Before the
Federal Communications Commission
Washington, D.C. 20554

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 NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON THE NOTICE OF INQUIRY

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Letter to Honorable Rick Boucher, et al. (April 6, 2009) ("NASUCA House USF Letter")[1]

[1] See http://www.nasuca.org/NASUCA%20Letter%20to%20House%20on%20USF%204-6-09.doc.

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I. INTRODUCTION AND EXECUTIVE SUMMARY

On April 8, 2009, the Federal Communications Commission ("FCC" or "Commission") released a Notice of Inquiry ("*NoI*") "to refresh the record regarding the issues raised by the United States Court of Appeals for the Tenth Circuit … in the *Qwest II* decision."[2] As noted by the Commission, the *Qwest II* remand occurred in 2005. Soon after, the Commission took comment on the issues raised by the remand.[3] But the Commission has not yet acted on those comments.

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[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337 ("96-45/05-337"), FCC 09-28 (rel. April 8, 2009) ("*NoI*"), ¶ 1, citing *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

[3] 96-45/05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19731 (2005) ("*Remand NPRM*"). Specifically, the Commission sought comment on how to define the statutory terms "sufficient" and "reasonably comparable" in light of *Qwest II*'s rejection of the Commission's definitions of those terms. The Commission also sought comment on the support mechanism for non-rural carriers, which the *Qwest II* court invalidated due to the Commission's reliance on an inadequate interpretation of statutory principles and failure to explain how a cost-based mechanism would address problems with rates.

Earlier this year, various of the petitioners in *Qwest II* applied to the Tenth Circuit for a writ of mandamus compelling the Commission to act on the remand.[4] In response, the Commission "committed to release a notice of inquiry no later than April 8, 2009, issue a further NPRM no later than December 15, 2009, and release a final order that responds to the remand no later than April 16, 2010."[5] The issuance of the current *NoI* is the first step in that commitment.

The National Association of State Utility Consumer Advocates ("NASUCA")[6] asserts that there is little refreshing needed for this record. The comments presented in response to the *Remand NPRM* exhaustively addressed the issues presented by the Tenth Circuit's decision "invalidat[ing] the Commission's high-cost universal service support mechanism for non-rural carriers, which determines the amount of support to be provided to each state by comparing the statewide average forward-looking cost per line for non-rural carriers to a nationwide cost benchmark."[7] As the Commission correctly describes it, in *Qwest II*,

> The court again held that the Commission failed to reasonably define the terms "sufficient" and "reasonably comparable." The court directed the Commission on remand to articulate a definition of "sufficient" that appropriately considers the range of principles in section 254 of the Act,

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[4] See *Qwest, et al., v. FCC*, Tenth Circuit 09-9502, Order (March 20, 2009).

[5] *NoI*, Statement of Commissioner Robert M. McDowell.

[6] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[7] *NoI*, ¶ 1.

> and to define "reasonably comparable" in a manner that comports with its duty to preserve and advance universal service. Because the non-rural high-cost support mechanism rests on the application of the definition of "reasonably comparable" rates that the court invalidated, the court deemed the support mechanism invalid. The court further noted that the Commission based the two standard deviations cost benchmark on a finding that rates were reasonably comparable, without empirically demonstrating a relationship between the costs and the rates in the record. On remand, the court directed the Commission to "utilize its unique expertise to craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve and advance universal service."[8]

The immediate task before the Commission is to respond to the *Qwest II* remand of the non-rural high-cost fund. There is very little new to be said on these subjects.[9]

The Commission need not and should not address issues of broader consequence and significance, which will complicate the decision process and make meeting the Commission's commitment to the Court more difficult. NASUCA agrees with the Wyoming Public Service Commission – one of the petitioners for mandamus at the Tenth Circuit – that "[t]he NOI should focus directly on refreshing the record concerning sufficiency of support to allow for comparability of rural rates for <u>currently</u> supported services provided by non-rural carriers"[10] -- rather than on using the *NoI* "to take an expansive, forward looking approach"[11] and "transform Universal Service for the broadband age…."[12] NASUCA's comments here will focus, therefore, on those immediate issues, and show how the record is adequate to resolve the Tenth Circuit's

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[8] Id., ¶ 5 (citations omitted).

[9] See id., ¶¶ 14-16 (definition of "reasonably comparable"); ¶¶ 17-20 (definition of "sufficient"); ¶¶ 21-27 (funding mechanism).

[10] 96-45, Wyoming PSC ex parte (April 2, 2009) at 2 (emphasis in original).

[11] 96-45/05-337, AT&T ex parte (March 30, 2009).

[12] Id.

issues. Issues regarding supporting broadband need not be considered in this context,[13] but NASUCA provides brief comments on the subject.

One of the issues that need not be addressed before April 16, 2010 is that of unifying the non-rural and rural funds. *Qwest II* addressed only the non-rural high-cost fund, based on the record addressing the universal service needs of the non-rural companies and their customers. The differences between non-rural companies and the rural companies, as shown by the record here, is substantial and real.[14] The *Qwest II* remand does not require unification of the non-rural and rural funds, with all its complications.[15]

The *NoI* requests comment on four of the many specific proposals that have been submitted in this docket since the issuance of the *Remand NPRM*. There is no indication of why the Commission chose these particular proposals rather than others, including NASUCA's proposals that are resubmitted herein.

Indeed, only one of the proposals, that of Qwest, is arguably new and relevant, having been filed as an ex parte on May 5, 2008.[16] Yet there already has been comment on the Qwest proposal, including by NASUCA. NASUCA's earlier comments are incorporated here.

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[13] See *NoI*, ¶ 28.

[14] See Appendix J.

[15] Other issues that need not be addressed in this context include the identical support rule, which is not pertinent here. Another issue that does not need to be addressed is the USF contribution mechanism, which is also well beyond the scope of the remand.

[16] *NOI*, ¶¶ 8-9. This proposal apparently replaces one made by Qwest in the *Remand NPRM* round, as to which there was extensive comment on reply.

The Vermont/Maine proposal[17] was the subject of extensive comment, including by NASUCA, in the *Remand NPRM* round. Those comments are also incorporated here.

Then there is the proposal from Embarq,[18] which is, as discussed below, more of a broadband proposal than a response to the Tenth Circuit's remand. And there is also a "proposal" from CostQuest[19] that does not address at all the key remand issues; it is more a proposal to reform the cost modeling process, and is discussed here in that context.

In the remand comments, NASUCA presented two alternatives for the Commission's consideration. The first alternative took a new direction that simplified the way in which high-cost support for non-rural carriers is determined. The second alternative retained much of the current mechanism, while attempting to directly meet the concerns on which the Tenth Circuit based its rejection and remand of prior Commission orders; in that respect it was more complicated than either the current mechanism that was overturned in *Qwest II* or the first NASUCA alternative. Both alternatives were and are based on the fact that the key purpose of the non-rural high-cost fund is to meet the statutory principle that non-rural companies' rates in the high-cost and rural portions of their service territories should be "reasonably comparable" to rates in urban areas. Both of NASUCA's proposals would replace the current three pieces of the non-rural high-cost universal service fund ("USF") with a single fund. NASUCA resubmits those proposals here.

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[17] Id., ¶ 10.

[18] Id., ¶ 11.

[19] Id., ¶ 12.

A key aspect of the *Qwest II* decision was the Court's rejection of the FCC's creating universal service policy without basing the policy on an analysis of actual rates. The Tenth Circuit rejected the Commission's "reasonably comparable" standard[20] that had been adopted without any review of the universe of rates, whether rural, urban or otherwise. Clearly, in order to determine whether rural rates are reasonably comparable to urban rates, it is necessary to know what those rates are.[21] In the *Remand NPRM* comments, NASUCA presented the Commission with data that encompassed rates as of February 2006 in more than 11,000 wire centers nationwide -- urban, rural, and in between -- served by the non-rural carriers under examination here. NASUCA's data -- which do not require updating for purposes of the remand -- allow the Commission to do such a review.

These comments include the necessary recitation of the legal framework in which the Commission's review must proceed.[22] A discussion of the issues from the *NoI* surrounding reasonable comparability[23] is followed by the sufficiency issue.[24] Then the "funding mechanism" issues are discussed.[25] (Issues regarding the Commission's cost model are addressed in a separate section.[26])

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[20] *Qwest II*, 398 F.3d at 1234-1237. That standard was adopted in the 96-45/05-337 Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559 (2003) ("*Order on Remand*").

[21] It is also necessary to define urban "areas" and rural "areas," in order to know which rates are which. This is accomplished in these comments by using Census Bureau definitions.

[22] Section II.

[23] Section III.

[24] Section IV.

[25] Section V.

[26] Section VI.

As noted above, the Commission also asks for comment on the relationship of the non-rural company high-cost funding mechanism to broadband policies. As proposed by the Federal-State Joint Board on Universal Service ("Joint Board") and supported by NASUCA, broadband issues should be addressed separately (in a broadband fund); they need not be addressed in the context of the traditional high-cost issues that were the subject of the *Qwest II* remand. Nonetheless, NASUCA briefly addresses those issues here.[27]

As also mentioned above, the Commission asks for comment on four specific high-cost USF proposals. As noted, the Embarq proposal is discussed here as a broadband issue[28]; similarly, the CostQuest "proposal" is addressed in the discussion of modeling.[29] Separate discussions are provided for the Qwest and Vermont/Maine proposals, echoing NASUCA's previous comments on the proposals.[30]

NASUCA's two separate proposals for the non-rural high-cost fund are repeated here.[31] They do address the Tenth Circuit's remand, and meet the statutory requirements.

Appendices to these comments include discrete discussions, adapted from earlier NASUCA comments, of more complete discussions of NASUCA's two proposals[32] and a demonstration that those proposals meet the statutory requirements.[33] There is also a

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[27] Section VII.

[28] Id.

[29] Section VI.

[30] Section VIII.

[31] Section IX.

[32] Appendices A and B.

[33] Appendix C.

review of the current non-rural carrier high-cost funding situation[34] and a discussion of NASUCA's non-rural rate census.[35] Other key issues are expanded on, including the affordability issue[36]; the impact of local calling areas on comparability[37]; the need for state support mechanisms[38]; the need to advance universal service[39]; the "rural difference"[40]; and finally, the need for gradualism, in order to ease the impact of the Commission's (hopefully final) determination on these issues.[41] Additional materials are also provided in support of continuing statewide cost averaging for non-rural carriers.[42]

II. LEGAL BACKGROUND[43]

The Telecommunications Act of 1996 ("1996 Act") codified the historical commitment of the Commission and state regulators to promote universal service by ensuring that consumers in all regions of the nation have access to affordable, quality telecommunications services.[44] In § 254 of the 1996 Act, Congress directed the

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[34] Appendix D.

[35] Appendix E.

[36] Appendix F.

[37] Appendix G.

[38] Appendix H.

[39] Appendix I.

[40] Appendix J.

[41] Appendix K.

[42] Appendix L.

[43] **The following material is adapted from the NASUCA *NRHC Remand* Comments (at 10-14).**

[44] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934. 47 U.S.C. §§ 151, *et seq*.

Commission, after consultation with the Joint Board, to adopt "policies for the preservation and advancement of universal service" based on a set of six "principles."[45] Of those principles, the Commission has focused on § 254(b)(3), which provides that consumers in "rural, insular, and high-cost areas" should have access to telecommunications services at rates that are "reasonably comparable to rates charged for similar services in urban areas."[46] The Commission has also focused on § 254(e), which provides that federal universal service support "should be explicit and sufficient to achieve the purposes of this section."[47]

In the *Ninth Report and Order*, the Commission established a federal high-cost universal service support mechanism for non-rural carriers based on forward-looking economic costs.[48] The Commission based the mechanism on costs, rather than on rates, for reasons discussed in the *First Report and Order*.[49] The *Ninth Report and Order* mechanism determined the amount of federal high-cost support to be provided to non-rural carriers by comparing the statewide average non-rural, forward-looking **cost** per line to a nationwide cost benchmark that was set at 135 percent of the national average cost per line, based on the FCC's high-cost model ("HCM"). Federal support was provided to non-rural carriers in states with costs that exceed the national benchmark. The Commission determined that this mechanism would produce rural rates that were

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[45] 47 U.S.C. § 254(b). The Commission was also permitted to adopt "additional principles…." 47 U.S.C. § 254(b)(7).

[46] 47 U.S.C. § 254(b)(3).

[47] 47 U.S.C. § 254(e).

[48] 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306, 14 FCC Rcd 20432 (1999) ("*Ninth Report and Order*"), ¶ 2.

[49] 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*"), ¶¶ 224-226.

