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

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DEC 23 2009
FCC Mail Room

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 15, 2009 **Released: December 15, 2009**

Comment Date: (30 days from publication in the Federal Register)
Reply Comment Date: (45 days from publication in the Federal Register)

By the Commission: Commissioners McDowell and Baker concurring and issuing separate statements; Commissioner Clyburn issuing a statement.

I. INTRODUCTION

1. In this further notice of proposed rulemaking, the Commission responds to the decision of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) in *Qwest Communications International, Inc. v. FCC*, in which the court remanded the Commission's rules for providing high-cost universal service support to non-rural carriers.[1] As discussed below, while the Commission has long recognized the need for comprehensive reform,[2] we are also cognizant that, under the American Recovery and Reinvestment Act of 2009 (the Recovery Act), the Commission must send a National Broadband Plan to Congress by February 17, 2010.[3] We anticipate that changes to universal service policies are likely to be recommended as part of that plan, and that the Commission will undertake comprehensive universal service reform when it implements those recommendations. It will not be feasible for the Commission to consider, evaluate, and implement these universal service recommendations between February 17, 2010, and April 16, 2010, the date by which the Commission committed to respond to the Tenth Circuit's remand. We tentatively conclude, therefore, that the Commission should not attempt wholesale reform of

[1] *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

[2] *See, e.g.*, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (*Identical Support Rule Notice*); *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (*Reverse Auctions Notice*); *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) (*Joint Board Comprehensive Reform Notice*); *High-Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC 6475 (2008) (*Comprehensive Reform FNPRM*).

[3] The American Recovery and Reinvestment Act of 2009 requires the Commission to deliver a National Broadband Plan to Congress by February 17, 2010. *See* Pub. L. No. 111-5, 123 Stat. 115 (2009).

the non-rural high-cost mechanism at this time, but we seek comment on certain interim changes to address the court's concerns and changes in the marketplace.

2. The interim changes on which we seek comment today are designed to respond to the court's concerns, while also taking into account the considerable changes in technology, the telecommunications marketplace, and consumer buying patterns that have occurred since we last modified our non-rural high-cost universal service support rules.[4] We seek comment on what changes should be made to the Commission's rules regarding the rate comparability review and certification process.[5] Specifically, we seek comment on whether the Commission should define "reasonably comparable" rural and urban rates in terms of rates for bundled local and long distance services. In addition, we seek comment on whether the Commission should require carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates.

3. Finally, we tentatively conclude that while the Commission considers comprehensive universal service reform consistent with both the Communications Act of 1934, as amended (the Communications Act),[6] and the Recovery Act, the current non-rural high-cost mechanism is an appropriate interim mechanism for determining high-cost support to non-rural carriers. We tentatively find that the mechanism as currently structured comports with the requirements of section 254 of the Communications Act, and it is therefore appropriate to maintain this mechanism on an interim basis until the Commission enacts comprehensive reform.[7]

II. BACKGROUND

4. A major objective of high-cost universal service support always has been to help ensure that consumers have access to telecommunications services in areas where the cost of providing such services would otherwise be prohibitively high. In section 254 of the Communications Act, Congress directed the Commission to preserve and advance universal service by ensuring, among other things, that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are "reasonably comparable to rates charged for similar services in urban areas."[8] In addition, section 254(e) provides that federal universal service support "should be explicit and sufficient to achieve the purposes of this section."[9]

5. Currently, the Commission's rules provide federal high-cost support to non-rural and rural carriers under different support mechanisms.[10] While rural carriers receive support based on their

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[4] The high-cost universal service support mechanism was adopted in the *Ninth Report and Order* in 1999, and modified in the *Order on Remand* in 2003 in response to the Tenth Circuit's decision in *Qwest I*. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) (*Ninth Report and Order*), *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) (*Qwest I*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559 (2003) (*Order on Remand*), *remanded*, *Qwest II*, 398 F.3d 1222.

[5] *See* 47 C.F.R. § 54.316.

[6] 47 U.S.C. §§ 151, *et seq.*

[7] 47 U.S.C. § 254. Section 254 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Telecommunications Act).

[8] 47 U.S.C. § 254(b)(3).

[9] 47 U.S.C. § 254(e). Similarly, section 254(b)(5) states that there "should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5).

[10] The term "non-rural carriers" refers to incumbent local exchange carriers that do not meet the statutory definition of a rural telephone company. *See* 47 U.S.C. § 153(37). Under section 153(37), rural telephone companies are defined as incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of three

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embedded costs, the current rules calculate support to non-rural carriers based on the forward-looking economic cost of constructing and operating the network facilities and functions used to provide the supported services in the areas served by non-rural carriers, as determined by the Commission's cost model.[11] Non-rural carriers receive support based on the model's cost estimates only in states where the statewide average forward-looking cost per line for non-rural carriers exceeds a national cost benchmark, which currently is set at two standard deviations above the national average cost per line.[12]

6. To induce states to achieve the reasonably comparable rates that are required by the statute, the Commission requires states to review annually their residential local rates in rural areas served by non-rural carriers and certify that those rural rates are reasonably comparable to urban rates nationwide, or explain why they are not.[13] The Commission defined the statutory term "reasonably comparable" in terms of a national *rate* benchmark, which serves as a "safe harbor" in the rate review and certification process.[14] States with rural rates below the benchmark may presume that their rural rates are reasonably comparable to urban rates nationwide without providing additional information; if the rural rates are above the benchmark, they can rebut the presumption by demonstrating that factors other than basic service rates affect the comparability of rates.[15] The national rate benchmark currently is set at two

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alternative criteria. *Id.* Thus, "non-rural carriers" are principally defined by study area size. Non-rural carriers serve the majority of access lines nationwide, including lines in rural, insular, and high-cost areas.

[11] In the *Universal Service First Report and Order*, the Commission determined that high-cost universal service support should be based on forward-looking economic cost, but that rural carriers' high-cost support would not begin to be based on forward-looking economic cost until further review. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8888-89 paras. 199, 203 (1997) (*Universal Service First Report and Order*). The Commission finalized the computer model platform and adopted model inputs used to estimate the forward-looking costs of a non-rural carrier's operations in the *Tenth Report and Order*. *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Tenth Report and Order, 14 FCC Rcd 20156 (1999) (*Tenth Report and Order*), *aff'd*, *Qwest I*, 258 F.3d 1191. The model platform refers to the computer model's assumptions about the design of the network and network engineering, and fixed characteristics such as soil and terrain. *See Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Fifth Report and Order, 13 FCC Rcd 21323 (1998) (*Fifth Report and Order*).

[12] *See* 47 C.F.R. §54.309(a)(3). The Commission originally set the cost benchmark at 135 percent above the national average forward-looking cost per line. *See Ninth Report and Order*, 14 FCC Rcd at 20463-64, para. 55. In *Qwest I*, the court found that the Commission "failed to explain how its 135% benchmark will help achieve the goal of reasonable comparability or sufficiency," and directed the Commission to "address the relevant data and provide adequate record support and reasoning for whatever level of support it ultimately selects upon remand." *Qwest I*, 258 F.2d at 1202-03. In the *Order on Remand*, the Commission adopted a two standard deviation benchmark: "Consistent with the court's directive, standard deviation analysis provides an empirical method, based on relevant data, of identifying states with significantly higher costs than the national average that are likely to have difficulty maintaining comparable rates without federal support." *Order on Remand*, 18 FCC Rcd at 22597, para. 62. As discussed below, there are numerous reasons why the Commission bases high-cost support on costs, rather than rates. *See infra* paras. 21-22.

