plan to deploy similar network architecture so the legacy distribution of support may be irrelevant. In addition, building out facilities may require more up front capital than the annualized ongoing support that the incumbent is receiving.

Rate Counsel concurs with the Commission's proposed decision to limit auction winners to one per study area.[96] As stated previously: "Certainly if an areas is too costly to serve without support, it would be even yet less efficient to subsidize more than one supplier, because potential economics of scale would be lost under such a multiple-winner system."[97] Rate Counsel does not support a more costly program merely for the sake of competition. The Commission's prior observation that "if only one winner receives support, this could provide a fair and efficient means of eliminating the subsidization of multiple ETCs in a region, particularly in areas in which costs are

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January 29, 2008 ("Joint Board Comprehensive Reform NPRM"), Statement of Commissioner Michael J. Copps, Approving in FCC 08-22, Approving in FCC 08-4, Approving in Part, Dissenting in Part in FCC 08-5, at 51.

95 / FNPRM, Appendix A, at para. 41.

96 / *Id.*, at para. 43.

97 / Rate Counsel April 2008 USF Comments, at 55.

prohibitive" and its conclusion in the FNPRM that "the single winner format will provide the most effective mechanism for determining the support amount sufficient to meet the universal service goals in any given area" are sound.[98]

The idea to favor high speed services over price (as long as bids fall under reserve price) is also appealing.[99] However, it still seems more expensive, inefficient, and not competitively neutral to wrap broadband up with high-cost universal service thus limiting broadband deployment to both high-cost areas and support to only providers that offer voice and broadband service bundles. Furthermore, a ten-year build-out period for the winning bidder creates the opportunity for unforeseen issues. The Commission fails to address what will happen if the new ETC exits the market.

Finally, the Commission has punted on a critical aspect of its plan for reverse auctions: what will it do when the incumbent does not commit to deploy broadband and no carrier bids in the reverse auction? The short answer is that the Commission does not know. Specifically, the Commission states: "if the reverse auction process does not yield a winning bidder, the Commission will reexamine whether it needs to take further action with regard to this situation, should it arise."[100] In those areas where no competition exists, an incumbent could refuse to deploy broadband knowing no other company will and continue, it seems, to collect high-cost funds at 2008 levels. The Commission should not automatically assume that the reserve price is too low or disaggregate the study area on a wire center basis as a first resort as it is apparently considering.[101] The

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98 / FNPRM, Appendix A, at para. 43 (cites omitted).

99 / *Id.*, at para. 46.

100 / *Id.*, at para. 18.

101 / *Id.*, at para. 47. *See* Rate Counsel April 2008 USF Comments, at 48-50, for a discussion of the pitfalls of distributing high-cost support at the wire center level.

Commission's statement that incumbent LECs will continue to receive current levels of high-cost funds when there is no bidder "during the limited period of time in which the Commission examines these issues" is naïve.[102]

Also, the Commission should actively investigate the role of broadband over power line in serving remote regions of the country. Any broadband subsidies should be directed to the most efficient technology, including broadband over power line and wireless broadband. Pilot programs could be used to assess the role of these alternative technologies.

The elimination of the identical support rule is an important step in reducing the burden of the universal service fund on consumers.

Rate Counsel supports the Commission's proposed decision to eliminate the identical support rule.[103] As noted by the Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell, there is a "growing measure of consensus" that the identical support rule should be eliminated.[104] There are key differences in the proposals approaches towards CETC support going forward however. In the Chairman's Draft Proposal, the CETC will be able to retain high-cost support based on a comparison of its actual costs to a benchmark.[105] In areas where the CETC is currently receiving high-cost support, but fails to commit to deploy broadband, a reverse auction will be held to award

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[102] / FNPRM, Appendix A, at para. 47.

[103] / *Id.*, at para. 51.

[104] / *Id.*, Joint Statement of Commissioner Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate and Robert M. McDowell, Re: *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Numbering Resource Optimization*, CC Docket No. 99-200; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36, November 5, 2008.