"reasonably comparable" to urban rates, and that as a result, the non-rural high cost fund would be "sufficient."[50]

The non-rural mechanism from the *Ninth Report and Order* was overturned by *Qwest I*.[51] The *Qwest I* Court directed the Commission on remand to define more precisely the statutory terms "sufficient" and "reasonably comparable," and then to assess whether the non-rural mechanism would be sufficient to achieve the statutory principle of making rural and urban rates reasonably comparable.[52] In addition, the Court found that the Commission failed to explain how its 135 percent nationwide cost benchmark would help achieve the goal of reasonable comparability or sufficiency.[53]

In response to the Court and the recommendations of the Joint Board, the Commission modified the high-cost universal service support mechanism for non-rural carriers, and 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. In particular, the Commission defined the statutory term "sufficient" as "enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers,"[54] and defined "reasonably comparable" in terms of a national urban residential rate benchmark,[55] set at two standard deviations above the average urban residential rate in an annual Wireline Competition

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[50] *Ninth Report and Order*, ¶ 2.

[51] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2003) ("*Qwest I*").

[52] Id. at 1202.

[53] Id. at 1202-03.

[54] *Order on Remand*, ¶ 30; *see also* id., ¶ 36.

[55] Id., ¶¶ 30, 40-42.

Bureau rate survey.[56] In addition, the Commission modified the 135 percent cost benchmark by adopting a cost benchmark based on two standard deviations above the national average cost.[57]

In the meantime, the Commission had also added two other forms of "high-cost" support to the HCM given to non-rural carriers. Interstate Access Support ("IAS") came out of the *CALLS Order*.[58] And Interstate Common Line ("ICL") support came from the *MAG Order*.[59] These two forms of support substantially increased the number of non-rural ILECs receiving high-cost support, such that only fourteen non-rural ILECs in thirteen states did **not** receive any high-cost support in 2005.[60] And according to the 2008 Annual Report of the Universal Service Administrative Company ("USAC"), in 2008 there were only two jurisdictions – the District of Columbia and New Hampshire – that received no high-cost support for non-rural companies.[61]

The *Order on Remand* was also appealed. The Tenth Circuit again reversed and remanded the non-rural high-cost mechanism to the Commission.[62]

The Court held that the Commission had once more failed to reasonably define

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[56] Id., ¶¶ 80-82; *see also* id., ¶¶ 40-42.

[57] Id., ¶¶ 49, 55-69.

[58] *In the Matter of Access Charge Reform*, CC Docket No 96-262, *et al*., Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

[59] *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *et al.*, 16 FCC Rcd 19613, Second Report and Order, *et al.*, (2001) ("*MAG Order*").

[60] See Appendix D. As discussed in Section III.B. below, most non-rural carrier support is low enough on a per-line basis that its removal would not likely produce rates that were no longer reasonably comparable.

[61] USAC 2008 Annual Report at 48.

[62] *Qwest II*, 398 F.3d 1222.

the terms "sufficient" and "reasonably comparable."[63] The Court directed the Commission on remand to articulate a definition of "sufficient" that appropriately considers the full range of principles in § 254(b), and to define "reasonably comparable" in a manner that comports with the Commission's duty to preserve **and advance** universal service.[64]

Because the non-rural high-cost support mechanism rested on the application of the definition of "reasonably comparable" rates that was invalidated by the Court, the Court also deemed the support mechanism invalid.[65] The Court also noted that the Commission based the two standard deviations **cost** benchmark on a finding that **rates** were reasonably comparable, without empirically demonstrating a relationship between costs and the rates in the record.[66]

The Court directed the Commission on remand to "utilize its unique expertise to craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service."[67] The *Remand NPRM* was the Commission's attempt to respond to the court's directives, but there was no action on the issues.

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[63] Id. at 1233.

[64] Id. at 1237.

[65] Id.

[66] Id.

[67] Id. (emphasis in original).

III. DEFINITION OF "REASONABLY COMPARABLE"

In the *NoI*, the Commission correctly focuses on the key question of how to define reasonable comparability.[68] Many of the questions the Commission asks, however, stray from the point. The discussion below attempts to take up the questions in a more logical order.

The Commission asks how it should define reasonably comparable rates.[69] That, of course, is the key question. The Tenth Circuit rejected the Commission's prior determinations because they were not based on a review of actual rates; NASUCA's rate census allows such a review.

The most recent result of the Commission's urban rates survey (rates as of October 15, 2007) shows a weighted average monthly urban residential charge of $25.62, with a low of $16.70 and a high of $38.59.[70] In the *Remand NPRM* comments, NASUCA reported that the same average as of October 15, 2004 showed a weighted average monthly urban residential charge of $24.31, with a low of $16.05 and a high of $34.47.[71] The current numbers thus represent a 5.4% increase in the weighted average, a 4% increase in the lowest rate and a 12% increase in the highest rate. This indicates that the range of urban rates is broadening, particularly on the high end. But the essential conclusions to be drawn from the rate census are substantially the same.

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[68] *NoI*, ¶¶ 14-16.

[69] Id., ¶ 15.

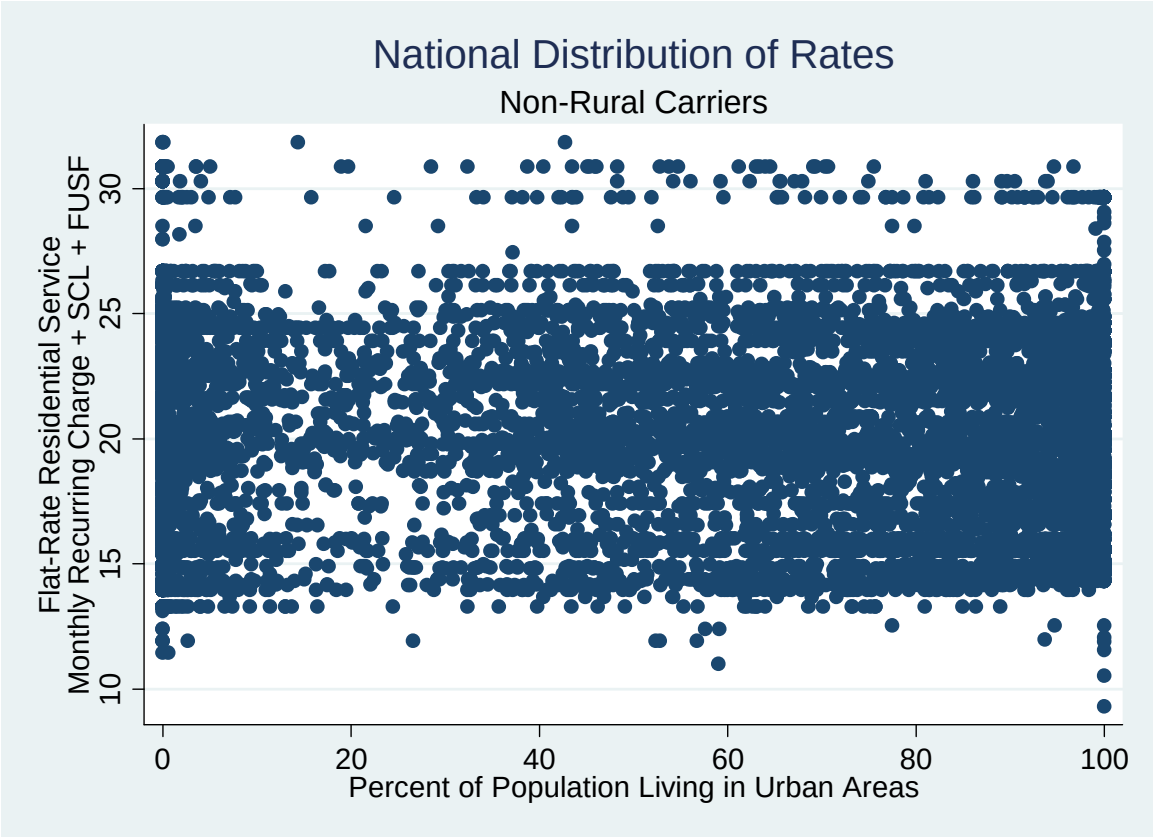
[70] *Reference Book of Rates, Price Indices, and Household Expenditures* (August 2008), Table 1.3.

[71] NASUCA *NRHC Remand* Comments at 20.

NASUCA presented a rate census that included over 11,000 non-rural carrier wire centers.[72] The census counted rates as of February 2006. (The rate census has not been repeated to include the most recent rate numbers.)

One crucial criterion in any such census is the definitions of "rural" and "urban." As explained in Appendix E to these comments, NASUCA recommends the use of Census Bureau definitions.[73]

The variety of rates charged by non-rural carriers is depicted in the following scatter diagram[74]:



[72] See Appendix E.

[73] See *NoI*, ¶ 23.

[74] **The following material has been adapted from NASUCA's *NRHC Remand* Comments (at 40-42).**

At a glance, the diagram shows that there are few rural rates that are above the range of urban rates.

The following chart simplifies the many points on the scatter diagram:

Percent of wire center population living in urban areas	Number of Wire Centers	Average price of flat-rate residential service + SLC + FUSF	Standard deviation	Minimum	Maximum
0%	1,808	21.00	3.79	11.43	31.82
0-20%	3,979	20.81	3.76	11.43	31.82
20-40%	545	20.47	3.56	11.91	30.86
40-60%	1057	20.42	3.72	10.99	31.82
60-80%	1,393	20.34	3.71	12.54	30.86
80-100%	4,278	19.40	3.86	9.29	30.86
100%	1092	19.57	4.20	9.29	29.64
Sample avg. (0-100%)	11,252	19.63	3.85	9.29	31.82

The data showed that there was not that much difference between rural rates and urban rates. The rural minimum rate was 23% greater than the urban minimum rate, but the average rural rate was only 7% greater than the average urban rate. Most importantly, the highest rural rate was only 7% higher than the highest urban rate. Further, there were only about 245 wire centers that had current rates greater than two standard deviations above the urban average.[75] Most of these were rural, but some were, in fact, urban. On the other hand, there were fifteen jurisdictions where no non-rural carrier rate was greater

[75] They are served by Cincinnati Bell in Kentucky, Verizon in Vermont, Qwest in Wyoming, Verizon in New York, CenturyTel in Alabama, and BellSouth in Georgia.

than one standard deviation from the urban average.[76] The extent to which the current comparability of rates has occurred **as a result of** the Commission's current non-rural high-cost mechanism is, of course, uncertain.

The *NoI* also seeks "comment on the court's suggestion that 'advancing' universal service is a 'concept that certainly could include a narrowing of the existing gap between urban and rural rates,' and on how the Commission could narrow the existing gap between urban and rural rates to advance universal service."[77] In the *NRHC Remand* comments, NASUCA proposed alternative means of advancing universal service.[78] And NASUCA's second alternative support mechanism also explicitly allowed narrowing the (already fairly narrow) gap between urban and rural rates.

The *NoI* also asks,

> Should the Commission continue to compare rural rates in all states to a single national urban rate benchmark? If so, which urban rates should the Commission use to establish the benchmark? Should the Commission compare rural rates to a national average urban rate, rather than some benchmark above the average? Should the Commission compare rural rates to the lowest urban rate? What would be the range of reasonably comparable rates? For example, should the Commission require that rural rates in all states be no more than ten percent, or perhaps twenty-five percent, above the lowest urban rate? We seek comment on how the Commission would justify any particular percentage above a benchmark, and on sources of rate data to use in this analysis.[79]

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[76] Alaska, Arizona, Delaware, District of Columbia, Florida, Iowa, Louisiana, New Jersey, Nevada, Oregon, Pennsylvania, Tennessee, Texas, Utah and Washington. Of course, local calling areas do not figure in to this comparison.

[77] *NoI*, ¶ 15, citing *Qwest II*, 398 F.3d at 1236.

[78] See Appendix I.

[79] *NoI*, ¶ 15 (citations omitted).

Yes, the Commission should continue to use a single national urban benchmark. (Otherwise a benchmark would have to be on a state level, or even more micro-analyzed. There is no reason to make this more complicated than it is.)

There is no basis for using the lowest urban rate as any kind of benchmark. Congress required the USF to ensure that rural rates generally, be **reasonably** comparable to urban rates generally, not to any specific urban rate, much less the lowest urban rate. The requirement should, therefore, be that no rural rate should be more than is reasonably comparable to the **range** of urban rates. Thus, the Commission should not "require that rural rates in all states be no more than ten percent, or perhaps twenty-five percent, above the **lowest** urban rate…."[80] Rather, the Commission should design the non-rural carrier high-cost fund to provide sufficient support to keep rural rates at some level above the weighted average urban rate. Whatever level the Commission adopts will now be backed up by a complete sampling of urban and rural rates.