[13] *See* 47 C.F.R. §54.316; *Order on Remand*, 18 FCC Rcd at 22601-14, paras. 70-92. In *Qwest I*, the court required the Commission on remand to develop mechanisms, a "carrot" or a "stick," to induce adequate state action to preserve and advance universal service. *See Qwest I*, 258 F.3d at 1204. In *Qwest II*, the court affirmed the portion of the *Order on Remand* creating a mechanism to induce state action to assist in implementing the goals of universal service. *See Qwest II*, 398 F.3d at 1226, 1238.

[14] *See* 47 C.F.R. §54.316(b); *Order on Remand*, 18 FCC Rcd at 22582-89, 22607-10, paras. 38-48, 80-82.

[15] *See Order on Remand*, 18 FCC Rcd at 22609-10, para. 82.

standard deviations above the average urban rate as reported in the most recent annual rate survey published by the Wireline Competition Bureau.[16]

7. In *Qwest II*, the court held that the Commission relied on an erroneous, or incomplete, construction of section 254 of the Communications Act in defining statutory terms and crafting the funding mechanism for non-rural high-cost support.[17] 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 Communications Act and to define "reasonably comparable" in a manner that comports with the requirement to preserve and advance universal service.[18] The court found that, "[b]y designating a comparability benchmark at the national urban average plus two standard deviations, the FCC has ensured that significant variance between rural and urban rates will continue unabated."[19] The court also found that the Commission ignored its obligation to "advance" universal service, "a concept that certainly could include a narrowing of the existing gap between urban and rural rates."[20] Because the non-rural high-cost support mechanism rested on the application of the definition of "reasonably comparable" rates invalidated by the court, the court also deemed the support mechanism invalid.[21] 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 in the record a relationship between costs and rates.[22]

8. In December 2005, the Commission issued a notice of proposed rulemaking seeking comment on issues raised by section 254 and the Tenth Circuit in *Qwest II*.[23] Since the Commission issued the *Remand NPRM*, it has sought comment on various proposals for comprehensive reform of the high-cost support mechanisms for both rural and non-rural carriers.[24] In addition, the Commission issued a further notice of proposed rulemaking seeking comment on comprehensive universal service and intercarrier compensation reform on November 5, 2008.[25]

9. On January 14, 2009, Qwest Corporation, the Maine Public Utilities Commission, the Vermont Public Service Board, and the Wyoming Public Service Commission filed a petition for writ of mandamus with the Tenth Circuit in the *Qwest II* proceeding.[26] Shortly after that petition was filed, the Commission and the petitioners negotiated an agreement under which the Commission would release a notice of inquiry no later than April 8, 2009; issue a further notice of proposed rulemaking no later than December 15, 2009; and release a final order that responds to the court's remand no later than April 16,

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[16] *See* 47 C.F.R. §54.316(b); Industry Analysis and Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service* (August 2008).

[17] *Qwest II*, 398 F.3d at 1226.

[18] *Id.* at 1237.

[19] *Id.* at 1236.

[20] *Id.*

[21] *Id.* at 1237.

[22] *Id.*

[23] *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19731 (2005) (*Remand NPRM*).

[24] *See Identical Support Rule Notice*, 23 FCC Rcd 1467; *Reverse Auctions Notice*, 23 FCC Rcd 1495; *Joint Board Comprehensive Reform Notice*, 23 FCC Rcd 1531.

[25] *Comprehensive Reform FNPRM*, 24 FCC 6475.

[26] Petition for a Writ of Mandamus, *In re Qwest Corp.*, No. 09-9502 (10th Cir. filed Jan. 14, 2009).

2010.[27] On April 8, 2009, the Commission issued a notice of inquiry to refresh the record regarding the issues raised by the court in this remand proceeding.[28] The Commission sought comment on several specific proposals, and sought comment generally on how any changes to the Commission's non-rural high-cost support mechanism should relate to more comprehensive high-cost universal service reform and the Commission's initiatives regarding broadband deployment.[29]

III. DISCUSSION

A. Relationship to Comprehensive Reform and the National Broadband Plan

10. The Commission has previously recognized the need for comprehensive universal service reform, and has sought comment on various proposals for comprehensive reform of the high-cost support mechanisms, rural as well as non-rural.[30] Since the Commission originally adopted the non-rural high-cost mechanism in 1999, the telecommunications marketplace has undergone significant changes. For example, while in 1996 the majority of consumers subscribed to separate local and long distance providers, today the majority of consumers subscribe to local/long distance bundles offered by a single provider. In addition, the vast majority of subscribers have wireless phones as well as wireline phones, and an increasing percentage of consumers are dropping their circuit-switched phones in favor of wireless or broadband-based (voice over Internet protocol) phone services. Finally, an increasing percentage of carriers are converting their networks from circuit-switched to Internet protocol (IP) technology.

11. In the *Remand NOI*, the Commission sought comment on the relationship between the Commission's resolution of the issues in this remand proceeding and more comprehensive reform of the high-cost universal service support system and the development of a comprehensive National Broadband Plan.[31] Many commenters argued that the Commission should use this remand proceeding to begin transitioning high-cost funding from support for voice services to support for broadband in light of the changes in technology and the marketplace.[32]

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[27] *See* Response of Federal Communications Commission to Petition for a Writ of Mandamus, *In re Qwest Corp.*, No. 09-9502 (10th Cir. filed March 6, 2009). In light of the parties' agreement on a timetable for FCC action, the Tenth Circuit denied the mandamus petition as moot. Order, *In re Qwest Corp.*, No. 09-9502 (10th Cir. issued March 20, 2009).

[28] *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Inquiry, 24 FCC Rcd 4281 (2009) (*Remand NOI*).

[29] *Id.*

[30] *See Identical Support Rule Notice*, 23 FCC Rcd 1467; *Reverse Auctions Notice*, 23 FCC Rcd 1495; *Joint Board Comprehensive Reform Notice*, 23 FCC Rcd 1531 (2008); *Comprehensive Reform FNPRM*, 24 FCC 6475.

[31] *Remand NOI*, 24 FCC Rcd at 4290-4293, paras. 21-28.

[32] *See, e.g.*, Comments of AT&T, Inc, WC Docket No. 05-337, CC Docket No. 96-45, at 3-4 (filed May 8, 2009) (AT&T NOI Comments) (arguing that ensuring the continued relevance of the Commission's universal service program "requires the transition of all high-cost funding from the legacy POTS [plain old telephone service] business model to support for business models that are viable in the hyper-connected digital world in which growing numbers of us live, thereby not only preserving but also *advancing* universal service as required by Congress and the Tenth Circuit. As part of this transition, the Commission must move toward a support mechanism that is narrowly targeted to rural and other high-cost areas, and that prepares for the end of the POTS model."); Comments of CTIA-The Wireless Association®, WC Docket No. 05-337, CC Docket No. 96-45, at ii (filed May 8, 2009) (CTIA NOI Comments) ("The existing universal service system, with its emphasis on legacy wireline voice technology, is in danger of becoming more of a hindrance that a help if it is not modernized soon. Reform of the universal service system should be integrated with rural and national broadband planning, and should focus on the deployment of mobile broadband services, which have the ability to bring the benefits of broadband not only to the home but to the person."); Comments of the National Cable Telecommunications Association, WC Docket No. 05-337, CC Docket No. 96-45, at 4-5 (filed May 8, 2009) (NCTA NOI Comments) ("In addition to the obvious need to fix the existing

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12. On the same day that the Commission issued the *Remand NOI*, it began the process of developing a National Broadband Plan that will "seek to ensure that all people of the United States have access to broadband capability," as required by the Recovery Act.[33] Since then, the Commission staff has undertaken an intensive and data-driven effort to develop a plan to ensure that our country has a broadband infrastructure appropriate to the challenges and opportunities of the 21st century. Work on the National Broadband Plan, which is due to Congress by February 17, 2010, is not complete. We anticipate that the National Broadband Plan will address the need to reform universal service funding to further the deployment and adoption of broadband throughout the nation. As a consequence, we tentatively conclude that fundamental reform limited to only the non-rural high-cost support mechanism should not be proposed at this time. After the National Broadband Plan is released in February, we will be in a better position to determine the modifications that would be consistent with our broadband policies. In response to the mandamus petition in the Tenth Circuit, the Commission has committed to issue an order responding to the court's remand by April 16, 2010. We believe that we will have insufficient time, between release of the National Broadband Plan in February and our deadline for responding to the court in April, to implement reforms to the high-cost universal service mechanisms consistent with the overall recommendations in the National Broadband Plan. While we are committed to addressing the remand by April 16, we anticipate that our efforts to revise and improve high cost support will be advanced further through proceedings that follow from the National Broadband Plan. Accordingly, we tentatively conclude that we should neither propose fundamental reform of the non-rural high-cost support mechanism in advance of the forthcoming National Broadband Plan, nor attempt to set the stage for implementation of (as yet unknown) plan recommendations in this further notice of proposed rulemaking. As discussed below, we also tentatively conclude that no fundamental reform is required since the program as currently structured is consistent with our statutory obligations under section 254 of the Communications Act.[34] We seek comment on these tentative conclusions.