[105] / Rate Counsel does not address the specific proposed calculation of CETC support in these comments but may do so in reply comments.

support to a "broadband mobility provider."[106] It seems like better use of the high-cost funds to just drop the additional provider (since presumably either the incumbent or reverse auction winner is committed to providing broadband) and instead shift those funds to a demand-side fund such as broadband Lifeline fund or to funding for broadband deployment in areas that lack access to broadband yet are not high-cost areas. By contrast, under the Draft Alternative, CETCs will lose funding under the Draft Alternative proposal in one-year increments over a five-year period.[107] Rate Counsel reiterates its position that consumers should not subsidize more than one network in those areas where it is apparently difficult for even just a single carrier to provide service without support.[108]

The high-cost reform proposals fail to address the *Qwest II* remand.

The Commission does not address its ongoing failure to resolve problems with its non-rural high cost model. The FCC determined in 1997 that universal service support should be based on forward-looking economic costs and that rural carriers would gradually shift to a forward-looking cost methodology.[109] In its *Ninth Report and Order* (1999), the FCC established a forward-looking federal high-cost support mechanism for non-rural carriers[110] and a nationwide cost benchmark to determine support that was set

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[106] / FNPRM, Appendix A, at para. 56.

[107] / *Id.*, at Appendix C, para. 17.

[108] / Rate Counsel June 2008 USF Reply Comments, at 76.

[109] / In the Matter of Federal-State Joint Board on Universal Service, FCC CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997)("1997 Universal Service Report and Order"), at para. 226. See also paras. 291-292.

[110] / Federal-State Joint Board on Universal Service, FCC CC Docket No. 96-45, *Order on Remand*, 18 FCC Rcd 22559 (2003), *remanded, Qwest II, 398 F. 3d 1222* ("Order on Remand"), at note 1, citing 47 U.S.C.§ 153(37). As explained by the Commission, "rural telephone companies are incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of the three alternative criteria." *Id.* Rural carriers serve fewer than twelve percent of lines. *Id.*

at 135% of the national average cost per line.[111] The *Ninth Report and Order* was remanded by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in 2001, after the Court determined that the Commission had failed to define "sufficient" and "reasonably comparable" adequately[112] and failed to provide sufficient support for its 135% benchmark.[113] In addition to requiring the Commission to define the statutory terms and to provide adequate justification for the level of support selected on remand, the *Qwest I* also required the FCC to develop mechanisms to induce state action with regard to the development of their own universal service programs and to explain its plan for all universal service mechanisms, as a whole, more fully.[114]

The Commission issued its *Order on Remand*, in response to *Qwest I* in October 2003. In its *Order on Remand*, the Commission adopted a rate review and expanded certification process "to induce states to ensure reasonable comparability of rural and urban rates in areas served by non-rural carriers."[115] The Commission defined "sufficient" as "enough federal support to enable states to achieve reasonable comparability for rural and urban rates in high-cost areas served by non-rural carriers," and "reasonably comparable" by setting a national urban residential rate benchmark.[116] The Commission set a national urban *rate* benchmark at two standard deviations above

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111 / In the Matter of Federal-State Joint Board on Universal Service, FCC CC Docket No. 96-45; High-Cost Universal Service Support, FCC WC Docket No. 05-337, *Notice of Proposed Rulemaking*, Rel. December 9, 2005 ("2005 High Cost USF NPRM"), at para. 3.

112 / *Qwest II*, at 1228, citing *Qwest I*.

113/ 2005 High Cost USF NPRM, at para. 4.

114 / *Qwest II*, at 1228.

115 / 2005 High Cost USF NPRM, at para. 5.

116 / *Id.*, citing *Order on Remand*, at para. 30.

the average urban residential rate and a *cost* benchmark based on two standard deviations above the national average cost.[117]

In February 2005, the Tenth Circuit remanded the Commission's *Order on Remand.* The decision ("*Qwest II*") held that the Commission had still failed to define "sufficient" and "reasonably comparable" stating that the Commission's definition of sufficient:

> . . . ignores the vast majority of § 254(b) principles by focusing solely on the issue of reasonable comparability in § 254(b)(3). The Commission has not demonstrated in the Order on Remand or the limited record available to this court why reasonable comparability conflicts with or outweighs the principles of affordability, or any other principles for that matter, in this context.[118]

The Court directed the Commission to define "sufficient" in a manner which "considers the range of principles" contained in the statute.[119] The Court further found that:

> . . . the Commission's selection of a comparability benchmark based on two standard deviations appears no less arbitrary than its prior selection of a 135% cost-support benchmark. On remand, the FCC must define the term "reasonably comparable" in a manner that comports with its concurrent duties to preserve and advance universal service.[120]

As a result, the non-rural high-cost support mechanism was deemed invalid.[121] Responding to the Tenth Circuit's directive, the Commission issued a Notice of Proposed Rulemaking in 2005, which it has not yet completed.