A. The data on urban and rural rates.

In the *NoI*, the Commission states, "Although the rate data in the record indicated that, in most states, rural rates were the same or lower than urban rates in the same state, the data also showed considerable variance in both urban and rural rates among states."[81] This statement, however, overlooks the Tenth Circuit's main criticism of the *Order on Remand*, that it was not based on a review of the "rate data in the record," incomplete as it was.

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[80] *NoI*, ¶ 15 (emphasis added).

[81] Id., ¶ 14, citing *Order on Remand*, 18 FCC Rcd at 22571, para. 22 n.55, 22658-71, App. C; *see also Remand NPRM*, 20 FCC Rcd at 19740, para. 18 n.71.

NASUCA presented comprehensive data on the basic service rates of non-rural companies.[82] Per *Qwest I* and *II*, this must be the fundamental data starting point for any mechanism that is designed to produce rural rates that are reasonably comparable to urban rates. This data shows the range and variance of rural rates, of urban rates, and of all rates -- from more than 11,000 non-rural carrier wire centers around the country. This rate analysis should be used as the basis of a standard of reasonable comparability to be used on a going-forward basis, including in the process described in detail later in the comments.

B. Recent data shows that most non-rural carriers' USF receipts do not have a significant impact on rates.

In testimony presented to the U.S. House Subcommittee on Communications, Technology and the Internet on March 12, 2009, FreePress Research Director S. Derek Turner provided an analysis of the per-line impact of high-cost funding received by non-rural carriers.[83] As the following charts adapted from Mr. Turner's testimony show, the amount of high-cost support received by most non-rural carriers is minimal, including HCM, IAS and ICLS, and is unlikely to have a significant impact on the carriers' rates.

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[82] See Appendix E.

[83] Accessible at http://www.freepress.net/node/48756. Mr. Turner's testimony also reviews the funding for rural carriers, which are not relevant here. The interpretations of the data presented here are NASUCA's.

High Cost Fund Support by Program and Study Area Type

(Projected 2008)

	Carriers in Rural Study Areas		Carriers in Non-Rural Study Areas		All Carriers	
High Cost Program	Annual Cost (est. 2008)	% of HCF	Annual Cost (est. 2008)	% of HCF	Annual Cost (est. 2008)	% of HCF
High Cost Loop (HCL)	$1,477,563,492	32%	$0	0%	$1,477,563,492	32%
Safety Net Additive (SNA)	$42,759,408	1%	$0	0%	$42,759,408	1%
Safety Valve Support (SVS)	$1,021,668	0.02%	$0	0%	$1,021,668	0.02%
Local Switching Support (LSS)	$475,096,980	10%	$0	0%	$475,096,980	10%
Interstate Common Line Support (ICLS)	$1,323,918,276	29%	$266,197,320	6%	$1,590,115,596	34%
Interstate Access Support (IAS)	$174,629,880	4%	$511,944,624	11%	$686,574,504	15%
High Cost Model Support (HCM)	$0	0%	$348,559,066	8%	$348,559,066	8%
All High Cost Fund Support (HCF)	$3,494,989,704	76%	$1,126,701,017	24%	$4,621,690,721	100%

High Cost Fund Support by Study Area and Carrier Type

(Projected 2008)

Study Area Type^	Study Area Carrier Cost Type	Number of Supported Study Areas#	Annual High Cost Fund Support (est. 2008)	Supported Lines*	Avg. Monthly Cost Per Supported Line+	% of All Supported Lines	% of High Cost Fund
Non-Rural	Avg. Sched. Incumbent	1	$2,838,648	107,530	$2.20	0.1%	0.1%
Non-Rural	Cost Incumbent	70	$611,160,490	92,882,783	$0.55	62%	13%
Non-Rural	Competitive	230	$512,701,876	33,224,821	$1.29	22%	11%
All Non-Rural Carrier Areas		301	$1,126,701,017	126,215,134	$0.74	84%	24%

^ 176 of the 1,855 study areas (which are served mostly by competitive carriers) have some lines classified as rural, and some as non-rural. Five of these 176 study areas receive no High Cost Fund support.

In total, 57 of the 1,855 study areas receive no support (mostly non-rural, cost carrier study areas). In total, 34,771,170 lines reported for these 57 study areas receive no high-cost fund support.

*For each study area and for each sub-high-cost-fund (except HCM) the number of supported "loops" (or "lines") is reported by USAC. For this table, the maximum number of loops for each study area + cost type combination is used as the "line" count.

+Weighted average based on number of loops in each study area.

Per Line Monthly High Cost Fund Support by Program and Study Area Type

(Projected 2008)

Non-Rural Study Areas

High Cost Program (Carriers Operating in Non-Rural Study Areas)	Annual Cost (est. 2008)	Supported Lines*	Avg. Monthly Per Supported Line Cost+	Median Monthly Per Supported Line Cost+	95th Percentile Monthly Per Supported Line Cost+	99th Percentile Monthly Per Supported Line Cost+
Interstate Common Line Support (ICLS)	$266,197,320	3,870,828	$5.73	$6.10	$6.32	$6.89
Interstate Access Support (IAS)	$511,944,624	109,360,919	$0.39	$0.19	$1.40	$2.62
High Cost Model Support#	$348,559,066	11,724,175	$2.48	$1.17	$6.40	$6.51
All High-Cost Fund Support for Non-Rural Only Study Areas	$1,126,701,017	126,215,134	$0.74	$0.17	$5.15	$7.04

*Supported Lines are those reported for study areas that received non-zero funding from each respective program. USAC reports some study areas with lines that receive zero funding for each respective program.

#USAC reports High Cost Model Support by Study Area, but does not list the total number of supported loops. For this table, the number of HCM supported lines is the maximum total lines reported for a given study area receiving non-zero HCM support.

+Weighted based on number of loops in each study area, reported for each program. For the monthly per line support values for the entire High Cost Fund, the maximum lines reported for each study area is used.

Per Line Monthly High Cost Fund Support by Cost and Study Area Type

(Projected 2008)

Carriers Operating in Non-Rural Study Areas

Amount of High Cost Support Per Line Is…	Number of Lines	Percent of All Supported Lines*	Percent of All Supported Non-Rural SA Lines	Total Annual High Cost Support	% of High Cost Fund	% of All Non-Rural SA's Share of High Cost Fund
Less Than $1 Per Month	105,397,072	70.5%	83.5%	$279,337,987	6.0%	24.8%
Less Than $5 Per Month	119,700,529	80.1%	94.8%	$625,255,977	13.5%	55.5%
Less Than $10 Per Month	126,205,575	84.5%	100.0%	$1,124,833,040	24.3%	99.8%
Less Than $15 Per Month	126,210,574	84.5%	100.0%	$1,125,546,490	24.4%	99.9%
Less Than $20 Per Month	126,210,574	84.5%	100.0%	$1,125,546,490	24.4%	99.9%
Less Than $25 Per Month	126,215,134	84.5%	100.0%	$1,126,701,017	24.4%	100.0%

*Supported Lines are the maximum reported for study areas that received non-zero funding. There are 149,423,648 lines that received some type of high-cost funding. 23,800,599 of these are lines in Rural Study Areas. 126,215,134 of these are in Non-Rural Study Areas.

Mr. Turner analyzed the per-line impact of HCM funding on a per-study area

basis. Such support is, of course, provided on a wire center basis.[84] But given that statewide average costs are used, the study area view would be more determinative of whether the support is adequate to ensure reasonably comparable rates.

The implication of this data is that, for the most part, high-cost support for most non-rural carriers could be eliminated or removed without making the carriers' rural rates not reasonably comparable to urban rates. This is particularly true for IAS and ICLS, which, after all, were basically designed as revenue replacement mechanisms.

C. Both rates and costs are relevant to the need for high-cost support.

The first universal service principle in 47 U.S.C. § 254(b) is that "[q]uality services should be available at just, reasonable, and affordable **rates**." (Emphasis added.) But the Commission has -- appropriately -- leaned heavily on the third principle:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, **and high cost** areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available **at rates that are reasonably comparable to rates charged for similar services in urban areas**.[85]

Now, again, the Commission returns to the question of whether rates or costs should be used to determine reasonable comparability.[86] As the Commission notes, "Although the Commission sought comment in the *Remand NPRM* on using a rate-based mechanism instead of the current cost-based mechanism to determine support, none of the

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[84] See Appendix D.

[85] 47 U.S.C. § 254(b)(3) (emphasis added).

[86] *NoI*, ¶ 16.

commenters proposed a workable funding mechanism based solely on rates."[87] This is because, as explained by NASUCA in the *NRHC Remand* comments, both rates and costs are needed for the evaluation.[88]

The use of costs for determining support levels, including the use of national and statewide averages, has of course been found reasonable by the Commission.[89] It has also tacitly been accepted by the industry.[90] And the Tenth Circuit approved the use of the cost model.[91] The *Qwest II* court stated,

> [W]e would be inclined to affirm the FCC's cost-based funding mechanism if it indeed resulted in reasonably comparable rates. However, we expected the Commission to return to us with empirical findings supporting this conclusion. Once again, we find no evidence in the record before us to support the FCC's pairing of rates to costs in this context.[92]

Further, as previously noted, the use of forward-looking costs under the Act has been upheld by the Supreme Court.[93]

The FCC's rationale for using costs rather than rates to determine the amount of support -- as expressed in the *Seventh Report and Order* -- still holds true:

> This approach does not consider rates directly. Instead, it uses costs as an indicator of a state's ability to maintain reasonable comparability of rates within the state and relative to other states. We conclude that the underlying assumption in the Joint Board's recommendation -- that a relationship exists between high costs

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[87] Id.

[88] **The following material is adapted from NASUCA's *NRHC Remand* Comments (at 83-85).**

[89] *Ninth Report and Order*, ¶ 32.

[90] See *Qwest I*, 258 F.3d at 1197, n.2 (noting that no party had appealed this aspect of the *Ninth Report and Order*).

[91] Id. at 1206.

[92] *Qwest II*, 398 F.3d at 1237.

[93] *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

> and high rates -- is a sound one, because rates are generally based on costs. We adopt this approach, in part, because states possess broad discretion in developing local rate designs. State rate designs may reflect a broad array of policy choices that affect actual rates for local service, intrastate access, enhanced services, and other intrastate services. A state facing costs substantially in excess of the national average, however, may be unable through any reasonable combination of local rate design policy choices to achieve rates reasonably comparable to those that prevail nationally. Through an examination of the underlying costs, instead of the resulting rates, we can evaluate the cost levels that must be supported in each state in order to develop reasonably comparable rates. Because responsibility for such support is shared at the federal and state levels, determining the federal portion based on costs rather than rates allows the federal jurisdiction to help accomplish the goal of rate comparability without having to evaluate states' policy choices affecting those rates.[94]

Fundamentally, if a state has established high rates in its rural areas despite low costs in those areas, it should be the state's responsibility -- and only the state's responsibility -- to provide support. On the other hand, if a state deaveraged its current averaged rates, this might increase the likelihood of eligibility for support, but would not impact the amount of support.

The Commission asks, "If the Commission defines reasonably comparable costs, should it compare costs to nationwide average costs, or should it also define rural and urban areas and compare rural costs to urban costs?"[95] Since the comparison demanded in § 254(b)(3) is of rural rates to urban rates, it only makes sense to make the cost comparison on the same basis, by comparing costs in the rural exchanges that might need support to national average **urban** costs.

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[94] *Seventh Report and Order*, ¶ 32 (footnotes omitted).

[95] *NoI*, ¶ 16.

Reasonably comparable rates are the goal to be achieved by the high-cost fund. Yet costs are the basis for determining the level of support. Costs are not a "proxy" for rates.[96] With the data provided by NASUCA, and the rationale set forth in the next section, the Commission should be able to "explain the relationship between costs and the resulting rates to the satisfaction of the court…."[97]

D. Addressing the Tenth Circuit's issues[98]

In order to arrive at a proper definition of "reasonably comparable," however, the views of the Tenth Circuit in its two rejections of the FCC's definition must be considered. Indeed, it might be easier to approach a definition by reviewing what the Tenth Circuit said about what makes rates **not** reasonably comparable. Of course, part of the problem with the Tenth Circuit's analysis was that it was based, perforce, on the Commission's **lack** of rural rate analysis.

Qwest I rejected the Commission's first definition of "reasonably comparable," which was "a fair range of urban/rural rates both within a state's borders, and among states nationwide."[99] That "fair" range triggered a standard that supported only areas where **costs** were 135% of the national urban cost.[100]

In *Qwest I*, the Court's key criticism was that the FCC had picked the 135% number without reviewing any actual rates. Despite parties having submitted rate data, the Court complained, "There is no record of the FCC's evaluation of this data; it

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[96] Id.

[97] Id.