13. We also are reluctant at this time to propose adopting any changes to the non-rural support mechanism that would increase significantly the amount of support non-rural carriers would receive. We caution that any rules adopted in this proceeding are likely to be interim rules and in effect only until comprehensive universal service reform is adopted in the aftermath of the National Broadband Plan. Any substantial increases in non-rural high-cost support disbursements, moreover, would increase the contribution factor above its current high level.[35] "Because universal service is funded by a general pool subsidized by all telecommunications providers – and thus indirectly by the customers – excess subsidization in some cases may undermine universal service by raising rates unnecessarily, thereby pricing some consumers out of the market."[36] If carriers were to receive significant additional high-cost support on an interim basis as a result of this proceeding, it likely would be more difficult to transition that support to focus on areas unserved or underserved by broadband, if called for in future proceedings. Given these concerns, we tentatively conclude that any changes to the non-rural high-cost support

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mechanisms, there also is an emerging consensus that these mechanisms should transition from voice-focused to broadband-focused. While the broadband marketplace generally is working to meet the needs of consumers, government support, including subsidies, may be needed to promote both the deployment of networks in unserved areas and the adoption of services by underserved populations.").

[33] *See* Recovery Act § 6001(k)(2); *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009) (*National Broadband Plan NOI*); *see also FCC Launches Development of National Broadband Plan*, News Release, April 8, 2009.

[34] *See infra* paras. 28-41.

[35] *See Proposed First Quarter 2010 Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 09-2588 (rel. Dec. 11, 2009)

[36] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (*Alenco*).

mechanism adopted at this time should be interim in nature and should not increase the overall amount of non-rural high-cost support significantly above current levels, provided that goal can be accomplished consistent with our mandate under section 254. We seek comment on this tentative conclusion and, to the extent commenters advocate changes to the existing mechanism, we ask commenters to address how any such changes will constrain growth in the amount of support.

B. Rate Comparability Review and Certification Process

14. We tentatively conclude that we should continue requiring the states to review annually their residential local rates in rural areas served by non-rural carriers and certify that their rural rates are reasonably comparable to urban rates nationwide, or explain why they are not.[37] We seek comment on this tentative conclusion.

15. We also seek comment, however, on whether we should change the rates we require the states to compare in light of the considerable changes in technology, the telecommunications marketplace, and consumer buying patterns that have occurred since we adopted a national average urban rate benchmark based on local rates. Specifically, we seek comment on whether the Commission should define "reasonably comparable" rural and urban rates in terms of rates for bundled telecommunications services. Given the changes in consumer buying patterns, the competitive marketplace, and the variety of pricing plans offered by carriers today, stand-alone local telephone rates may no longer be the most relevant measure of whether rural and urban consumers have access to reasonably comparable telecommunications services at reasonably comparable rates.

16. In particular, when the Commission adopted the non-rural high-cost support mechanism, none of the Bell Operating Companies, which served the majority of non-rural carrier customers, were permitted to offer combined local and interstate long distance services to their customers.[38] At that time, most customers of non-rural carriers took local service from the incumbent local exchange carrier and subscribed to a separate interexchange carrier for long distance service. When the Commission originally adopted the non-rural high-cost support mechanism, it was "designed to achieve reasonable comparability of intrastate rates among states."[39] Given the different combinations of carriers a customer could choose from, and differing amounts of usage based on per-minute charges, it would have been difficult at that time to identify a typical package of local and long distance services. In the *Order on Remand*, the Commission explicitly defined "reasonable comparability" in terms of the national average urban rate for *local telephone service*.[40] The telecommunications marketplace has changed considerably since that time, however.[41]

17. When the Commission issued the *Remand NPRM* in 2005, it noted that most consumers no longer purchase stand-alone local telephone service, but instead purchase bundles of telecommunications services from one or more providers, and it sought comment on whether the

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[37] *See* 47 C.F.R. § 54.316; *Order on Remand*, 18 FCC Rcd at 22601-14, paras. 70-92.

[38] Specifically, the Bell Operating Companies were prohibited from providing in-region interLATA service prior to the Commission's authorization pursuant to section 271 of the Communications Act. *See* http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/.

[39] *Ninth Report and Order*, 14 FCC Rcd at 20457-58, para. 45.

[40] *See Order on Remand*, 18 FCC Rcd at 22582, para. 38 & n.130.

[41] *See, e.g.*, Comments of the United States Telecom Association, WC Docket No. 05-337, CC Docket No. 96-45, at 5 (filed May 8, 2009) (USTelecom NOI Comments) ("Since the Tenth Circuit case began, the market has changed dramatically. Customers now have new options, such as cable and wireless for obtaining voice services at reasonably comparable rates. These services are generally sold at rates that are set on a nationwide basis. Prepaid wireless plans provide affordable options that were not available a few years ago. Distance is now irrelevant as the vast majority of consumers subscribe to bundled all distance plans.").

Commission should continue defining reasonably comparable rates in terms of local rates only.[42] The Commission also sought comment on whether defining reasonably comparable rural and urban rates in terms of consumers' total telephone bills would be more consistent with its obligation to preserve and advance universal service than focusing only on local rates.[43] In the *Remand NOI*, the Commission noted that consumers increasingly are purchasing packages of services that include not only unlimited nationwide calling, but also broadband Internet access and video services, and it sought comment on whether the Commission should consider a broader range of rates in determining whether rates are affordable and reasonably comparable.[44] We now seek additional comment on these issues.

18. As the Commission previously noted, most rural consumers typically have smaller calling areas for local telephone service than urban consumers and, therefore, may purchase more long distance services than urban consumers.[45] We seek comment on whether a comparison of local rates only is appropriate if rural consumers incur substantial charges for long distance services and pay more for combined local and long distance telephone services than urban consumers.[46] Although only local telephone service is supported by the high-cost universal service mechanism at this time, section 254(b)(3) of the Act provides that consumers in all regions of the nation should have access to telecommunications and information services, *including advanced services and interexchange services*, at reasonably comparable rural and urban rates.[47] In light of the fact that most consumers subscribe to both local and long distance services from the same provider, would it be more consistent with the statute, and the Commission's obligation to advance universal service,[48] to define reasonably comparable rates for purposes of the non-rural mechanism in terms of combined local and long distance rates?