Many commenters in the USF Comprehensive Reform proceeding earlier this year expressed concern that the Commission has yet to address the Tenth Circuit's *Qwest*

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117 / *Id.*, citing *Order on Remand*, at paras. 80-82.

118 / *Qwest II*, at 1234.

119 / *Id.*, at 1234.

120 / *Id.*, at 1237.

121 / 2005 High Cost USF NPRM, at para. 6.

II remand that the FCC more properly define the terms "sufficient" and "reasonably comparable."[122] NASUCA reminded the Commission that it has not dealt with the *Qwest II* decision by determining how to define "reasonably comparable" and "affordable," stating: "Absent that definition, it is literally impossible for the Commission to determine that any configuration of the high-cost fund – either the new pieces or the remainder that will become the POLR [Provider of Last Resort] Fund – is sufficient to meet the requirements of 47 U.S.C. § 254."[123]

Resolving the thorny issue of determining "reasonably comparable" urban and rural rates is a threshold requirement for establishing USF accountability. Otherwise, the high cost fund could be larger than is necessary, with the excess support unduly burdening consumers. Numerous factors influence rate comparability. In the FCC's *2005 High Cost USF NPRM*, regarding Section 254(b)(1), which states that "[q]uality services should be available at just, reasonable, and affordable rates," the Commission sought comment on whether rural rates reasonably comparable to urban rates implies that those rates are also affordable.[124]

The high cost universal service fund is meant to subsidize telecommunications services in areas where the costs of providing such services are particularly high, and, therefore, the federal high cost fund, in that sense, promotes affordability. However, the

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122/ As described above, the FCC issued a Notice of Proposed Rulemaking in December of 2005 (that it still has not ruled on) responding to the Tenth Circuit's directive. 2005 High Cost USF NPRM, at para. 1, citing *Qwest II.*

123 / *In the Matter of Federal-State Joint Board on Universal Service*, FCC CC Docket No. 96-45; *High-Cost Universal Service Support*, FCC WC Docket No. 05-337, Comments of the National Association of State Utility Consumer Advocates on the Joint Board Recommended Decision, April 17, 2008, at 5-6.

124 / 2005 High Cost USF NPRM, at para. 9.

specific goal of affordability should be addressed primarily in federal and state Lifeline and Link Up programs. In its *Order on Remand*, the FCC stated:

> While the Joint Board and the Commission generally have considered affordability in implementing section 254, the Commission has not specifically identified an affordable rate, and we decline to do so now. Because various factors, many of which are local in nature, affect rate affordability, the Commission agreed with the Joint Board that it would not be appropriate to establish a nationwide affordable rate. The Commission also agreed with the Joint Board that states should exercise primary responsibility for determining the affordability of rates. The Commission previously rejected a proposal similar to the one SBC suggests now, concluding that it "would over-emphasize income levels in relation to other non-rate factors that may affect affordability and fail to reflect the effect of local circumstances on the affordability of a particular rate." Given the unique characteristics of each jurisdiction, we continue to find that states are better suited than the Commission to make determinations regarding affordability. Moreover, the Commission has previously rejected a proposal to link non-rural high-cost support to income and stated that "section 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates."[125]

The FCC has previously determined that it is "better to address affordability issues unique to low-income consumers through the federal low-income programs specifically designed for this purpose rather than through the high-cost support programs."[126] This conclusion remains appropriate and is compatible with the Court's decision in *Qwest II*. In fulfilling the goal of *reasonably comparable* rates the Commission should not allow excessive USF contribution fees to thwart the equally compelling goal of *affordable service*.[127]

As stated earlier this year:

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125 / *Order on Remand*, at para. 45, cites omitted.