[98] **The following material is adapted from NASUCA's NRHC Remand Comments (at 37-40).**

[99] *Qwest I*, 258 F.3d at 1201, citing *Ninth Report and Order*, ¶ 54, n.8.

[100] *Qwest I*, 258 F.3d at 1197.

apparently adopted the benchmark without explicit empirical findings in this regard."[101] NASUCA urges the Commission not to commit that error again.

To make matters worse, the *Qwest I* Court found that the Commission's selection of the 135% was arbitrary. The Court stated,

> The FCC is not a mediator whose job is to pick the "midpoint" of a range or to come to a "reasonable compromise" among competing positions. As an expert agency, its job is to make rational and informed decisions on the record before it in order to achieve the principles set by Congress. Merely identifying some range and then picking a compromise figure is not rational decision-making.[102]

The *Qwest I* Court did say that it would likely have supported the 135% benchmark if "the FCC's 135% benchmark [had] actually produced urban and rural rates that were reasonably comparable, however those terms are defined…."[103] Yet the Court sympathized with Vermont and Montana, which had asserted that some rural rates would be 70-80% higher than urban rates under the funding mechanism set out in the *Ninth Report and Order*.[104] The Court stated, "We doubt that the statutory principle of 'reasonable comparability' can be stretched that far."[105] It is not clear, however, **which** urban rates were being referred to by the Court.

The *Qwest II* Court later noted that in the *Order on Remand*,

> [T]he FCC … found it reasonable to assume that Congress was aware of the variance in urban rates at the time, on the basis of then available WCB survey information, and that Congress would not have required rural rates to be any closer to a national urban

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[101] Id. at 1202.

[102] Id. at 1203.

[103] Id.

[104] *Qwest I*, 258 F.3d at 1201.

[105] Id.

> average than other urban rates. Underlying this assumption is the FCC's determination that Congress considered rural and urban rates reasonably comparable in 1996.[106]

In response to the *Qwest I* remand, "[t]he Commission … defined 'reasonably comparable' in terms of a national urban rate benchmark, i.e., rural rates are deemed reasonably comparable if they fall within two standard deviations, or roughly 138%, of the national urban average."[107] The court reviewed the rates allowed under the "two standard deviations" benchmark, however, and found that the benchmark did not meet the Commission's duty to **advance** universal service.[108]

It does appear that if the two standard deviation benchmark had been shown to preserve and advance universal service, the Tenth Circuit would have approved its use. It is clear that the Commission's prior lack of consideration of statutory principles and language doomed the prior reasonable comparability standards. The Commission must now look at the data and follow the dictates of the statute.

The data suggest that little beyond the level of support currently awarded is necessary to maintain this level of comparability, and probably far less. There does not appear to be any correlation, however, between the level of support received and the

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[106] *Qwest II*, 398 F.3d at 1235, citing *Order on Remand*, ¶¶ 39-40.

[107] *Qwest II*, 398 F.3d at 1228, citing *Order on Remand*, ¶ 38. Also in the Court's words, "A standard deviation is a statistical term representing the difference between input values in a range and the mean or average. One standard deviation encompasses 68.27% of the values in a given range. Two standard deviations encompasses 95.45% of the same values. In a hypothetical survey of 100 varying rates charged by telecommunications carriers, two standard deviations from the mean will encompass nearly 96 of the rates in the range, leaving roughly 4 rates outside the grouping." Id. at 1228, n.2. It should be noted that the "4 rates outside the grouping" include two that are below the mean and two rates at the high end. Thus under the FCC's analysis, only two rates out of the hundred would be deemed high enough not to be reasonably comparable to the mean.

[108] Id. at 1236-1237 (internal citations omitted).

degree of comparability.[109] That correlation is provided by both of NASUCA's proposals discussed in Section IX., below.

Looked at from another direction, the highest urban rate in NASUCA's non-rural carrier rate census was 151% of the urban average and was only 8.7% higher than a rate two standard deviations above the average ($27.27). Thus it seems clear that the Tenth Circuit's view of reasonable comparability was overly constricted -- due to the Commission's failure to have assessed a complete record -- especially because following such a view would require support for rural rates that are **below** the highest urban rate.

The Tenth Circuit compared high rural rates allowed under the previous support mechanisms to the lowest urban rates, finding the difference disturbing.[110] But NASUCA's survey shows, in fact, that the highest urban rates are not reasonably comparable to the lowest urban rates, under any of the standards cited by the Tenth Circuit.

The existence of these ranges -- which, as previously noted, the Commission correctly assessed were within Congress' contemplation in putting together the 1996 Act[111] -- argues strongly for the use of the weighted average urban rate as the starting point for any rate benchmark. There was no indication that Congress intended the comparison to be to the lowest urban rates; if so, there would be support for a multitude of rural customers without any support for urban customers who pay the same -- or higher -- rates.

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[109] See Appendix F to NASUCA *NRHC Remand* Comments.

[110] *Qwest II* at 1237, citing *Qwest I*, 258 F.3d at 1201.

[111] *Order on Remand*, ¶¶ 39-40.

Yet the Commission did not review a comprehensive database of urban and rural rates before establishing the benchmark. (And, according to *Qwest I*, the Commission did not address any of the data it had, apart from the 95-city urban rate sample.[112])

It would also appear that if all rural rates were lowered to be no higher than the highest urban rate, then there would be no significant difference between urban and rural rates. Certainly that action would lower the rural average rate to be even closer to the urban average. It could be argued, however, that this would result in rural rates being **equal** to urban rates, which does not comport with Congress' use of the term "reasonably comparable," rather than "equal," in § 254(b)(3). Therefore, it would seem appropriate to adopt some range above the highest urban rate that would still enable rural rates to be "reasonably comparable" to urban rates. On the other hand, moving toward equality would certainly be "advancing" universal service.

A typical dictionary defines "comparable" as:

> 1 Admitting of comparison with another or others: "The satellite revolution is comparable to Gutenberg's invention of movable type" (Irvin Molotsky).
>
> 2. Similar or equivalent: pianists of comparable ability.[113]

"Comparable" does not mean "equal." If Congress had intended rural rates to be equal to urban rates, the 1996 Act would have said so. Congress even added the qualifier, "reasonably," so that rural rates were supposed to be only "reasonably comparable" to urban rates.

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[112] *Qwest I*, 258 F.3d at 1202.

[113] The American Heritage® Dictionary of the English Language, Fourth Edition (2000), accessed at http://dictionary.reference.com/search?q=comparable on February 20, 2006.

NASUCA submits that its database is comprehensive. The Commission should use the database to determine what is reasonably comparable.

These data show that the full range of urban rates -- going well beyond the FCC's 95-sample survey, with SLC included -- is $15.70 to $35.45, with a weighted average of $25.38. With this information in hand, it is unreasonable to give any relevance to the lowest urban rates without considering the range of rates as it existed when the 1996 Act was passed.[114] Unfortunately, it appears that the Tenth Circuit did not consider this range, because of the limited range the FCC had used.

A review of NASUCA's database shows as follows:

Standard deviation of non-rural carrier rural rates from non-rural average	Rate	Non-rural carrier rural rate as % of rural average	Non-rural carrier rural rate as % of urban average
0	$20.81	100%	107%
1	$24.79	118%	127%
2	$27.27	130%	139%
3	$32.37	154%	165%

It would appear, however, that from the Tenth Circuit's perspective, the issue should be looked at as follows:

[114] The Commission asked, "How should the Commission interpret the *Qwest II* court's rejection of the Commission's reliance on the range of urban rates?" *NRHC Remand NPRM*, ¶ 20. As explained above, that is not an accurate description of the Tenth Circuit's holdings.

Percentages of rural (defined as 0-20% urban) average ($20.81)	Rural rate	Rural rate as % of urban average ($19.40)	**Rural = 0% urban** Estimated number of lines "needing support" (i.e., above, e.g., 120% of rural average)	**Rural = 0-20% urban** Estimated number of lines "needing support" (i.e., above, e.g., 120% of rural average)	**Rural = 0-40% urban** Estimated number of lines "needing support" (i.e., above, e.g., 120% of rural average)
(1)	(2) = $20.81 * (1)	(3) = (2) / $19.40			
120%	$24.97	128%	261,546	674,858	889,571
125%	$26.01	133%	139,487	381,345	515,511
133%	$27.68	142%	52,376	132,227	185,414
140%	$29.13	149%	50,709	126,511	171,157
150%	$31.22	160%	2,899	13,694	13,694
166%	$34.54	177%	0	0	0

Thus with a rural average of $20.81, 125% of the average is $26.01. If "rural" is defined as 0% urban, there are about 140,000 rural lines served by non-rural carriers that would be eligible for support, i.e., that have rates above $26.01. Likewise, 140% of the rural average is $29.13. If "rural" includes wire centers that are up to 40% urban, there are about 170,000 lines that would be eligible for support.

Based on all of this data, the specific concerns raised by the Tenth Circuit can be addressed here:

- In *Qwest I*, the court expressed its "concern that a discrepancy of 70-80% between some rural rates and urban rates might impermissibly stretch the boundaries of rate comparability."[115] Yet the data show that the discrepancy among urban rates is just as great as the discrepancy between urban and rural rates. Even so, NASUCA's proposed second alternative includes a process to gradually reduce the comparability standard, such

[115] *Qwest I*, 258 F.3d at 1201.

that the range of rural rates above urban rates will be lowered and eventually eliminated.

- In *Qwest II*, the court first complained that "rural rates falling just below the comparability benchmark may exceed the lowest urban rates by over 100%."[116] The highest urban rate ($29.64) is more than three times the lowest urban rate; while the highest rural rate ($31.82) is somewhat less than three times the lowest rural rate. Congress did not, in fact, say that rural rates would be reasonably comparable to the **lowest** urban rate. Rather, § 254(b) directs that rural rates be reasonably comparable to urban rates generally. The best reflection of the general urban rate is the national weighted average urban rate.

- In *Qwest II*, the court also worried that "[e]ven if such rural rates are compared against the national urban average, we fail to see how they could be deemed reasonably comparable, especially in light of our previous consideration."[117] Looking at the entire universe of non-rural carriers' rates, rather than the selection presented to the Tenth Circuit, rural rates appear to be reasonably comparable to urban rates. Under NASUCA's proposed second alternative, however, the initial focus is on reducing high rural rates. And the continuing focus will be on further reducing the comparability threshold.

A reasonable comparability standard can be constructed based on the record here, and should meet the Tenth Circuit's concerns.

As the Commission states, the Tenth Circuit rejected the Commission's use of a range because the range merely preserved "the disparity of rates existing in 1996" while doing nothing to "advance" universal service.[118] The law requires that the non-rural high cost mechanism both preserve **and** advance universal service. This does not mean that there can be no benchmarks; it means that the application of the Commission's benchmarks is required to advance universal service.[119] NASUCA's second proposal

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[116] *Qwest II*, 398 F.3d at 1237.

[117] Id.

[118] *Remand NPRM*, ¶ 19.

[119] *Qwest II*, 398 F.3d at 1236.

does so by -- over time -- narrowing the range of "acceptable" (i.e., non-supported) rural rates, and by expanding the definition of rural areas to include more territory.[120]

E. How Can Universal Service Support Ensure Reasonably Comparable Rural Rates When Rates Are Deregulated?[121]

It is safe to say that when Congress tasked the Commission with ensuring that rural rates were reasonably comparable to urban rates, basic service rates were regulated -- that is, set with the approval of or within limits set by state regulators. Congress reasonably assumed that there would be oversight to ensure that the federal high-cost assistance actually resulted on reasonably comparable rates.[122]

Such oversight is increasingly absent, however. From state to state, the constraints that once applied to the rates for basic service are diminishing, as a result of state legislative action or state regulatory initiative.[123]

This is one area among many in which the states must be responsible for their decisions. A state that has given its non-rural carrier(s) discretion to set their own rates for basic service cannot certify that universal service support is being applied so as to ensure reasonably comparable rates.[124]

The trend toward deregulated rates demands even closer examination by the Commission in determining whether those rates are affordable and whether rural rates are reasonably comparable to urban rates. Indeed, it would be reasonable for the

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[120] See Section IX.B. and Appendix B.

[121] **The following material is adapted from NASUCA's NRHC Remand Comments (at 54-55).**

[122] State commissions continue to affirm this to the Commission each year.

[123] E.g., Indiana. See http://www.upi.com/Hi-Tech/view.php?StoryID=20060301-110338-4271r.

[124] Such states have typically made the decision that (allegedly) "market-based" rates are per se just and reasonable.