19. If the Commission determines that a more meaningful measure of rural and urban rate comparability should include rates for long distance services as well as local rates, how should the Commission define a typical package of services on which to base the comparison? Several commenters point to the widespread availability of national calling plans from competing intermodal providers, including wireless, cable, and VoIP providers, and argue that rates should be considered reasonably comparable in rural areas where such service options are available.[49] Currently, the Commission defines

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[42] *Remand NPRM*, 20 FCC Rcd at 19741, para. 21 & n.74 (citing J.D. Power and Associates Reports: Three Quarters of Households Now Bundle Local and Long Distance Telephone Service with One Provider, July 14, 2005). The Commission's most recent local telephone competition report indicates that for 69 percent of residential lines the local carrier is also the presubscribed interstate long distance provider. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Competition: Status as of June 30, 2008*, Table 6 (July 2009). The Commission's data likely understate the percentage of consumers who currently subscribe to bundled local and long distance service because the data do not include all telephone lines provided via voice over Internet protocol (VoIP).

[43] *Remand NPRM*, 20 FCC Rcd at 19741-42, para. 22.

[44] *Remand NOI*, 24 FCC Rcd at 4289-90, para. 19.

[45] *Remand NPRM*, 20 FCC Rcd at 19741-42, at paras. 21-22. *See e.g.*, Reply Comments of the Regulatory Commission of Alaska, WC Docket No. 05-337, CC Docket No. 96-45, at 10-11 (filed June 8, 2009) (Alaska Commission NOI Reply Comments) (arguing that any definition of reasonable comparability should take into consideration the limitations on local calling); Comments of the National Association of State Utility Consumer Advocates, CC Docket No. 96-45, , WC Docket No. 05-337, at 49-54 (filed March 27, 2006) (NASUCA NPRM Comments) (proposing two methods for adjusting rates to account for calling areas) .

[46] *See* Rural Cellular NOI Comments, at 14 (filed May 8, 2009) (arguing that the low local rates for rural service in areas with very small calling areas make rural/urban comparisons impossible).

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

[48] *See* 47 U.S.C. § 254(b)(5).

[49] *See, e.g.*, NCTA NOI Comments at 8-9 ("In most areas of the country, including most rural areas, consumers have multiple options for all-distance voice services from a variety of companies, including LECs, wireless carriers, and

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reasonably comparable rates in terms of incumbent local exchange carrier rates only. Given the increasing number of consumers subscribing to voice services from alternative providers,[50] should the Commission look at the bundled rates of all types of providers? In addition, many providers offer "all distance" or unlimited nationwide calling plans.[51] In determining whether rates and services are reasonably comparable in rural and urban areas, should the Commission consider service bundles that include unlimited long distance calling? These popular service bundles provide predictability and cost savings to high-volume users,[52] but may not address the needs of consumers who make few long distance calls. Should the Commission also consider service bundles that include per minute rates or various "buckets" of minutes that may be popular with lower-volume users? We invite commenters to submit data on the rates and availability of bundled service offerings, identify sources of such data, and propose methods of analyzing such data.

20. We also seek comment on whether the Commission should require carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates. We note in this regard that if we define reasonably comparable rates in terms of bundled local and long distance services some (or none) of the components of those bundles will be regulated by the states. Would requiring carriers to provide such data assist the Commission in monitoring these rates over time so that the Commission can adjust its definition of reasonably comparable rates as the marketplace changes?

C. Maintaining the Current Non-Rural Mechanism on an Interim Basis

1. Cost-Based Support Mechanism

21. Because we believe that any proposed reforms to the non-rural high-cost support mechanism should be interim in nature, pending adoption and implementation of the National Broadband Plan, we tentatively conclude that the current non-rural funding mechanism should remain in place at this time, and seek comment on this tentative conclusion. We tentatively conclude that it is appropriate to

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cable operators. For example, large cable operators such as Comcast, Time Warner Cable and Cox typically charge the same rates for voice service without regard to whether they are operating in rural or urban areas. In areas served by these companies, there can be no doubt that rural rates and urban rates are comparable."); Comments of the New Jersey Division of Rate Counsel, WC Docket No. 05-337, CC Docket No. 96-45, at 7 (filed May 8, 2009) (New Jersey Rate Counsel NOI Comments) (noting that wireless carriers offer "nationwide" plans, and, therefore, offer inherently "reasonably comparable" rates in rural and urban areas, and that VoIP-based services similarly are typically offered at rates that do not distinguish between rural and urban areas); Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, CC Docket No. 96-45, at 16-17 (filed May 8, 2009) (Verizon NOI Comments) ("Wireless carriers and VoIP providers, in particular, offer competing voice services (usually in bundles of access and usage) in virtually all parts of the country utilizing national pricing plans, thereby ensuring reasonable comparability between urban and rural rates."); USTelecom NOI Comments at 5 ("It cannot be denied that these actual bundled rates are representative of urban rates and therefore any rural rates falling within the identified zone of urban rates should be considered reasonably comparable.").

[50] *See, e.g.*, Verizon NOI Comments at 17 n.17 ("Wireless minutes of use now eclipse wireline minutes of use."); J.D. Powers and Associates Reports: Bundling Video with Voice and Data Services Gives Cable Companies A Competitive Edge over Telephone Providers, July 11, 2007 (reporting that cable companies lead customer satisfaction rankings for telephone service in the all six U.S. regions for the first time).

[51] *See, e.g.*, NTCA NOI Comments at 8; USTelecom NOI Comments at 5 (suggesting "the Commission could consider rates for bundled, all-distance service offerings as the relevant rates for determining reasonable comparability"); Verizon NOI Comments at 17.

[52] *See, e.g.*, USTelecom Comments at 5 ("Distance is now irrelevant as the vast majority of consumers subscribe to bundled all distance plans. That is the standard offering for wireless, over the top VoIP and cable VoIP and is increasingly becoming the most popular service offerings by ILECs.").

distribute universal service support in high-cost areas based on estimated forward-looking economic cost rather than on retail rates, primarily because costs necessarily are a major factor affecting retail rates.

22. As the Commission has previously discussed, there are numerous reasons to believe that cost represents a reasonable proxy for the ability of carriers and state regulators to ensure that rural rates remain reasonably comparable.[53] In contrast, it makes little sense to base support on current retail rates, which are not independently determined but rather are the result of the interplay of underlying costs and other factors that are unrelated to whether an area is high-cost. Retail rates in many states remain regulated, and state regulators differ in their treatment of regulated carriers' recovery of their intrastate regulated costs. For example, some states still require carriers to charge business customers higher rates to create implicit subsidies for residential customers, while other regulators have eliminated such implicit subsidies in the face of increasing competition for business customers. Similarly, state regulators vary in the extent to which they have rebalanced rates by reducing intrastate access charges and increasing local rates. In addition, some states have ceased regulating local retail rates. Moreover, basing support on retail rates would create perverse incentives for state commissions and carriers to the extent that rate levels dictated the amount of federal universal service support available in a state. State commissions or carriers would have an incentive to set local rates well above cost simply to increase their states' carriers' federal universal service support. Similarly, where states have deregulated retail rates, carriers facing competition may have an incentive to raise certain local rates to increase their support rather than to cut rates to meet competition. We seek comment on the relative advantages and disadvantages of basing support on costs versus retail rates.

2. Forward-Looking Cost Model

23. In the *Remand NOI*, the Commission acknowledged that many of the inputs in the forward-looking economic cost model have not been updated since they were adopted a decade ago, and sought comment on the extent to which the Commission should continue to use its model in determining high-cost support without updating, changing, or replacing the model.[54] Virtually all commenters that addressed this issue argued that the model should be updated.[55] We agree that the model should be updated or replaced if a forward-looking cost model continues to be used to compute non-rural high-cost support for the long term. Not only are the model inputs out-of-date, but also the technology assumed by the model no longer reflects "the least-cost, most-efficient, and reasonable technology for providing the supported services that is currently being deployed."[56] The Commission's cost model essentially estimates the costs of a narrowband, circuit-switched network that provides plain old telephone service (POTS), whereas today's most efficient providers are constructing fixed or mobile networks that are capable of providing broadband as well as voice services.