126 / 2005 High Cost USF NPRM, at para. 10 (cites omitted).

127 / Rate Counsel does not repeat its position on the 2005 High Cost USF NPRM here, but directs the Commission to its comments and reply comments filed in response. Rate Counsel submitted initial and reply comments on March 27, 2006 and May 26, 2006, respectively, in the Commission's *Qwest II* proceeding.

> *Until the Commission addresses the Court's Qwest II directive to determine "reasonably comparable" rates, the Commission cannot gauge whether the universal service goals of the 1996 Act are being achieved.* Determining benchmarks for assessing the reasonable comparability of urban and rural rates is an essential component of high cost reform. Without ways to gauge whether rate comparability has been achieved, the HCF will continue to be perceived as a "black hole" for support because regulators will lack a way to measure "success."[128]

As Rate Counsel has stated previously, numerous factors influence rate comparability, stating for example that "[s]tate rate designs are inherently complex and difficult to compare, which means that the Commission should establish broad ranges for assessing 'reasonable comparability.'"[129] Without ways to gauge whether reasonable urban/rural rate comparability has been achieved, consumers are at risk of subsidizing an inflated high cost fund.

In recent years, many states have deregulated local service, or allowed for rate increases in basic local service, which enables ILECs to set retail rates to recover any foregone implicit subsidies.

The FCC should not replace the existing revenue-based contribution mechanism with a numbers-based mechanism.

All three FCC proposals are flawed because they would replace the existing revenue-based contribution mechanism for universal service funding with a new numbers-based assessment methodology.[130] A numbers-based mechanism would assess all lines equally, regardless of the size of consumers' bills. The existing mechanism is more equitable because it relies on the total revenues derived from the consumer as the

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128 / Rate Counsel June 2008 USF Comments Reply Comments, at 6.

129 / Rate Counsel 2006 USF Comments, at 29. *See*, also *id.*, stating "Because of these countless factors, which state regulators address, [Rate Counsel] is wary of any federal mechanism that places undue emphasis on precision in rate comparisons.

130 / FNPRM, Appendix A, at para. 105; Appendix B, at para. 52; and Appendix C, at para. 101.

basis of assessment, and, therefore, consumers contribute to the USF in proportion to their demand for the network. Furthermore, with a revenue-based mechanism, low-use consumers are assessed a lower amount than are high-use consumers, an outcome which is consistent with the goal of affordable rates. The proposed Lifeline exemption for a numbers-based exemption is commendable, but does not address the budget constraints that many households in a weakening economy, which are not Lifeline-eligible, confront.

NASUCA adopted a resolution opposing the adoption of a numbers-based USF contribution methodology in 2007.[131] Rate Counsel concurs with NASUCA that a revenue-based system is "more robust and equitable" than the proposed contribution methodology and that a number or connections-based methodology would shift the burden to low-use and low-income consumers.[132]

Rate Counsel is concerned that the Commission's proposal as presented in the FNPRM lacks detailed data and justification for the contribution amount. Furthermore, the Commission should not move forward in implementing the residential numbers-based system without first resolving the issue of the contribution methodology to be used for business services. It is fundamentally unfair for business contributions to be determined "based on the funding requirements not covered by the $1.00 assessment" on residential consumers in the intervening period.[133] Any new contribution methodology should be implemented on a comprehensive basis.

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131 / NASUCA Resolution 2007-11, "Opposing Proposals for the Adoption of a Numbers-Based or a Connections-Based Universal Service Contribution Mechanism."

132 / *See, e.g.*, Universal Service Contribution Methodology, WC Docket No. 06-122, *et al.*, Comments of the National Association of State Utility Consumer Advocates to Refresh the Record, July 7, 2008, at 21-24.

133 / *See, e.g.*, *id.*, Appendix A, at para. 134.