Commission to determine that a state, having deregulated its retail basic service rates, can have no control over whether those rates are reasonable or reasonably comparable, and thus should not receive any high-cost support.[125]

In the *NoI*, the Commission notes that

> [t]he court in *Qwest II* found that, in pairing rates with costs in its non-rural high-cost support funding mechanism the Commission had not "empirically demonstrat[ed] a relationship between the costs and rates." We seek comment on how best to empirically demonstrate this relationship.[126]

It would have been difficult for the Commission to demonstrate such an empirical relationship at the time of the *Remand Order*. Under the currently typical state regulatory regime, however, it is even more difficult, if not impossible, to do so for the non-rural carriers.[127]

Thus the Commission's question, "Could the Commission use the non-rural cost model to approximate urban and non-urban rates?"[128] must of necessity receive a negative answer. But the cost model can still be used to demonstrate what rates **would** be in the absence of state ratemaking and state universal service efforts -- which is all that could be expected under a support mechanism that complied with § 254. And that estimation would "take into account the availability of explicit and implicit state-based support mechanisms, such as state universal service funds and intrastate access charge revenue…."[129] Thus the amount of support granted can continue to be based on costs.

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[125] If rates are deregulated but do not increase, support could continue.

[126] *NoI*, ¶ 23 (citations omitted).

[127] Which is not to say that it would be easy for the rural carriers.

[128] Id.

[129] Id.

IV. "REASONABLE COMPARABILITY" OF RATES IS THE KEY STATUTORY PRINCIPLE FOR JUDGING THE SUFFICIENCY OF HIGH-COST UNIVERSAL SERVICE SUPPORT FOR NON-RURAL CARRIERS.

In the *NoI*, the Commission states,

> In *Qwest II*, the court directed the Commission to consider all the section 254(b) principles in addition to reasonable comparability in section 254(b)(3) of the Act in defining the term "sufficient." In particular, the court was "troubled by the Commission's seeming suggestion that other principles, including affordability, do not underlie the federal non-rural support mechanisms." We seek comment on how the Commission should balance all seven principles in section 254(b) of the Act in defining the term "sufficient." Should the Commission give greater weight to some principles over others? Are some principles more directly related to the specific purposes of non-rural high-cost support than the other principles, and should they be given greater weight than the remaining principles? We note in this regard that, although some commenters in this proceeding discussed all the section 254(b) principles in relationship to the non-rural support mechanism, two principles–reasonable comparability and affordability–received the most attention.[130]

Here again, there is little needed in this regard to refresh the record.

A. Introduction[131]

The *Qwest II* Court based its remand of the *Order on Remand* on the fact that the Commission had considered only reasonable comparability, out of the six principles in § 254 of the 1996 Act, in determining the sufficiency of the non-rural high cost fund.[132] The Commission's failure to even discuss the other principles doomed the *Order on Remand*.

The court indicated, however, that the Commission would have considerable leeway in considering each of the principles, stating, "The FCC may exercise its

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[130] *NoI*, ¶ 17 (citations omitted).

[131] **The following material is adapted from NASUCA's *NRHC Remand* Comments (at 29-37).**

[132] *Qwest II*, 398 F.3d at 1234.

discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."[133] *Qwest I* had stated that the Commission "must work to achieve each [principle] unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority."[134] When the Commission does its review here, it will still find reasonable comparability to be the most important and most effective principle. This requires no departure from the principles and no abandonment of any of the principles.

Section 254(b) of the Act states that the Commission and Joint Board "shall base policies for the preservation and advancement of universal service" on the following principles:

> (1) Quality and rates. Quality services should be available at just, reasonable, and affordable rates.
>
> (2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.
>
> (3) Access in rural and high cost areas. Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
>
> (4) Equitable and nondiscriminatory contributions. All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

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[133] Id., citing *Qwest I*, 258 F.3d at 1200.

[134] *Qwest I*, 258 F.3d at 1199.

(5) Specific and predictable support mechanisms. There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries. Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).[135]

It should be noted that when the *Qwest I* Court discussed § 254(b), it mentioned only (b)(3) and (b)(5).[136] Even *Qwest II* first discussed only (b)(1), (b)(3) and b(5).[137]

Qwest I had noted that, although § 254(b) directs that the Commission "shall" consider the principles,

> each of the principles in § 254(b) internally is phrased in terms of "should." "The term 'should' indicates a recommended course of action, but does not itself imply the obligation associated with 'shall.'"[138]

The following comments are submitted in the context of the statutory "shalls" and "shoulds," as interpreted by the Tenth Circuit.

B. Reasonable comparability

Reasonable comparability of rates is the only one of the principles that is both relevant to this issue and capable of a resolution at the federal level. "Reasonable comparability," on the national level, can only be evaluated, preserved and advanced by this Commission.

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[135] 47 U.S.C. § 254(b)(1)-(6). In addition, 47 U.S.C. § 254(b)(7) allows the Commission to adopt additional principles. Pursuant to this authority the Commission adopted a principle of competitive neutrality. *First Report and Order*, ¶ 47.

[136] *Qwest I*, 258 F.3d at 1199.

[137] *Qwest II*, 398 F.3d at 1226-1227.

[138] *Qwest I*, 258 F.3d at 1200 (citation omitted).

Reasonable comparability is a standard that is capable of objective review and determination, as was accomplished by NASUCA through review of rate data for more than 11,000 wire centers nationwide, which included 1,808 wire centers that are 0% urban according to Census Bureau criteria and 1,092 wire centers that are 100% urban according to those same criteria. Despite the disparity in the number of wire centers, the rural wire centers serve only 1.8% of the population while the urban wire centers serve 24.6%. This leaves 74.6% "in the middle."[139] This wire center-by-wire center review can be contrasted with a review of affordability, which would have to occur on a customer-by-customer basis, as discussed in the next section.

The Tenth Circuit did not reject the Commission's reliance on reasonable comparability, or its mechanism to bring about reasonable comparability; rather the Court objected to the Commission's failure to address the other principles, and found the Commission's specific benchmarks to be arbitrary. NASUCA's comments are designed to give the Commission the basis to address both of the court's objections.

C. Affordability

The Tenth Circuit allowed that the Commission could make one principle subsidiary to another, as long as it considered all the principles.[140] The principle of affordability should be subsidiary to the principle of reasonable comparability, for a number of reasons.

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[139] When the definition of "rural" is expanded to include wire centers that are up to 20% urban, the range and average do not materially change. The same is true when "urban" includes wire centers that are 80%-100% urban.

[140] *Qwest II*, 398 F.3d at 1234.

First, as the Commission found, "[S]ection 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates."[141] If affordability is the primary standard, then in high-income rural areas, rates would not be reasonably comparable to urban rates, even though they are supposedly affordable. On the other hand, given the current level of urban rates, rural rates that are reasonably comparable to urban rates are likely to be affordable.

For low-income consumers who might find local service rates unaffordable, the Commission has created the Lifeline and Link-up programs. The Commission previously determined that it was 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.[142] *Qwest II* does not undermine that conclusion at all.

In any event, one thing that would not enhance the affordability of service, that would neither preserve nor advance universal service, would be to adopt an affordability standard like that proposed by SBC before the *Order on Remand*. SBC's proposal was "to adopt an affordability benchmark for local telephone service … based on the median household income of a particular geographic area."[143] The Commission correctly rejected the proposal.

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[141] 96-45, Seventh Report and Order and Thirteenth Order on Reconsideration, FCC 99-119, 14 FCC Rcd 8078 (1999) ("*Seventh Report and Order*"), ¶ 39; *see also Order on Remand*, ¶ 45.

[142] *See Seventh Report and Order*, ¶ 39; *First Report and Order*, ¶ 124.

[143] *Order on Remand*, ¶ 45.

The **median** household income of a wire center is "[t]he middle value in a distribution, above and below which lie an equal number of values."[144] Thus in a particular wire center, half of the population will have incomes above the median, and half will have incomes below. Failure to support service in high-median-income areas will disadvantage many consumers with incomes below the median.

Thus the Commission need not collect additional rate data in order to gauge affordability.[145] Even less valuable -- for the purposes of the high-cost USF at least -- would be a compilation of rates for bundles, for wireless services and for broadband.[146] In the first place, these are not currently supported services under 47 U.S.C. § 254(c)(1). Until they are determined to be supportable pursuant to the § 254(c)(1) tests, then their affordability is largely irrelevant **for universal service purposes**. The Joint Board-recommended and NASUCA-supported creation of separate mobility and broadband funds might require a separate examination of the services supported by each fund.

Additional information on the problems with an affordability standard -- derived from comments on affordability proposals from AT&T and Qwest -- is included here as Appendix F. Here again, the record does not need to be refreshed.

Affordability cannot take precedence over reasonable comparability. As discussed above, achieving reasonable comparability also advances affordability. Unfortunately, the reverse is not necessarily true.

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[144] http://dictionary.reference.com/search?q=median (accessed February 23, 2005).

[145] *NoI*, ¶ 19.

[146] Id.

D. The other statutory principles

As noted above, the *Qwest II* Court indicated that the Commission would have considerable leeway in considering each of the principles, stating: "The FCC may exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."[147] *Qwest I* had stated that the Commission "must work to achieve each one unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC's authority."[148]

A review of the principles other than 254(b)(3) shows that they cannot and should not overwhelm the need for reasonable comparability. Taking them one by one:

Section 254(b)(1) calls for rates for "quality" service to be just and reasonable, in addition to being affordable. Here the primary responsibility lies with the states, which have a multitude of standards by which to judge service quality, and to judge the justness and reasonableness of rates.[149] It is also fair to say that there are real limitations on the Commission's authority in this area.

Section 254(b)(2) provides that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." The Commission has done much to promote consumers' access to these services, consistent with this principle and 47 U.S.C. § 706. But the Commission cannot provide support for advanced

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[147] Id., citing *Qwest I*, 258 F.3d at 1200.

[148] See *Ninth Report and Order*, ¶ 37; *Qwest I*, 258 F.3d at 1200.

[149] See *Order on Remand*, ¶ 47 (rejecting NASUCA proposal to consider service quality and finding that states are in the best position to address service quality issues and will have ample opportunity to do so in the rate review and expanded certification process).

services at this point because they have not been found to meet the test for support in 47 U.S.C. § 254(c)(1). As discussed in Section V.B., below, however, the support that the high-cost fund gives to multiple-use rural networks not only enhances access to basic service but makes it more feasible for non-rural carriers to provide advanced services.

Section 254(b)(4) provides for equitable and nondiscriminatory contribution to the USF. The method of contribution has little to do with the actual needs of the fund, so this principle is basically irrelevant for determining what the support should be used for or whether the fund is sufficient.

Section 254(b)(5) provides that "[t]here should be specific, predictable, and sufficient Federal and state mechanisms to preserve and advance universal service." The Tenth Circuit rejected the Commission's definition of "sufficient" (as found in § 254(e)) because it did not consider all of the statutory policies.[150] There is no reason why "sufficient" in § 254(b)(5) should be viewed any differently. Further, NASUCA submits that the Commission can find NASUCA's proposals set forth in Section IX and Appendices A and B, below, to be both specific and predictable.

Section 254(b)(6) provides for access to advanced telecommunications services "as described in subsection (h)" for elementary and secondary schools and classrooms, health care providers, and libraries. As the Commission notes, it has established separate programs to accomplish this goal.[151] Further, as mentioned above, the support that the high-cost fund gives to multiple-use rural networks makes it more feasible for non-rural

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[150] *Qwest II*, 398 F.3d at 1233-1234. The Court found that the state inducement mechanism created in the *Order on Remand* adequately addressed the need for state mechanisms, as indicated in § 254(b)(5). Id. at 1238.

[151] *Remand NPRM*, ¶ 16.

carriers to provide advanced services to schools, libraries, and health care providers, among others, in rural areas.

Finally, **Section 254(b)(7)** provides that the Joint Board and the Commission may adopt additional principles that "are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with [the 1996 Act]." The Commission established "competitive neutrality" as an additional principle upon which to base policies for the preservation and advancement of universal service.[152] As discussed herein, if the Commission properly refocuses the non-rural high-cost mechanism on reasonably comparable rates for reasonably comparable services, and then applies that focus consistently to competitive carriers, the "universal service support mechanisms and rules [will] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[153] But overall, competitive neutrality does not really address whether non-rural high-cost support is sufficient; to that extent, the Commission's additional competitive neutrality principle does not need to be considered in the same context as the other statutory principles.

The Tenth Circuit did not direct any particular result from the Commission's consideration of these principles, nor did it require any particular weight to be given one principle or another. The discussion here should guide the Commission to considering all of the principles in their proper context; that consideration should be made explicit and obvious in the next order. In the end, however, NASUCA submits that the Commission will come to the conclusion set forth here: Reasonable comparability is the principle that

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[152] See *First Report and Order*, ¶ 47.

[153] Id.

should be most prominent in fashioning a mechanism to "preserve and advance" universal service in rural areas served by non-rural carriers.