24. We acknowledge that much progress has been made in developing computer cost models that estimate the cost of constructing a broadband network, such as the CostQuest model,[57] and we note that Commission staff has been working to develop an economic cost model to estimate the cost of

[53] *See, e.g.*, *Ninth Report and Order*, 14 FCC Rcd at 20453-54, paras. 36-38; *Order on Remand*, 18 FCC Rcd at 22572-73, para. 23.

[54] *Remand NOI*, 24 FCC Rcd at 4291-92, para. 24.

[55] *See, e.g.*, Comments of the Maine Public Advocate, WC Docket No. 05-337, CC Docket No. 96-45, at 20-25 (filed May 8, 2009) (Maine Public Advocate NOI Comments); Comments of the Rural Cellular Association, WC Docket No. 05-337, CC Docket No. 96-45, at 30 (filed May 8, 2009) (Rural Cellular NOI Comments); Comments of Vermont Public Service Board and Maine Public Utilities Commission, WC Docket No. 05-337, CC Docket No. 96-45, at 9-12 (filed May 8, 2009) (Vermont and Maine NOI Comments).

[56] *Universal Service First Report and Order*, 12 FCC Rcd at 8913, para. 250 (setting forth the Commission's criteria for forward-looking economic cost determinations for purposes of federal universal service support calculations).

[57] *Remand NOI*, 24 FCC Rcd at 4286-87, para. 12.

providing broadband services for purposes of the National Broadband Plan.[58] Nevertheless, we do not believe that we could adequately evaluate any existing cost model or develop a new cost model in time to meet our commitment to respond to the Tenth Circuit's remand decision by April 16, 2010. As the Commission noted in the *Remand NOI*, the Commission's current model was developed over a multi-year period involving dozens of public workshops,[59] and we expect that it would take a similar period to evaluate or develop a new cost model and to establish new input values. Moreover, we do not believe that it would be a productive use of Commission resources to attempt to update a model that estimates the cost of a legacy, circuit-switched, voice-only network, if the Commission ultimately decides to use a forward-looking cost model to estimate the cost of providing broadband over a modern multi-service network.[60] Accordingly, we tentatively conclude that we should continue to use the existing model to estimate non-rural support while these interim rules remain in place, pending the development of an updated and more advanced model or some other means of determining high-cost support for the long term. We seek comment on this tentative conclusion.

25. We also tentatively conclude that we should continue to determine non-rural support by comparing the statewide average cost of non-rural carriers to a nationwide cost benchmark set at two standard deviations above the national average cost per line on an interim basis. As discussed above, we tentatively conclude that any changes to the non-rural high-cost support mechanism should not result in substantial additional support.[61] Following from this tentative conclusion, we further tentatively conclude that we should not adopt the proposal of Vermont and Maine that the Commission use a cost benchmark of no more than 125 percent of cost, because this would increase significantly the overall amount of high-cost support for non-rural carriers.[62]

26. We also tentatively conclude that we should not modify our current mechanism to base support on average wire center costs per line. First, some of those proposing a shift to wire center costs, such as Qwest, would set thresholds in a manner that would result in a significant increase in the size of the fund.[63] Second, as previously discussed, the Commission's existing model estimates the costs of a

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[58] *See* Adam Bender, "'Massive' Economic Model Guiding FCC Broadband Deployment Recommendations," Communications Daily, Oct. 30, 2009, at 2-3; Lynn Stanton, "Broadband Plan Cost Model May Not Go Out For Comment Before February," TRDaily, October 29, 2009.

[59] *Remand NOI*, 24 FCC Rcd at 4292, para. 25.

[60] *See, e.g.*, AT&T NOI Comments at 35 n.65 ("If the Commission anticipates that the reformed non-rural high-cost support mechanism will only be used for a relatively brief period of time (i.e., until the transition to the Broadband Incentive Fund is complete), it may be prudent to continue using its existing cost model.").

[61] *See supra* para. 13.

[62] *See Remand NOI*, 24 FCC Rcd at 4285, para. 10.

[63] *See id.* at 4284-86, paras. 8-9, 11. Qwest's proposal also would substantially increase non-rural support, so we reject it for the same reasons we reject Vermont and Maine's proposal. Qwest suggests that that the Commission could limit the increase in non-rural high-cost support to approximately $322 million by providing non-rural high-cost support to ETCs in rural areas served by medium-size incumbent LECs, that is, excluding AT&T and Verizon. *See id.* at 4284-85, para. 9; Letter from R. Steven Davis, Senior Vice President – Federal Relations, and Shirley Bloomfield, Senior Vice President – Public Policy, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45, WC Docket No. 05-337, (filed May 5, 2008) (attaching Proposal for Implementing the Tenth Circuit's Remand in *Qwest II*), at 4-5, 26-27. Embarq proposes funding non-rural high-cost support, in part, with interstate common lines support and interstate access currently provided to competitive eligible telecommunications carriers. *See Remand NOI*, 24 FCC Rcd at 4286, para. 11 n. 37; Letter from David C. Bartlett, Vice President – Federal Government Affairs, to Chairman Kevin J. Martin, Commissioner Michael J. Copps, Commissioner Jonathan S. Adelstein, Commissioner Deborah Taylor Tate, Commissioner Robert M. McDowell, Federal Communications Commission, CC Docket No. 96-45, WC Docket No. 05-337 (filed Sept. 18, 2008) (attaching A Plan to Promote Broadband Deployment and Reform High-Cost Support Without Increasing Overall USF Levels), at 21.

narrowband, circuit-switched network that essentially provides only POTS, rather than the costs of the multi-service networks that providers are deploying today. If the Commission were to decide to calculate support on the basis of the per-line costs for a narrower geographic area (such as wire centers), we tentatively find that the Commission should do so based on an updated model, similar to the one being developed for purposes of the National Broadband Plan,[64] that incorporates the least-cost, most efficient technologies currently being deployed.

27. While we believe that there may be considerable merit in an approach that distributes high-cost support on a more disaggregated basis rather than on the basis of statewide average costs, we do not believe that the current version of the Commission's model is an appropriate tool to implement such an approach. Accordingly, we tentatively conclude that, until the Commission adopts an updated cost model, the non-rural high-cost support should continue to be based on statewide average costs. We seek comment on these tentative conclusions. Although we tentatively conclude that the proposals to change the non-rural mechanism should not be adopted in their entirety at this time, we seek comment on whether it might be feasible to adopt some elements of these or other proposals. We also seek comment on whether there are other interim adjustments that we should make to the non-rural mechanism that could be implemented quickly, through an order issued no later than April 16, 2010.

3. Current Non-Rural Mechanism Is Consistent with Section 254 Principles

a. "Sufficient"

28. As discussed above, we tentatively conclude that we should maintain the existing non-rural high-cost funding mechanism on an interim basis given the relationship between universal service support and the Commission's mandate under the Recovery Act to develop a plan for providing broadband throughout the nation. While the Commission is developing that plan and coordinating its requirements under both the Recovery and the Communications Act, we tentatively conclude that the program as currently constructed is consistent with the requirements in section 254 of the Communications Act. We seek comment on this tentative conclusion.

29. Section 254(e) of the Communications Act provides that federal universal service support "should be explicit and *sufficient* to achieve the purposes of [section 254]."[65] The Tenth Circuit held that the Commission did not adequately demonstrate how its non-rural universal service support mechanism was "sufficient" within the meaning of section 254(e).[66] In the non-rural context, the Commission previously had defined "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."[67] In *Qwest II*, the court noted, however, that "reasonable comparability" was just one of several principles that Congress directed the Commission to consider when crafting policies to preserve and advance universal service.[68] The court was "troubled by the Commission's seeming suggestion that other principles, including affordability, do not underlie federal non-rural support mechanisms."[69] "On remand," the court concluded, "the FCC must articulate a definition of 'sufficient' that appropriately considers the range of principles identified in the text of the statute."[70]

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[64] *See supra* para. 24.