IV. BROADBAND DEPLOYMENT

Introduction

Rate Counsel applauds the Commission for its general commitment to expanding the deployment and affordability of broadband service. Rate Counsel disagrees, however, with some of the specific approaches proposed in the FNPRM. Among Rate Counsel's concerns are the following:

- By linking support for broadband deployment to the existing High Cost support mechanism, the Commission would focus broadband support only on those areas that already receive High Cost support, which would exclude those areas of the country that are not high-cost areas and yet that lack broadband access.[134] Furthermore, by linking broadband subsidies to the high cost program, the FCC would complicate unnecessarily the implementation of long-overdue reform to the high cost fund.
- The proposed pilot program to subsidize broadband adoption through the Lifeline and Link Up programs is a step in the right direction, but the level of proposed funding is inadequate to the magnitude of the task. Furthermore, in today's

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134 / In the northern New England states, Verizon left many areas of the region without broadband, which then led to transaction-related commitments by FairPoint to address these gaps in broadband service. *See, e.g., Verizon New England, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Co., Verizon Select Services, Inc. and FairPoint Communications, Inc. Petition for Authority to Transfer Assets and Franchise, Order Approving Settlement Agreement with Conditions*, New Hampshire Public Utilities Commission Docket No. 07-011, Order No. 24,823, February 25, 2008. Another example exists in Massachusetts (a state that receives no high cost funds) where many rural areas lack broadband access. As a result, the state legislature has established funding to address these gaps. In Massachusetts, funds recently became available to bring broadband to unserved areas. The Massachusetts legislature passed legislation establishing the Massachusetts Broadband Institute (MBI) in August 2008. The MBI is "tasked with meeting the access needs of un-served citizens throughout the Commonwealth." The MBI will be a division of the Massachusetts Technology Collaborative and will manage a statewide Massachusetts Broadband Incentive Fund that will have up to $40 million of funds "to incentivize public/private partnerships which result in new broadband deployment solutions." http://www.mtpc.org/broadband/index.html.

economic downturn, there are likely many households that may not qualify for Lifeline, but that nonetheless confront severe budget constraints. Affordable broadband is essential not only for Lifeline customers, but for all households.

- Ongoing federal and state data gathering and broadband mapping efforts should inform the distribution of any broadband subsidies.
- The Commission should emphasize the importance of identifying the least-cost, most efficient broadband technology for remote and unserved areas, including technologies such as broadband over power lines and wireless broadband.

Overview of the Commission's broadband proposals

The major components of the FCC's broadband proposals include the following:

- The FCC proposes to tie broadband deployment to High Cost support: delivering broadband becomes a condition of continued High Cost support to ETCs.
- High Cost support would be available only to one service provider in each area.
- In service areas where the ILEC does not commit to offer broadband Internet access to all subscribers within the study area within five years in order to continue to receive High Cost support, the service provider would be determined through a reverse auction process. The winning bidder must agree to offer broadband to all customers in service area within ten years.[135]
- The FCC proposes to make available $300 million each year for the next three years as part of a Pilot Program to encourage broadband adoption among low income consumers though the Lifeline and Link Up programs.[136]

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[135] / *See, e.g.*, FNPRM, Appendix A, at paras. 28 and 41.

[136] / *Id.*, Appendix A, at para. 64 and Appendix C, at para. 60.

The Commission should designate broadband as a supported service.

Rate Counsel agrees with the Joint Board's recommendation that the nation's universal service goals should include the universal availability of broadband services to narrow the ever-expanding digital divide.[137] The Commission should establish a support mechanism for extending broadband to unserved and underserved areas that entails a program of grants to state authorities, with the monies awarded to states proportionally, based either on population or households.[138]

In contrast, the FCC proposes to make the provision of broadband service a condition of LECs' continuing ability to receive High Cost support, stating that the approach would "spur widespread deployment of broadband by ensuring that carriers receiving universal service high-cost support offer broadband throughout their service areas."[139] Rate Counsel concurs that broadband should be a supported service,[140] but disagrees with the proposed mechanism for determining the level of and recipients of such support. The approach of making High Cost support contingent on the ILEC or ETC providing broadband access throughout its service area overlooks the fact that those territories that are not currently eligible for High Cost support would remain unserved. Therefore, if the FCC's proposal is adopted, many non-High Cost areas could remain in the "pre-broadband" era.

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[137] / *Comprehensive Reform Recommended Decision*, at para. 1. See, also, Rate Counsel April 2008 USF Comments, at 19; Rate Counsel 2006 USF Comments, at 25.