E. Affordability, sufficiency, and the size of the fund

The Commission asks, "If the Commission defines affordable rates for purposes of the non-rural support mechanism, should it also consider the burden on universal service contributors when determining whether rates are affordable?"[154] Clearly, the Commission must consider the burden on universal service contributors regardless of whether it defines affordable rates. As the Commission notes,

> The Commission previously found that the principle of sufficiency means that non-rural high-cost support should be "only as large as necessary" to meet the statutory goal. Although the U.S. Court of the Appeals for the Fifth Circuit found that "excessive funding may itself violate the sufficiency requirements of the [1996] Act," the Tenth Circuit linked the idea that the amount of support should only be as large as necessary to the principle of affordability, rather than sufficiency. The Tenth Circuit explained that "excessive subsidization arguably may affect the affordability of telecommunications services for unsubsidized users, thus violating the principle in [section] 254(b)(1)."[155]

It should be clear that excessive funding would violate both the sufficiency directive of § 254(b)(5) and the affordability directive of § 245(b)(1).

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V. FUNDING MECHANISM

The Commission seeks comment "on how 'to craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and [the Commission's] statutory obligation to preserve *and* advance universal service,'" as

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[154] *NoI*, ¶ 20.

[155] Id. (citations omitted).

directed by the Tenth Circuit.[156] As discussed above, a non-rural high-cost funding mechanism must, at the very least:

- Be able to be shown to produce reasonably comparable rates;
- Contain a standard for reasonable comparability that is based on data;
- Be based on consideration of all of the § 254(c) principles; and
- Include provisions to advance universal service.

Both of NASUCA's proposals meet those tests.

That is the task here. The Commission does not need to solve the problems of "the more comprehensive reform of the high-cost universal service support system"[157] in order to meet its commitment to the Tenth Circuit. Which is not to say that the broader issues of high-cost funding need not be addressed; just not in this context, and not at this time.[158] The Commission needs to devise a non-rural high-cost fund that will pass appellate muster. Thus NASUCA submits that the Commission should "modify the existing mechanism for non-rural carriers pending comprehensive reform…."[159] rather than attempt to adopt comprehensive reform by April 16, 2010.

The Commission mentions the need to be "consistent with [the] longer term goal of developing a comprehensive national broadband plan."[160] And there are also the

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[156] Id., ¶ 21, quoting *Qwest II*, 398 F.3d at 1234 (emphasis in original).

[157] *NoI*, ¶ 21.

[158] Those other issues were discussed at length in comments leading to the Joint Board's November 2007 Recommended Decision, in comments **on** the Recommended Decision, in ex partes leading up to last fall's "comprehensive" USF/intercarrier compensation draft orders; and in comments **on** those draft orders.

[159] *NoI* ¶ 21.

[160] Id.

closely inter-related intercarrier compensation issues.[161] This all argues for not attempting comprehensive reform under the timeline agreed to in the Tenth Circuit.

The Commission also asks whether it "should re-evaluate its conception of the state and federal roles in providing universal service support, and consider whether is should now replace implicit state support with explicit federal support."[162] This is also a longer-term issue, and need not be addressed in this context. (NASUCA submits that the Commission should not attempt to supplant state policies on implicit -- or explicit -- support. Certainly, such replacement should not be undertaken before there is a reinitializing of jurisdictional responsibilities through the separations process.)

Then the Commission asks for "comment on the impact of any increases in non-rural support on the size of the fund and on our ability to achieve reform in other areas."[163] NASUCA submits that, based on the record – especially NASUCA's rate census – there need not be increases in non-rural support in order to produce non-rural carrier rural rates that are reasonably comparable to urban rates. Indeed, given the excesses of IAS and ICLS, it seems likely that a lawful non-rural support mechanism will not create an increase over the current funding level.[164] Any proposed mechanism that will increase the fund must be looked at with extreme skepticism.[165]

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[161] Those issues impact rural carriers much more significantly than non-rural carriers.

[162] Id., ¶ 22 (citing Tenth Circuit approval of the Commission's declining to replace implicit state support with explicit federal support).

[163] Id.

[164] As suggested in other contexts, this will allow diversion of current funding to other purpose, such as broadband expansion.

[165] This should eliminate the need for phase-ins or offsets. See Appendix K.

A. The Commission Should Continue Statewide Averaging of Costs for Non-rural Carriers

The Commission mentions, but does not explicitly request comment on, the practice of statewide cost averaging for non-rural carriers, recalling that in the *Remand Order*, it had "explained that '[s]tatewide averaging effectively enables the state to support its high-cost wire centers with funds from its low-cost wire centers through implicit or explicit support mechanisms, rather than unnecessarily shifting funds from other states.'"[166] As discussed here and in the response to the Qwest proposal -- a major tenet of which is the elimination of statewide averaging -- in Section VIII.A. below, statewide averaging continues to be an entirely appropriate approach for determining non-rural carrier support. There has been a lot of whining from ILECs that such averaging is undercut by competition, but there is no actual data on such impacts, or -- as the statute requires -- impacts that would result in rural rates of non-rural carriers no longer being reasonably comparable to urban rates.

A crucial part of the current debate is the claim that the non-rural carriers need more support for the rural areas that they serve.[167] The Joint Board's *Comprehensive Reform Recommended Decision* states,

> The Joint Board conceptually agrees that providers of service to rural areas should be treated similarly. Current support mechanisms tend to provide stronger incentives for rural LECs than for non-rural LECs to provide comparable and affordable rates and services in rural and high-cost areas. While the Joint Board seeks to minimize this disparity for rural consumers,

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[166] *NoI*, ¶ 22, quoting *Order on Remand*, 18 FCC Rcd at 22573, ¶ 24.

[167] **The following material is adapted from NASUCA's Initial Comments on the Joint Board Recommended Decision (April 17, 2008) at 41-43.**

> regardless of provider, we also acknowledge the complexities and potential costs of such a transition.[168]

The specific issue invoked by the Joint Board is "determining non-rural support on a wire center or even a sub-wire center basis, as opposed to the current statewide average cost basis."[169] NASUCA continues to recommend that the Commission maintain the current practice of statewide cost-averaging for the large non-rural carriers. Where statewide average cost for non-rural carriers is below the relevant federal benchmark,[170] it is appropriate for support, if any, to be an intrastate issue decided by individual states.[171] As the *Comprehensive Reform Recommended Decision* states,

> [T]he Tenth Circuit upheld the existing statewide averaging mechanism as a reasonable method of support allocation consistent with the Act, and it later rejected an argument advanced by Qwest and SBC that it was arbitrary and capricious for the Commission to fail to induce states to move from implicit to explicit state support mechanisms.[172]

There should be a heavy burden to overturn this longstanding practice. It must again be noted that the continuing moves by individual states to deregulate basic rates increase the difficulties for the FCC to meet the requirements of the Act as it relates to affordable and comparable rates.

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[168] 96-45/05-337, Recommended Decision, FCC 07J-4 (Fed.-State Joint Board, 2007) ("*Comprehensive Reform Recommended Decision*"), ¶ 40.

[169] Id., ¶ 41.

[170] *Order on Remand*, ¶¶ 49, 64.

[171] That is true whether or not the state contains low-cost metropolitan areas, i.e., if the rural costs for the areas of the state served by non-rural carriers are not high enough to force high rates. It is especially true in states that have low-cost metropolitan areas.

[172] *Comprehensive Reform Recommended Decision*, ¶ 41 (citations omitted).

In its comments on the *NRHC NPRM*, Qwest -- which is one of the non-rural carriers most frequently arguing that it needs more support -- acknowledged that the difference between the rural and non-rural funds has largely been driven by the larger non-rural carriers' ability to provide implicit support due to their larger scale and scope of operations.[173] Qwest complained, however, that this ability had been eroded due to competition.[174] But that is no justification for doing away with statewide averaging. If competition has eliminated the implicit support used by non-rural carriers, which causes a need for increases in the non-rural carriers' rural rates, then that is an issue for the respective state commissions. If subsequent rate increases result in rural rates that are not reasonably comparable to national urban rates, then and only then will that be an issue for the federal USF, consistent with its statutory purposes. Qwest used the example of competition in Omaha, Nebraska as a basis for its argument.[175] Yet despite this alleged competition and its supposed impacts, there is not much difference between Qwest's rural and urban rates in Nebraska.[176]

Fundamental to Qwest's preference for the individual wire center cost standard is the assumption that supporting individual wire centers is the only way to ensure that support will be sufficient.[177] By those terms, it is important to note that, according to Qwest, "Using the latest available Synthesis Model wire center cost output, this would

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[173] Qwest NRHC Comments at 21.

[174] Id.

[175] Id. at 21.

[176] See NASUCA *NRHC Remand* Reply Comments, Attachment C.

[177] Qwest NRHC Comments at 21.

result in a total non-rural support fund **of approximately $1.9 billion**, a significantly higher amount than the current non-rural fund size of $290.9 million."[178] An increase to **6.5 times** the current amount was, and is indeed, "significantly higher."

B. If Universal Service Is to Support Networks, It Must Be Recognized that Networks Have Multiple Uses.[179]

It is often argued by ILECs -- most often rural ILECs -- that universal service supports networks, not just basic service.[180] NASUCA's response has typically been that the law allows only the services designated by the Commission to be supported by the USF.[181] For now, those services are limited to basic service.[182]

Yet the Commission has acknowledged that

> [a]lthough advanced telecommunications and information services currently are not supported by the non-rural high-cost mechanism, the public switched telephone network is not a single-use network, and modern network infrastructure can provide access not only to voice services, but also to data, graphics, video, and other services. The Commission has found that the use of high-cost support to invest in infrastructure capable of providing access to advanced services is not inconsistent with the requirement in section 254(e) that support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."[183]

However, there is also the question looked at in the other direction: Is basic service -- and thereby federal support -- the only service whose revenues will support the

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[178] Id. at 32 (emphasis added). It is not clear (because Qwest did not include the calculation in its comments) whether the increase to $1.9 billion included payments to CETCs.

[179] **The following material is adapted from NASUCA's *NRHC Remand* Comments (at 55-56).**

[180] See 96-45, NASUCA Reply Comments on Joint Board High-Cost Support Proposals and Other Universal Service Issues (October 31, 2005) at 14.

[181] Id.

[182] 47 C.F.R. § 54.101.

[183] *Remand NPRM*, ¶ 12, citing 47 U.S.C. § 254(e) and *MAG Order*, ¶ 200.

networks? That answer is clearly no, especially as the networks evolve to provide more and more advanced services.

The increasingly multiple uses of the networks demands closer scrutiny from the Commission to ensure that federal support is used to support basic service. The other corresponding obligation is to ensure that the advanced services also provide support for the networks over which they travel.[184]

VI. THE NEED TO FIX THE HIGH-COST MODEL

The Commission notes the many problems with the current model that determines one of the forms of high-cost support received by non-rural carriers.[185] (As NASUCA has recommended, the non-rural carrier high-cost fund should be modified to provide a single source of support for non-rural carriers.[186])

Numerous comments and ex partes over the years, including by NASUCA, have suggested corrections and updates for the high-cost model that would address the problems the Commission identifies, among others. Some of those are repeated here.

The Commission asks "that parties advocating that the Commission update its cost model propose an efficient, timely, and cost effective process for doing so."[187] NASUCA (and other parties) must be forgiven for asserting that such updates could have

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[184] The prices for advanced services are, by and large, deregulated by order of this Commission. There does not appear to be any way to ensure that the rates for advanced services in rural areas are reasonably comparable to those in urban areas.

[185] *NoI*. ¶ 24.

[186] See NASUCA RD Initial Comments at 7. The provider of last resort fund proposed by the Joint Board would be consistent with NASUCA's proposal.

[187] *NoI*, ¶ 25.

been accomplished, indeed many times over, in the years since the model was adopted, **if only the Commission had determined to do so**. It is true that the development of the current model was "an extremely time-consuming process"[188]; but many of the fundamental legal questions have been resolved in the meantime,[189] which should make further refinement of the model much less contentious. As asserted by Vermont/Maine, the Commission could simply issue an "anticipated schedule for completing work on evaluating these changes to the model"[190] including the CostQuest proposals.

Under those circumstances, the Commission's speculation that it might "not update its cost model"[191] makes little sense.[192] Specifically, it would not be "appropriate to return to using embedded costs," especially "given the Commission's previous statements concerning the use of forward-looking economic costs versus embedded costs…."[193]

As NASUCA has argued, there is a desperate need to update and improve the FCC's forward-looking HCM, also referred to as the Synthesis Model.[194] It has been many years since the Synthesis Model was last substantially revised. It is clear that there have been improvements that have been developed in cost modeling that should be

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[188] Id.