[65] 47 U.S.C. § 254(e) (emphasis added).

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

[67] *Order on Remand*, 18 FCC Rcd at 22578, para. 30.

[68] *Qwest II*, 398 F.3d at 1234 (citing 47 U.S.C. § 254(b)).

[69] *Id.*

[70] *Id.*

30. Section 254(b) sets forth a number of principles upon which the Federal-State Joint Board on Universal Service (Joint Board) and the Commission should base universal service policies. These include: (1) "[q]uality service should be available at just, reasonable, and affordable rates;" (2) "access to advanced telecommunications and information services should be provided in all regions of the Nation;" (3) "low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications services 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 . . . in urban areas; (4) "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service;" (5) "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service;" and (6) "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services."[71] In addition, section 254(b) permits the Joint Board and the Commission to adopt "[s]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest . . .."[72]

31. In implementing section 254, the Commission, consistent with the recommendations of the Joint Board, created a number of different universal service support mechanisms that were targeted to address specific principles enumerated in section 254(b). Thus, for example, the Commission created a separate E-rate program to provide support to schools and libraries, and a rural health care mechanism to provide support for health care providers, and it expanded and modified the existing Lifeline and Link-up programs to assist low-income consumers.[73] The non-rural high-cost support mechanism, thus, is just one relatively small segment of the Commission's comprehensive scheme to preserve and advance universal service. In implementing section 254, the Commission did not attempt to address and advance each and every section 254(b) universal service principle in a single support mechanism, nor is there any indication that Congress intended the provisions to be implemented in this manner. Instead, the Commission crafted a variety of mechanisms that – collectively – address the section 254(b) principles. These mechanisms, taken together, advance all of the section 254(b) principles enumerated by Congress. For example, the Commission addressed the section 254(b)(6) principle that schools, libraries, and health care providers "should have access to advanced telecommunications services,"[74] by creating the E-rate program and the rural health care support mechanism. The Commission, therefore, did not need to address this principle in designing the various high-cost support mechanisms. In particular, the non-rural high-cost support mechanism was meant to ensure that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are reasonably comparable to rates in urban areas. Thus, the Commission believes that a fair assessment of whether the Commission has reasonably implemented the section 254 principles, and whether support is "sufficient," must encompass the entirety of universal service support mechanisms; no single program is intended to accomplish the myriad of statutory purposes. Moreover, the competing purposes of section 254 impose practical limits on the fund as a whole: if the fund grows too large, it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and requiring fair and equitable contributions from carriers. We seek comment on the foregoing analysis. We also seek comment on the principles the Commission

[71] 47 U.S.C. § 254(b).

[72] 47 U.S.C. § 254(b)(7). Based on the Joint Board's recommendation, the Commission established "competitive neutrality" as an additional principle upon which to base policies for the preservation and advancement of universal service. *See Universal Service First Report and Order*, 12 FCC Rcd at 8801-03, paras. 46-53.

[73] *See Universal Service First Report and Order*, 12 FCC Rcd at 8952-9133, paras. 326-685. The Fifth Circuit rejected a challenge to the Commission's schools and libraries program and parts of the rural health care program. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-46 (5th Cir. 1999).

[74] 47 U.S.C. § 254(b)(6).

should consider in designing the non-rural high-cost mechanism and in determining whether the level of support is "sufficient."

32. In *Qwest II*, the Tenth Circuit expressed specific concern that the Commission's non-rural mechanism may not be "sufficient" to advance the principle of *affordability*.[75] We seek comment on how we should assess whether the current non-rural high-cost mechanism advances this principle, particularly when considered in conjunction with the other universal service mechanisms (*e.g.*, the low-income mechanism). We note that the Commission's most recent report on telephone subscribership (released in December 2009) found that, as of July 2009, the telephone subscribership penetration rate in the United States was 95.7 percent – the highest reported penetration rate since the Census Bureau began collecting such data in November 1983.[76] Does the current high penetration rate demonstrate that our universal service programs are sufficient to ensure that rates are affordable? If not, what other data might the Commission consider in determining whether rates are affordable? Should it consider data on the percentage of income that consumers spend on local telephone service or other telecommunications services? Should it compare consumer expenditures on telephone or telecommunications services with consumer expenditures on other services, such as cable television service? Do such data confirm that rates are affordable?

33. As the Tenth Circuit has recognized, the Commission must sometimes "exercise its discretion to balance the principles" of section 254(b) "against one another when they conflict."[77] If the high-cost fund for non-rural carriers were to increase substantially, there emerges a tension between the principles of reasonable comparability and affordability. If the Commission dramatically increased the size of the non-rural fund to reduce rural rates to make them more comparable to the lowest urban rates, carriers serving other areas of the country would likely increase their rates to pay for the spike in their non-rural support contributions, making rates in those service areas less affordable. The court recognized the need for the Commission to balance the competing principles of comparability and affordability in the non-rural high-cost context.[78] The court held, however, that "the FCC has failed to demonstrate that its balancing calculus takes into account the full range of principles Congress dictated to guide the Commission in its actions."[79] For the reasons discussed above, we tentatively conclude that in designing its non-rural high-cost mechanism the Commission should principally balance the statutory principles of reasonable comparability and affordability of rates in areas served by non-rural carriers on the one hand with affordability of rates in other areas where customers are net contributors to universal service funding on the other. As the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently found when it upheld the Commission's interim cap on competitive eligible telecommunications carriers' support, the concept of "sufficiency" can reasonably encompass "not just affordability for those benefited, but fairness for those burdened."[80] We also tentatively conclude that a proper balancing inquiry must take into account our generally applicable responsibility to be a prudent guardian of the public's resources. We seek comment on these tentative conclusions.

34. The Tenth Circuit acknowledged that "excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)."[81] The

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[75] *Qwest II*, 398 F.3d at 1234 (emphasis added).

[76] Industry Analysis and Technology Division, Wireline Competition Bureau, *Telephone Subscribership in the United States* (December 2009).

[77] *Qwest I*, 258 F.3d at 1200.

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

[79] *Id.*

[80] *Rural Cellular Ass'n v. FCC*, 2009 WL 4722826, *6 (D.C. Cir. decided Dec. 11, 2009) (*Rural Cellular Ass'n*).

[81] *Qwest II*, 398 F.3d at 1234 (citing *Qwest I*, 258 F.3d at 1200).

Commission made a determination of necessary, but not excessive, support in crafting the interim universal service support rules that the Fifth Circuit upheld in *Alenco Communications, Inc. v. FCC*.[82] More recently, in upholding an interim cap on certain universal service funding, the D.C. Circuit stated that the Commission, in assessing whether universal service subsidies are excessive, "must consider not only the possibility of pricing some customers out of the market altogether, but the need to limit the burden on customers who continue to maintain telephone service."[83] Given the unprecedented level of telephone subscribership, we tentatively conclude that current subsidy levels are at least sufficient (and may be more than enough) to ensure reasonably comparable and affordable rates that permit widespread access to basic telephone service. We seek comment on this tentative conclusion.

35. We further tentatively conclude that the Commission's non-rural support mechanism is also consistent with the statutory principle that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."[84] The Commission's cost-based formula provides a specific and predictable methodology for determining when non-rural carriers qualify for high-cost support. We seek comment on this tentative conclusion.