[138] / Rate Counsel April 2008 USF Comments, at 5.

[139] / FNPRM, Appendix A, at para. 3. The cites herein are to the proposals set forth in Appendix A. Identical broadband proposals are set forth in Appendix C.

[140] / *Id.*, at paras. 19-23.

The Commission should follow the recommendation of the Joint Board to create a Broadband Fund to support deployment of broadband infrastructure.

Rate Counsel reiterates its previous recommendation that the Commission move forward with financial incentives for build-out to unserved and underserved areas.[141] The purpose of any broadband support should be to: (1) subsidize one-time construction in unserved areas and (2) subsidize broadband rates for Lifeline customers.

The Broadband Fund should focus on the one-time costs of deploying broadband infrastructure to all unserved and underserved areas of the nation, and should target construction costs – the major impediment to making broadband available to high cost areas. The Commission should not implement a policy that would provide a steady stream of funds to subsidize operations.[142] Rate Counsel reiterates its previous recommendation:

> Broadband providers likely have already picked the low-hanging fruit; that is, they have already deployed broadband to those areas where they can expect to make a profit. Because we may have reached the limit of what the competitive market will provide on its own, Rate Counsel supports a Broadband Fund, provided that it is carefully structured, has a clear sunset date, and is distributed proportionally to all states and jurisdictions (based on population or households).[143]

Moreover, Rate Counsel recommends that the Commission adopt a focused broadband fund rather than link broadband requirements to the existing high-cost fund.

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[141] / Rate Counsel April 2008 USF Comments, at 30.

[142] / Rate Counsel April 2008 USF Comments, at 34; Rate Counsel June 2008 USF Reply Comments, at 18, 30-31.

[143] / Rate Counsel April 2008 USF Comments, at 29.

The FCC should adopt an expeditious timeframe to close the divide between broadband "haves" and "have-nots."

Rate Counsel reiterates its recommended three-year push to deploy broadband universally,[144] rather than the prolonged time table proposed in the FNPRM, which is out of touch with the realities of the modern economy and consumers' needs to have easy and reliable access to the information economy. The FNPRM states the following regarding a broadband timetable:

> In sum, all ETCs must offer broadband Internet access service, along with all supported services, to all customers throughout their service areas by the end of a five- or ten-year build-out period consistent with the requirements of this order.[145]

The timeframe of five years (or ten years if an area is put out for bid) is extremely long.

Any funds that subsidize broadband deployment should be designed to discourage abuse and waste.

Rate Counsel continues to support the requirement that USF participants be subject to periodic audits.[146] In addition, service providers receiving funds specifically for the purpose of deploying broadband infrastructure should be required to compare the actual broadband deployment results with their original plans after funds are expended and be held accountable for failure to meet deployment benchmarks.[147] The Commission appropriately recognizes the importance of reducing fraud, waste, and abuse, and thus

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144 / *Id.*, at 35.

145 / FNPRM, Appendix A, at para. 25.

146 / Rate Counsel April 2008 USF Comments at 50; Rate Counsel June 2008 USF Reply Comments, at 63.

147 / Rate Counsel June 2008 USF Reply Comments, at 27.

includes provisions for audits of USF participants.[148] In addition, the FCC proposes specifies several reporting requirements for the Broadband Pilot Program:

> We require participating each [sic] ETC to file with USAC on a monthly basis the number of Pilot Program consumers it is serving, the types and prices of devices offered, the type of technology used(including make and model of equipment used) and the speeds at which it is providing service to each of those consumers. ETCs in their monthly submission must also report the number of subscribers served for the past month and projections for the number of subscribers for the next 2 months. Such monthly reporting is required to allow USAC to monitor availability of funds under the Pilot Program and notify participating ETCs when funds may no longer be available for additional customers.[149]

Rate Counsel commends the Commission for including these important provisions in the draft proposal. Ensuring that funds are used efficiently benefits all consumers by reducing the contributions consumers must pay to the USF, and thus making telecommunications services more affordable for all.