[189] In *Qwest I*, *Qwest II* and *Verizon v. FCC*, *Verizon Communications v. FCC*, 535 U.S. 467 (2002).

[190] See Vermont/Maine NRHC Remand Comments at 39.

[191] *NoI*, ¶ 26.

[192] Indeed, as announced in the May 4, 2009 FCC Daily Digest, FCC Staff have just released some significant updates to the HCM. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1008A1.pdf. (The timing of this release does not allow comment on the updates here.)

[193] Id. This would be particularly problematic "given the cost allocation relief granted to several of the largest non-rural LECs in forbearance proceedings…." Id. (citations omitted).

[194] **The following material has been adapted from NASUCA's *NRHC Remand* Comments at 63-64.**

considered and be applied to the Synthesis Model. At this point, however, it does not appear that there are any available alternatives that are superior to the FCC's Synthesis Model.

Three crucial updates need to be made to the model: First, switched and special access line counts must be brought up-to-date. Second, the allocation of special access lines among wire centers must also be updated. The current allocation relies on a 1999 data request. The deployment of special access lines has changed significantly in the intervening years, and it is clear that the model, as it now exists, includes a serious misallocation of special access lines. This must be corrected.

Third, the customer location files should be updated to accurately locate customers and design the network. The problems with network planning in the current model are widely recognized.[195] There are more accurate means of mapping customer locations today so as to better approximate customer locations and the cost of constructing networks to reach such customers. With current technological capabilities, geocoded customer locations and/or minimum road spanning tree algorithms[196] should be used to update the network. Securing these data would not be burdensome on the carriers and updated data could be integrated into the model in a relatively short period of time.

Another aspect of the model is also outdated. As designed, the model derives costs for narrowband service. Of course, the network now and for the foreseeable future will also be constructed to provide broadband service. (The arguments above on multiple-use networks are relevant here.) Especially for use with NASUCA's first

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[195] See CostQuest White Paper at 22-23.

[196] See id. at 50.

alternative proposal, which considers revenues from all services in establishing the urban benchmark, it will be necessary to consider the costs for all of those services.[197] On the rural side, since the costs to be reviewed are only the costs of the supported services, it will be necessary to **exclude**, for example, the costs of broadband.[198]

Finally, NASUCA's data allows the Commission to correct a fundamental problem with the current HCM: Whether it be rates or price, the relevant comparison for determining reasonable comparability is **urban** rates or prices. The HCM determines support based on the national average cost, not the national **urban** average cost. The Commission can use the urban areas identified by NASUCA -- whether the standard be 100% or 100%-80% urban -- in order to develop a benchmark that provides the proper perspective.

VII. BROADBAND ISSUES (INCLUDING EMBARQ PROPOSAL)

The Commission also seeks comment "on the relationship of any modifications to the non-rural high-cost support mechanism to our broadband policies."[199] As discussed above, the modifications to the non-rural high-cost mechanism required by the *Qwest II* remand have little necessary relationship to broadband policy. Broadband issues should be dealt with in a broader context, as with the Joint Board's proposal for a separate broadband fund.[200]

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[197] See Appendix A at 2-4.

[198] Costs of broadband would be considered separately in the context of the separate broadband fund or NASUCA's proposed broadband incentive program, as discussed in the next section.

[199] *NoI*, ¶ 28.

[200] NASUCA supported this proposal, and was extremely disappointed with the Commission's terse (albeit perhaps tentative) rejection of the proposal in November 2008.

It is especially problematic that "broadband" has not yet been determined to be a supported service pursuant to 47 U.S.C. § 254(b). And that issue invokes the Commission's continual (although incorrect) treatment of broadband service as not "telecommunications" eligible for support under § 254.

This context should also control the Commission's consideration of the Embarq proposal discussed in the *NoI*.[201] Like former Chairman Martin's USF/broadband proposal,[202] the Embarq proposal would make deploying broadband a condition of receiving high-cost USF support. As discussed in NASUCA's comments on Chairman Martin's proposal, this condition would not likely influence the non-rural carriers in whose rural territories broadband deployment has fallen behind that in urban areas.[203]

VIII. DISCUSSION OF QWEST AND VERMONT/MAINE PROPOSALS

A. QWEST PROPOSAL[204]

On May 5, 2008, after the initial comments on the Joint Board RD were filed, Qwest filed "a proposal for revising the methodology used to determine high-cost universal service support for 'non-rural' incumbent local exchange carriers …, to comply with the Tenth Circuit Court of Appeals' decision in *Qwest II*."[205] Qwest's

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[201] Id., ¶ 11.

[202] See 96-545/05-337, et al., *Further Notice of Proposed Rulemaking*, FCC 08-262, Appendix A.

[203] See 96-45/05-337, et al., NASUCA, et al. Comments on Further Notice of Proposed Rulemaking (November 26, 2008) at 39-41.

[204] **This material is adapted from NASUCA's Combined RD Reply Comments at 55-61**.

[205] Qwest ex parte (May 5, 2008) ("Qwest Proposal"), cover letter at 1.

proposal, like those of other ILECs, asserts that support should be provided on a wire center basis, without the statewide averaging used in the current mechanism.

According to Qwest, its proposal, if applied to all non-rural ILECs, "would increase the amount of support provided to non-rural eligible telecommunications carriers … by about **$1.2 billion**."[206] As a compromise to this 25% increase in the size of the current $4.7 billion high-cost fund,[207] Qwest asserted that the Commission

> could reasonably decide, on an interim basis, to target wire-based federal support to the rural areas served by smaller non-rural ILECs, namely, those other than AT&T and Verizon. Given their smaller size, scale, and scope, these "medium-size ILECs" have been most affected by the loss of implicit subsidies resulting from robust competition in urban areas. By initially limiting the rule modifications to the medium-size ILECs, the Commission could limit the size of the increase in the non-rural program to about $322 million.[208]

Obviously, Qwest is willing to jettison its larger RBOC brethren -- AT&T and Verizon -- in order to secure more benefits for itself. But as discussed below, Qwest simply fails to demonstrate that it, and the other '"medium-size ILECs' have been most affected by the loss of implicit subsidies resulting from robust competition in urban areas."[209]

According to Qwest, there has been a loss of implicit support for its rural wire centers, which, according to Qwest, "makes it difficult for non-rural ILECs to provide basic telephone services at reasonably comparable rates…."[210] Obviously, this is the same

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[206] Id. at 2 (emphasis added).

[207] Qwest notes that its calculation requires a freeze on the amounts paid to CETCs. Id., n.1.

[208] Id. at 1. This $878 million difference reflects the size of the A&T and Verizon operations in their territories.

[209] Id.

[210] Id. at 3.

claim made by the other ILECs that want to eliminate statewide averaging and to have support calculated on a wire center or exchange basis. And Qwest, like these other ILECs, totally fails to support its claims with any systematic data, and, in particular, fails to show that its wire centers need additional support in order for rural rates to remain reasonably comparable.

Qwest begins by citing the *Qwest II* finding that the Commission's high-cost support rules for non-rural ILECs rely on an "erroneous, or incomplete, construction" of § 254.[211] But Qwest does not acknowledge that the Commission's failure, according to the Tenth Circuit, was to define the key terms of "sufficient" and "reasonably comparable" following the directives of **all** of the principles in 47 U.S.C. § 254(c). Qwest also fails to understand that its proposal -- bent only on increasing the amount of support that it receives -- brings us no closer to a lawful definition of either term.

Qwest also complains about the amount of high-cost support some states and CETCs receive.[212] NASUCA does not disagree that such support may be excessive; but that does not mean that, of necessity, Qwest and the other non-rural ILECs in the other states receive **insufficient** support. Indeed, this is underscored by Qwest's serious understatement of the amount of support it receives: "Despite the rural nature of much of the 14 western states it serves, Qwest received only $27 million in federal high-cost assistance in 2007…."[213]

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[211] Id. at 1, quoting *Qwest II*, 398 F.3d at 1226.

[212] Id. at 2.

[213] Id.

Yet as shown on a state-by-state basis in NASUCA's initial 2008 RD comments, Qwest actually received $83.7 million in high-cost support in 2007, when both HCM and IAS are counted.[214] Qwest's $27 million figure includes only HCM.

NASUCA's *NRHC Remand* Initial Comments showed that, with few exceptions, non-rural carriers' rates in 2005 -- at 2005 levels of support -- were indeed reasonably comparable to urban rates. Despite Qwest's selective discussion of lost implicit support,[215] Qwest gives no indication that it has applied to any of its states to increase rural rates because of that lost support.

Indeed, Qwest merely asserts that "[i]n practice, the … option of raising rates in rural areas often is not available, because of state prohibitions and the significant administrative expense of maintaining geographically disaggregated rates."[216] But Qwest does not even cite a single one of those state prohibitions, or give any indication of the magnitude of the supposed expense. Instead, as stated earlier in response to a similar Embarq request, "It may simply be that it is easier for [the carrier] to attempt to convince a national Joint Board and the FCC to assist it with universal service funds than it is for [the carrier] to seek rate increases in these states for these wire centers and portions of wire centers. But that turns the universal service support issue basically backwards."[217]

In the end, Qwest simply fails to show that the lack of support creates "a significant risk that consumers will not have access to telecommunications and information

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[214] NASUCA 2008 RD Comments, Appendix 3.

[215] Qwest Proposal at 13-14.

[216] Id. at 17.

[217] See NASUCA 2008 RD Combined Reply Comments at 58, quoting NASUCA May 31, 2007 Comments at 17.

services that are reasonably comparable to those services available in urban areas, as they are entitled under the Act."[218] Certainly, Qwest has not quantified the risk. By contrast, Qwest **has** quantified the impact of protecting consumers from this supposed risk: either $1.2 billion or $322 million, depending on which ILECs' customers are deemed to need protection from that risk.

Those increases would result from the heart of Qwest's proposal, which is "to target support to wire centers with costs that exceed a particular benchmark, which Qwest recommends the Commission set at 125 percent of the national average rate."[219] Although the specifics are a little hard to discern, it appears that Qwest would give support to any wire center where **costs** exceed 125% of the national average urban **rate**. Apparently, according to Qwest, that rate is $25.27,[220] such that all wire centers with costs in excess of $31.59 would be supported in the full amount of the excess. The impact of the proposal on a holding company basis is shown in Attachment B to Qwest's Proposal; the impact on a state-by-state basis is also shown in Qwest's Attachment B.

To begin in evaluating Qwest's proposal, it is important to note that although the current non-rural high cost mechanism recognizes reasonably comparable rates as those within two standard deviations of the national urban rate,[221] determination of support does not use that rate benchmark at all. Instead, support is given to wire centers in states where the statewide average **cost** is more than two standard deviation above the national average

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[218] Qwest Proposal at 17.

[219] Id. at 22.

[220] See id., Attachment B.

[221] Qwest Proposal at 24.

cost.[222] And support is given for only 76% of the costs above the benchmark.[223] So Qwest's proposal goes far beyond merely doing away with statewide averaging and moving the benchmark to 125% of the average, which is what Qwest claims will "advance" universal service as required by *Qwest II*.[224]

In the *NRHC Remand* comment cycle, Qwest had proposed a wire-center-centric support mechanism that would have cost an additional $1.9 billion.[225] This latest proposal by Qwest reduces that amount to $1.2 billion, for which one should be thankful. In its earlier manifestation Qwest proposed the alternative of allocating the then-current fund amount without statewide averaging,[226] which merely diluted the fund out of all recognition. That proposal has apparently fallen by the wayside; Qwest's current compromise is to eliminate AT&T and Verizon from the take. That would reduce the incremental funding to $322 million.

Attachment 1 to NASUCA's 2008 RD reply comments showed the impact of Qwest's proposal, in comparison to funding under the current mechanisms. These results raise additional questions about Qwest's approach. First, it appears that Qwest does not intend its approach to supplant the IAS or ICLS received by non-rural carriers. Thus Qwest's proposed $1.2 billion support would be in addition to that existing support. And for its alternative proposal, which excludes AT&T and Verizon, it is also not clear whether

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[222] See NASUCA *NRHC Remand* Comments at 24-25.

[223] Id.

[224] Qwest Proposal at 24, citing *Qwest II*, 398 F.3d at 1236-37.

[225] NASUCA *NRHC Remand* Reply Comments at 28.

[226] Id. at 43-44.

the intent is to supersede the HCM currently being received by those companies.