The Commission's broadband proposals lack a sunset date. Rate Counsel urges the Commission to establish clear sunset dates to avoid creating any expectation that the funding will be of indefinite duration. The sunset mechanism could include a provision allowing the Commission to extend the date only if certain specific circumstances are met.[150] Rate Counsel also reiterates its recommendation that the Commission avoid subsidizing broadband deployment that has already been promised by service providers as a condition for approval of other transactions or approvals.[151]

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148 / FNPRM, Appendix A, at paras. 62-63.

149 / *Id.*, at para. 88.

150 / Rate Counsel April 2008 USF Comments, at 51; Rate Counsel June 2008 USF Reply Comments, at 30-31, 63.

151 / Rate Counsel June 2008 USF Reply Comments, at 33.

Lifeline and Link Up programs should encompass broadband service.

Rate Counsel concurs with the Commission's proposed inclusion of broadband service in the Lifeline and Link Up programs. However, the funding is inadequate.[152] The Commission states:

> We conclude that we will make available $300 million each year for the next three years to enable ETCs to support broadband Internet access service and the necessary access devices. In particular, if an ETC provides Lifeline service to an eligible customer, the Pilot Program will support 50 percent of the cost of broadband Internet access installation, including a broadband Internet access device, up to a total amount of $100. In addition, if an ETC provides Lifeline service to an eligible household, the Pilot Program will double, up to an additional $10, the household's current monthly subsidy to offset the cost of broadband Internet access service.[153]

The Commission describes the *best* possible result, which does not seem sufficiently ambitious to close the digital divide:

> According to the Commission's data, there are approximately 6.9 million consumers participating in the Lifeline universal service program. Providing an additional $300 million in annual support through the low-income universal service support mechanisms over a three-year period should increase the broadband subscribership for low-income customers to *over fifty percent.*[154]

One way to strengthen the program would be to elicit matching funds from states or other entities. Instead, the Commission proposes: "For the broadband Lifeline/Link Up Pilot Program we adopt today, we limit support to one subsidy per household. We do

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152 / *Id.*, at 32.

153 / FNPRM, Appendix A, at para. 64.

154 / *Id.*, at para. 75 (emphasis added, footnote omitted). Rate Counsel is not optimistic that the $10 month offset for broadband service is a large enough subsidy for many Lifeline consumers. If the Pilot Program is implemented and subscription rates remain low, the Commission should examine whether the $10 subsidy is truly enough to enable consumers to cross the digital divide.

not require state or carrier matching requirements. The Pilot Program is exempt from fees and taxes to the same degree as the current Lifeline programs."[155]

Rate Counsel previously recommended that the Commission impose USF fees on all broadband services (whether offered by telecommunications or cable companies) "for the purpose of generating funds to support broadband deployment to underserved populations (*e.g.*, where income constraints discourage broadband demand, and, therefore, where Lifeline subsidies are warranted) and unserved areas (*e.g.*, in rural, high-cost areas where such deployment has not already been funded through the rural high cost fund or as a result of regulatory bartering with state commissions)."[156] More specifically, Rate Counsel estimated that a 1% charge on current broadband customers would yield approximately $400 million per year – funds that could supplement the $300 million per year of the Pilot Program.[157]

Broadband should meet the "3/1" speed requirement in order to receive support.

Rate Counsel reiterates its recommendation that broadband service funded through the Broadband Fund meet the minimum speed requirement of 3 Mbps downloading, and 1 Mbps uploading.[158] The FCC proposes less ambitious minimum speed requirements,[159] but explains that the result of the reverse auction process (see

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155 / *Id.*, at para. 80.

156 / Rate Counsel June 2008 USF Reply Comments, at 3.

157 / *Id.*, at 23-24 and 37-38.

158 / *Id.*, at 34-35, citing California PUC, at 16-17.

159 / FNPRM, Appendix A, at para. 28, specifying the minimum required speed of 768 kbps download, and 200 kbps upload.

below) will not always be the cheapest option, but rather the less expensive option of the highest proposed speed tier.[160]

> The winning bid will be selected through a two-step process. First, we will identify the highest speed tier for which there is a valid bid. If here is only one bid for that tier, then that is the winning bid. If there are multiple bids within that tier, then the winning bid will be the lowest price bid within that tier.[161]

Reverse auctions for broadband funds should occur only on a trial basis.

As discussed above, if the Commission is determined to use reverse auctions they should be used only on a trial basis to target support to deploy broadband in underserved and unserved areas until the myriad details and consequences of reverse auctions are addressed and resolved. The implementation issues associated with reverse auctions are daunting, and the benefits are not sufficient to warrant the substantial administrative resources that would be associated with designing and implementing such a plan to replace the existing high-cost mechanism.[162]

Broadband subsidies should be used to support least-cost efficient technology.

USF subsidies that are used to support broadband deployment in unserved and underserved areas should be awarded to those providers that use the least-cost and most efficient technologies. Rate Counsel urges the Commission to investigate more fully, for example, the opportunity for broadband to be deployed in rural areas over existing power lines, and the role of wireless broadband in serving remote areas. Providing the

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[160] / *Id.*, at para. 44.

[161] / *Id.*, at para. 46.

[162] / Rate Counsel April 2008 USF Comments, at 10, 57; Rate Counsel June 2008 USF Reply Comments, at 65-66, 70.

incumbent ETC with essentially what is "right of first refusal" may not be the most efficient or least cost manner in which to subsidize broadband deployment.

Detailed data should inform any broadband deployment initiatives.

The FCC should be informed, in its implementation of the Pilot Program or high-cost funds linked to broadband, by the ongoing data gathering and broadband mapping efforts. The recently enacted Broadband Data Improvement Act (S 1492)[163] and the data-reporting directives that the FCC set forth in WC Docket No. 07-38[164] (as well as further pending decisions in Docket No. 07-38[165]) will increase state and national policy makers' ability to determine which areas of the nation are unserved and underserved.

Summary of Rate Counsel's major broadband recommendations

Rate Counsel recommends the following to encourage the deployment of affordable broadband at reasonable speeds throughout the country:

- Broadband should be a supported service.
- The Commission should encourage the deployment of broadband infrastructure, using the most efficient and least-cost technology.
- The Commission should consider subsidizing a pilot deployment of broadband over power lines to assess the potential of this technology to provide broadband access in remote areas.

163/ President Bush signed the legislation into law on October 10, 2008. http://www.govtrack.us/congress/billtext.xpd?bill=s110-1492.

164 / *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, released: June 12, 2008 ("Form 477 Order").

165 / Comments, including those by Rate Counsel, were filed in response to Commission's FNPRM in WC Docket No. 07-38 on August 1, 2008 and September 2, 2008 on specific broadband data gathering issues, and on July 17, 2008 and August 1, 2008, regarding broadband mapping. This phase of the docket is still pending FCC review.

- Ubiquitous deployment of broadband technology should occur within three years.
- Broadband deployment programs should fund only one service provider in each area, cover only one-time construction costs, have a clear sunset date, and be subject to audits of all program participants.
- Broadband should be included in the services covered by the Lifeline and Link Up programs.
- The minimum speed acceptable for support should be 3 Mbps, downloading, and 1 Mbps, uploading.
- Reverse auctions should be used only on a trial basis to determine broadband support.
- Broadband deployment should be coordinated with ongoing state and federal data gathering and broadband mapping programs.

V. CONCLUSION

Rate Counsel supports the goals of replacing the fragmented intercarrier compensation systems, reforming universal service programs, and subsidizing broadband deployment in unserved and underseved areas. However, the proposals set forth in Appendices A, B, and C are skewed toward industry, and, if adopted would burden consumers unduly without an offsetting consumer gain. Rate Counsel urges the Commission to reject those portions of its proposals that seek to insulate incumbents from the impact of emerging competition and evolving technology.

Rate Counsel also notes that the complexity, depth and myriad of issues under consideration, warrant that the Commission consider the option of addressing these issues through a negotiated rulemaking, as permitted under section 561 *et seq,* of the Negotiated

Rulemaking Act ("the Act"), consistent with section 553 of Title 5 of the Administrative Procedure Act. Section 563 of the Act permits an agency *to* "...establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest."[166] A negotiated rulemaking process would ensure not only the balanced representation of the issues but also of all who would be significantly affected by the proposed rulemaking, such as residents of rural areas.

Respectfully submitted,

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[166] / Negotiated Rulemaking Act, 5 U.S.C. 563 et seq.