Despite these issues, a few things **are** clear based on the results of Qwest's proposal: First, Qwest itself would receive almost $140 million more each year under its plan.[227] And Qwest's plan would award $1.193 billion in high-cost model support to companies that currently get no such support.[228] As noted, this does not apparently include current IAS or ICL amounts already received by these carriers. Perhaps the best example of Qwest's over-reaching is the fact that its plan would give Ohio $78 million more per year, including apparently money to Cincinnati Bell Telephone ("CBT"), which in 2007 earned a return on equity of **89.62**%.[229]

But it should be obvious that Qwest is asking that it and the other large ILECs to receive these huge amounts in additional support, in the absence of any demonstration that their rural rates are at any real risk of becoming no longer reasonably comparable to urban rates. Much less that their current rates are not reasonably comparable. Qwest's proposal must be rejected.

B. VERMONT/MAINE PROPOSAL[230]

Vermont/Maine propose the use of "net subscriber cost" as a proxy for rates.[231] According to Vermont/Maine, this is because of various difficulties in determining rate

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[227] NASUCA 2008 RD Comments, Attachment 1.

[228] Id.

[229] 2007 Annual Report to the Public Utilities Commission of Ohio. CBT's five year average return on equity was **67.13%.**

[230] **This material is adapted from NASUCA's *Remand NPRM* Remand Comments at 14-15.**

[231] Vermont/Maine at 20-28. Interestingly, Vermont/Maine do not seem to follow their own advice that "[i]f something serves as a 'proxy' for something else … the Commission should make findings that the assumed correlation reliably exists…." Id. at 17.

levels, including the presence of message and measured service rates;[232] the differences between business and residential rates;[233] the existence of options and bundles;[234] and variations in state ratemaking policies.[235]

Unfortunately, Vermont/Maine's alternative of "net subscriber cost," defined as "the residual price that a subscriber needs to pay for basic telecommunications service, given the company's cost of service"[236] does not advance the cause much. According to Vermont/Maine, this approach "measures and manages what Congress actually intended to manage, the local customer's actual cost of acquiring service."[237] But what it does not measure is the cost to the customer of acquiring the services *that are supported by the federal fund*, per Congress' explicit requirement.

Vermont/Maine's formula includes a component that addresses "customer revenue for non-USF services."[238] But there will be the same problems with segregating those revenues that Vermont/Maine list for identifying the rates that are supposed to be

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[232] Id. at 20-21. NASUCA submits that the continued prevalence of flat-rate local calling across the country makes that the key comparison in determining whether rural **rates** are reasonably comparable to urban rates. Only where a flat-rate local calling option is not available do difficulties arise, and these can be dealt with on a case-by-case basis.

[233] Id. at 21-23.

[234] Id. at 23-24.

[235] Id. at 24-26. Vermont/Maine also complain that a rates-based standard will needlessly inflate the fund. Id. at 26. The impact on the fund depends on the level of the standard that is chosen more than the type of standard. This is also true for Vermont/Maine's "net subscriber cost" standard. See id. at 28.

[236] Id. at 27.

[237] Id. at 28.

[238] Id.

reasonably comparable. The proposal does not really simplify or clarify anything.

IX. SUMMARY OF NASUCA'S PROPOSALS[239]

As noted above, in the *Remand NPRM* round, NASUCA submitted two discrete proposals, either of which would have addressed the issues raised by the Tenth Circuit. NASUCA includes a summary of both proposals here; more complete discussions of the proposals are included in Appendices A and B.

A. The urban revenue/rural cost alternative

The current support mechanism takes a sample of 95 urban rates from around the nation, determines the national weighted urban average rate, and then establishes a rate comparability benchmark at two standard deviations above the average. A cost benchmark is set, by contrast, at two standard deviations above the national weighted average cost, not the average urban cost, based on the Commission's HCM.[240] Then support is granted to states that have statewide average costs that are above the benchmark.

NASUCA's first alternative proposal begins by determining a benchmark based on the national urban average per-line **revenue**, being revenue from all sources, not just basic service. This includes basic service, SLCs, optional/vertical services, access charges, and advanced services, in recognition that the network is constructed to provide multiple services, both traditional and advanced. Then, the **costs** in each wire center are compared to that national urban average revenue. Support is then awarded to all wire centers with costs

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[239] **This material is adapted from NASUCA's NRHC Remand Comments (at 3-6)**.

[240] *Remand NPRM*, ¶ 5.

that are higher than the national urban revenue benchmark.[241] The presumption contained in this proposal is that areas with costs that are greater than the urban revenue benchmark **will find it impossible** to have basic service rates that are reasonably comparable to urban rates in the absence of support. The revenue/cost comparison alleviates most concerns over statewide averaging.

B. The rate-focused alternative

NASUCA's second alternative begins and ends by looking at the rates that federal support is intended to help make reasonably comparable to urban rates. NASUCA's second alternative consists of steps to be taken upon the initial application as a transition from the current mechanism, followed by steps for the initial process that will be repeated annually. The mechanism is, of necessity, more complex than NASUCA's first alternative.

The mechanism first determines **eligibility** for support through an examination of rates. This follows the law and the Tenth Circuit's rulings.

Then, as with the current mechanism, the **amount** of support is based on costs. That is the appropriate method for apportioning support from the federal USF, placing the primary responsibility for ratemaking on the states, while assisting with support for areas in states that have -- as a whole -- high costs that otherwise would be accounted for in rates that were not reasonably comparable. In the end, the support awarded is again compared to the local service rate, in order to judge whether the support produces reasonably comparable rates.

Backstopping the process throughout is a mechanism where individual states can set forth specific conditions that justify providing support in areas that -- through the standard

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[241] All rural and all high-cost wire centers are eligible for support. 47 U.S.C. § 254(b)(3). If an urban wire center happens to be high-cost enough that its costs are significantly greater than the national urban average per-line revenues, it would likely need support to maintain reasonable comparability of rates.

operation of the mechanism -- would not receive support. Here again, NASUCA's second alternative builds on the current system.[242]

This proposal is designed as a gradual, iterative process where the industry, the Commission, the states and consumers learn as the process is implemented. This is consistent with the evolving nature of universal service.[243] The operation of the process is set forth in the following flowchart:

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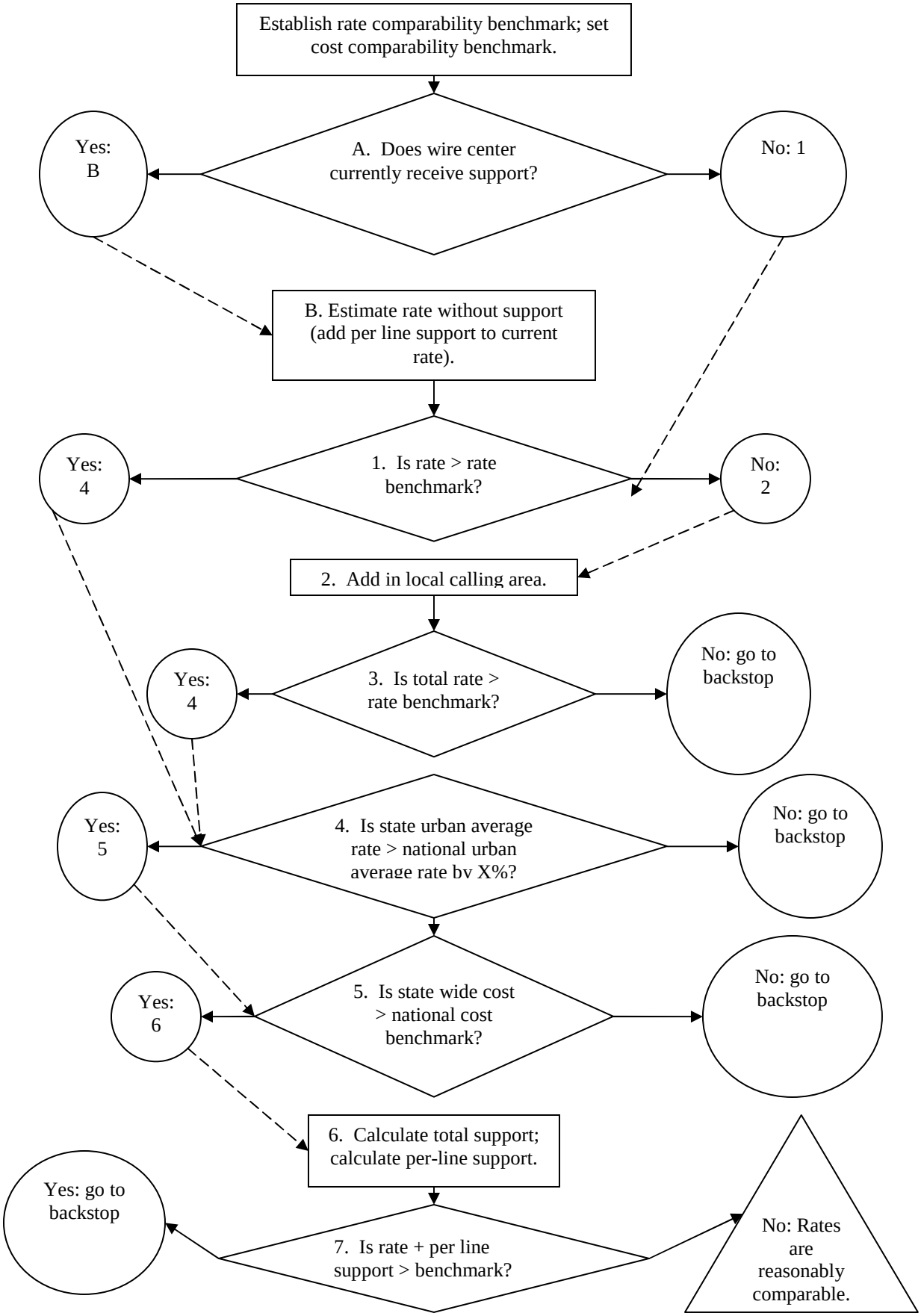
[242] See *Order on Remand*, ¶ 93.

[243] 47 U.S.C. § 254(c)(1).


Establish rate comparability benchmark; set cost comparability benchmark.
A. Does wire center currently receive support?
Yes: B
No: 1
B. Estimate rate without support (add per line support to current rate).
1. Is rate > rate benchmark?
Yes: 4
No: 2
2. Add in local calling area.
3. Is total rate > rate benchmark?
Yes: 4
No: go to backstop
4. Is state urban average rate > national urban average rate by X%?
Yes: 5
No: go to backstop
5. Is state wide cost > national cost benchmark?
Yes: 6
No: go to backstop
6. Calculate total support; calculate per-line support.
7. Is rate + per line support > benchmark?
Yes: go to backstop
No: Rates are reasonably comparable.

Under the current system, in 2008 only two jurisdictions -- the District of Columbia and New Hampshire -- received no high-cost support for non-rural companies.[244] Forty-two states, the District of Columbia and Puerto Rico receive no funding based on high costs, due to the fact that their statewide average costs do not exceed the Commission's cost benchmarks.[245] Non-rural ILECs in forty-six states receive interstate access or interstate common line support, which were designed as revenue replacement mechanisms, but fall under the high-cost rubric.[246]

Four-and-a-half years ago, Wyoming requested additional federal support under the Commission's supplemental mechanism.[247] No other state commission has requested funding under the Commission's supplemental mechanism.[248] It would be safe to assume, then, that those states believe their rural rates to be reasonably comparable to urban rates under the current benchmark. That is borne out by the data compiled for NASUCA.

NASUCA's second alternative proposes that the reform of the non-rural high-cost mechanism begin with states that currently have high rural rates for their non-rural carrier(s) but receive no high-cost funding, and then progress to states that currently

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[244] USAC 2008 Annual Report at 48. This description does not include, e.g., American Samoa and the Northern Marian Islands.

[245] Id. (same caveat applies).

[246] As discussed elsewhere, the support mechanisms should be combined such that there is a single "high cost" support mechanism.

[247] 96-45, "Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier" ("Joint Wyoming Petition") (December 21, 2004). The Commission has taken no action on Wyoming's request -- other than requesting public comment -- in the more than four years since the Joint Wyoming Petition was filed.

[248] One has to note that this could also result from the states' observation of the Commission's lack of action on the Wyoming request.

receive high-cost funds but still have high rural rates. Then states that have reasonably comparable rates but receive large amounts of high cost funds would be reviewed, to determine whether the funding amount is appropriate. A next step would be to review the states that, without the current high-cost funding, would likely have rates that would nonetheless be reasonably comparable; this support would be deemed not needed and could be eliminated.

X. CONCLUSION

The Commission must arrive at a support mechanism for non-rural carriers that meets the requirements of § 254, or face rejection again in the courts. NASUCA has provided the Commission with sufficient data and legal and policy arguments to allow it to address the concerns of the Tenth Circuit. NASUCA has also presented the Commission with two alternative proposals for a legally-compliant non-rural high-cost mechanism. Both of the proposals -- in different ways -- meet the needs of the statute and would therefore result in a fund that is sufficient, as required by § 254(e).

Respectfully submitted,

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