36. Finally, we note that the non-rural high-cost mechanism currently does not directly address the principle that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation."[85] The Commission, however, is currently considering whether to extend universal service support to broadband services.[86] Such an expansion of the universal service program would help advance the goal of widespread access to advanced services in accordance with section 254(b)(2). We tentatively conclude that it would be premature to expand existing universal service programs at this time, before the National Broadband Plan has been issued. We seek comment on this tentative conclusion.

b. "Reasonably Comparable"

37. Section 254(b)(3) provides: "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."[87] In 2003, the Commission determined that rural rates were "reasonably comparable" if they fell within two standard deviations of the national average urban rate contained in the Wireline Competition Bureau's annual rate survey. In adopting this definition of "reasonably comparable," the Commission presumed that Congress believed that rural and urban rates were already "reasonably comparable" at the time the 1996 Telecommunications Act was passed, and that the Commission's task under section 254(b)(3) was to preserve existing levels of rate comparability.

38. In *Qwest II*, the Tenth Circuit rejected the Commission's definition of "reasonably comparable." The court noted that section 254(b) referred to "policies for the preservation *and*

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[82] *Alenco*, 201 F.3d 608.

[83] *Rural Cellular Ass'n*, 2009 WL 4722826, *6.

[84] 47 U.S.C. § 254(b)(5).

[85] 47 U.S.C. § 254(b)(2).

[86] *See A National Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342, 4354, para. 41 (2009) (*National Broadband Plan NOI*); *Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, GN Docket Nos. 09-47, 09,51, 09-137, Public Notice, DA 09-2419 (rel. Nov. 13, 2009).

[87] 47 U.S.C. § 254(b)(3).

advancement of universal service."[88] In the court's view, the statute's charge to "advance" universal service suggests that the Commission must do more than maintain existing rate differences. In particular, in the context of rate comparability, the court concluded that "the Commission erred in premising its consideration of the term 'preserve' on the disparity of rates existing in 1996 while ignoring its concurrent obligation to advance universal service, a concept that certainly could include a narrowing of the existing gap between urban and rural rates."[89] The court seemed concerned that, unless the Commission took action to reduce the existing variance in rates between rural and urban areas, rural rates would be too high to ensure universal access to basic service. "Rates cannot be divorced from a consideration of universal service," the court said, "nor can the variance between rates paid in rural and urban areas. If rates are too high, the essential telecommunications services encompassed by universal service may indeed prove unavailable."[90]

39. The Tenth Circuit noted that under the Commission's 2002 data, "rural rates falling just below the comparability benchmark may exceed the lowest urban rates by over 100%."[91] We tentatively conclude, however, that the statute does not require the Commission to make rural rates comparable to the "lowest urban rate," particularly when urban rates themselves vary considerably. Indeed, as the Tenth Circuit recognized, the Commission set its previous comparability benchmark at the national urban *average* plus two standard deviations because that benchmark "approaches the outer perimeter of the variance in urban rates."[92] Under the Commission's benchmark approach, rural rates receive "closer scrutiny" as they "approach the level of the highest urban rate."[93] The Tenth Circuit acknowledged that "there is a certain logic to this approach"; but it ultimately concluded that "the benchmark is rendered untenable because of the impermissible statutory construction on which it rests."[94]

40. We seek comment on how we should respond to the Tenth Circuit's concerns about reasonable comparability of rates. How should we evaluate whether the current non-rural high-cost mechanism is "advancing" universal service in satisfaction of section 254(b)(5)? Does the fact that telephone penetration rates have increased since we started our universal service programs demonstrate that "rates are" *not* "too high" under that program, since "essential telecommunications services encompassed by universal service" have *not* "prove[d] unavailable" but have in fact become more available?[95] Section 254(b)(3) requires that rates in rural, insular, and high cost areas be "reasonably comparable to those . . . in urban areas."[96] Given the variance in urban rates, does it make sense to interpret this statutory principle as requiring that *all* rural rates be no higher than the lowest urban rate? Would such an interpretation effectively result in the preemption of state rate-making authority? In addition, would such an interpretation of the statute result in a significant increase in the size of the fund that would unreasonably burden those contributing to the fund? In interpreting this statutory provision, should we instead compare the variance in rural rates to the variance in urban rates? Are there other ways to assess rate comparability?

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[88] 47 U.S.C. § 254(b) (emphasis added).

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

[90] *Id.* at 1236.

[91] *Id.* at 1237.

[92] *Id.*

[93] *Id.*

[94] *Id.*

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

[96] Recovery Act § 6001(k).

41. The court's criticism of the Commission's statutory construction appeared to stem from a concern that the Commission's non-rural mechanism was not doing enough to satisfy the statutory mandate to "advance" universal service. Is it reasonable to interpret the statute's directive to "advance universal service" as satisfied if the Commission extends universal service to new services and new technologies, such as broadband Internet access service? As discussed above, section 6001(k) of the Recovery Act directs the Commission to submit to Congress a National Broadband Plan.[97] The Recovery Act further requires that the plan "shall seek to ensure that all people of the United States have access to broadband capability,"[98] and that the plan include, *inter alia*, a "detailed strategy for achieving affordability of such [broadband] service and maximum utilization of broadband infrastructure and service by the public."[99] Do these provisions of the Recovery Act support such an interpretation?

IV. CONCLUSION

42. For the foregoing reasons, we tentatively conclude that we should not make fundamental changes to the non-rural high-cost support mechanism at this time. We seek comment on whether the Commission should define "reasonably comparable" rural and urban rates in terms of rates for bundled local and long distance services, and on whether the Commission should require carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

43. As required by the Regulatory Flexibility Act of 1980, as amended,[100] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this further notice, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this further notice. The IRFA is in the Appendix.[101] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the further notice. The Commission will send a copy of the further notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[102] In addition, the further notice and IRFA (or summaries thereof) will be published in the Federal Register.[103]

B. Paperwork Reduction Act Analysis

44. This document discusses potential new or revised information collection requirements. The reporting requirements, if any, that might be adopted pursuant to this further notice of proposed rulemaking are too speculative at this time to request comment from the OMB or interested parties under section 3507(d) of the Paperwork Reduction Act.[104] Therefore, if the Commission determines that reporting is required, it will seek comment from the OMB and interested parties prior to any such requirements taking effect.[105] In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we will seek specific comment on how we might "further reduce the information collection burden for

[97] *See supra* paras. 1, 12.

[98] Recovery Act § 6001(k)(2).

[99] *Id.*

[100] 5 U.S.C. § 603.

[101] *See* Appendix.

[102] *See* 5 U.S.C. § 603(a).

[103] *Id.*

[104] *See* 44 U.S.C. § 3507(d).

[105] Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995).

small business concerns with fewer than 25 employees."[106] Nevertheless, interested parties are encouraged to comment on whether any new or revised information collection is necessary, and if so, how the Commission might minimize the burden of any such collection.

C. *Ex Parte* Presentations

45. These matters shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[107] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[108] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[109]

D. Comment Filing Procedures

46. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[110] interested parties may file comments and reply comments regarding the further notice on or before the dates indicated on the first page of this document. All filings should refer to WC Docket No. 05-337. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's e-Rulemaking Portal; or (3) by filing paper copies.[111]

47. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs/ or the Federal e-Rulemaking Portal: http://www.regulations.gov.

48. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

49. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

50. Effective December 28, 2009, all hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington DC 20554.

51. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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[106] Small Business Paperwork Relief Act of 2002, Pub. L. No. 107-198, 116 Stat. 729 (2002); 44 U.S.C. § 3506(c)(4).

[107] 47 C.F.R. §§ 1.1200-1.1216.

[108] 47 C.F.R. § 1.1206(b)(2).

[109] 47 C.F.R. § 1.1206(b).

[110] 47 C.F.R. §§ 1.415, 1.419.

[111] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

52. Parties should send a copy of their filings to Katie King, Telecommunications Access Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-B544, 445 12th Street, S.W., Washington, D.C. 20554, or by e-mail to katie.king@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

53. Documents in WC Docket No. 05-337 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

VI. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 214, 254, and 403, and section 1.411 of the Commission's rules, 47 C.F.R. § 1.411, this further notice of proposed rulemaking IS ADOPTED.

55. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this further notice of proposed rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

56. IT IS FURTHER ORDERED, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 C.F.R. §§ 1.4(b)(1), 1.103(a), that this further notice of proposed rulemaking SHALL BE EFFECTIVE on the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice provided on the first page of the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. In section 254 of the Communications Act of 1934, as amended, Congress directed the Commission to preserve and advance universal service by ensuring, among other things, that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are "reasonably comparable to rates charged for similar services in urban areas."[4] In addition, section 254(e) provides that federal universal service support "should be explicit and sufficient to achieve the purposes of this section."[5]

3. Currently, the Commission's rules provide federal high-cost universal service support to non-rural and rural carriers under different support mechanisms.[6] Non-rural carriers receive support in states where the statewide average forward-looking cost per line for non-rural carriers exceeds a national cost benchmark.[7] To induce states to achieve the reasonably comparable rates that are required by the statute, the Commission requires states to review annually their residential local rates in rural areas served by non-rural carriers and certify that those rural rates are reasonably comparable to urban rates nationwide, or explain why they are not.[8] The Commission defined the statutory term "reasonably

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601–12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *Id.*

[4] 47 U.S.C. § 254(b)(3).

[5] 47 U.S.C. § 254(e). Similarly, section 254(b)(5) states that there "should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5).

[6] The term "non-rural carriers" refers to incumbent local exchange carriers that do not meet the statutory definition of a rural telephone company. *See* 47 U.S.C. § 153(37). Under section 153(37), rural telephone companies are defined as incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of three alternative criteria. *Id.* Thus, "non-rural carriers" are principally defined by study area size. Non-rural carriers serve the majority of access lines nationwide, including lines in rural, insular, and high-cost areas.

[7] *See* 47 C.F.R. §54.309(a)(3); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) (*Ninth Report and Order*), *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) (*Qwest I*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559 (2003) (*Order on Remand*), *remanded*, *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

[8] *See* 47 C.F.R. §54.316; *Order on Remand*, 18 FCC Rcd at 22601-14, paras. 70-92. In *Qwest I*, the court required the Commission on remand to develop mechanisms, a "carrot" or a "stick," to induce adequate state action to preserve and advance universal service. *See Qwest I*, 258 F.3d at 1204. In *Qwest II*, the court affirmed the portion

(continued...)

comparable" in terms of a national *rate* benchmark, which serves as a "safe harbor" in the rate review and certification process.[9] The national rate benchmark currently is set at two standard deviations above the average urban rate as reported in the most recent annual survey of local telephone rates published by the Wireline Competition Bureau.[10]

4. In *Qwest II*, the court held that the Commission relied on an erroneous, or incomplete, construction of section 254 of the Communications Act in defining statutory terms and crafting the funding mechanism for non-rural high-cost support.[11] 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 Communications Act and to define "reasonably comparable" in a manner that comports with the requirement to preserve and advance universal service.[12]

5. In the Further Notice, the Commission seeks comment on revising the non-rural high-cost universal service rules regarding the rate comparability review and certification process. Such action is necessary to respond to the decision of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) in *Qwest II*, in which the court remanded the Commission's rules for providing high-cost universal service support to non-rural carriers.[13] Specifically, the Commission seeks comment on whether it should define "reasonably comparable" rural and urban rates in terms of rates for bundled local and long distance services, rather than in terms of local rates only.[14] In addition, the Commission seeks comment on whether it should require carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates.[15]

B. Legal Basis

6. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 1, 2, 4(i), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 214, 254, 403 and section 1.411of the Commission's rules, 47 C.F.R. §§ 1.411.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

7. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[16] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[17] In addition, the term "small business" has the

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(...continued from previous page)
of the *Order on Remand* creating a mechanism to induce state action to assist in implementing the goals of universal service. *See Qwest II*, 398 F.3d at 1226, 1238.

[9] *See* 47 C.F.R. §54.316(b); *Order on Remand*, 18 FCC Rcd at 22582-89, 22607-10, paras. 38-48, 80-82.

[10] *See* 47 C.F.R. §54.316(b); Industry Analysis and Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service* (August 2008).

[11] *Qwest II*, 398 F.3d at 1226.

[12] *Id.* at 1237.

[13] *Qwest II*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

[14] *See* Further Notice, paras. 14-19.

[15] *See* Further Notice, para. 20.

[16] 5 U.S.C. § 604(a)(3).

[17] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[18] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[19]

8. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[20] According to Census Bureau data for 2002, there were 2,432 firms in this category, total, that operated for the entire year.[21] Of this total, 2,395 firms had employment of 999 or fewer employees, and an additional 37 firms had employment of 1,000 employees or more.[22] Thus, under this size standard, the majority of firms can be considered small.

9. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[23] According to Commission data, 1,311 carriers reported that they were incumbent local exchange service providers.[24] Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees.[25] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by our action.

10. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[26] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[27] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize

[18] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[19] 15 U.S.C. § 632.

[20] 13 C.F.R. § 121.201, U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," North American Industry Classification System (NAICS) code 517110.

[21] 13 C.F.R. § 121.201, NAICS code 517110.

[22] *See id.*

[23] 13 C.F.R. § 121.201, NAICS code 517110.

[24] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Aug. 2008) (*Trends in Telephone Service*).

[25] *See id.*

[26] 5 U.S.C. § 601(3).

[27] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); *see also* 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

11. Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[28] According to Commission data, 1,005 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[29] Of these 1,005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees.[30] In addition, 16 carriers have reported that they are Shared-Tenant Service Providers, and all 16 are estimated to have 1,500 or fewer employees.[31] In addition, 89 carriers have reported that they are Other Local Service Providers.[32] Of the 89, all 89 have 1,500 or fewer employees and none has more than 1,500 employees.[33] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by our action.

12. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.[34] Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of Paging and Cellular and Other Wireless Telecommunications.[35] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[36] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[37] For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[38] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[39] Thus, using the prior categories and the available data, we estimate that the majority of wireless firms can be considered small. Also, according to Commission data, 434 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR)

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[28] *See* 13 C.F.R. § 121.201, NAICS code 517110.

[29] *See Trends in Telephone Service* at Table 5.3.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See* 13 C.F.R. § 121.201, NAICS code 517210. 2007 Census data are not yet available.

[35] *See* 13 C.F.R. § 121.201, NAICS codes 517211, 517212.

[36] *See* 13 C.F.R. § 121.201, NAICS code 517211.

[37] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1,000 employees or more."

[38] *See* 13 C.F.R. § 121. 201, NAICS code 517212.

[39] *See id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1,000 employees or more."

Telephony services, which are placed together in the data.[40] We have estimated that 222 of these are small, under the SBA small business size standard.[41] Thus, under this category and size standard, approximately half of firms can be considered small.

13. *Broadband Personal Communications Service.* The broadband personal communications service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[42] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[43] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[44] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[45] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

14. *Narrowband Personal Communications Services.* To date, two auctions of narrowband PCS licenses have been conducted. For purposes of the two auctions that have been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.*[46] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small

[40] *See Trends in Telephone Service* at Table 5.3.

[41] *See id.*

[42] *See generally Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); *see also* 47 C.F.R. § 24.720(b)(1).

[43] *See generally Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824 (1996); *see also* 47 C.F.R. § 24.720(b)(2).

[44] *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

[45] *See* FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. Jan. 14, 1997). *See also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (1997).

[46] *See generally Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456 (2000).

business size standards.[47] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's rules.[48] The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

15. *Wireless Telephony.* Wireless telephony includes cellular, PCS, and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for wireless services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 434 carriers reported that they were engaged in the provision of wireless telephony.[49] We have estimated that 222 of these are small under the SBA small business size standard.[50]

16. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively.[51] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

17. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[52] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[53] As noted, the SBA has determined a small business size standard applicable to wireless entities, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service,

[47] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

[48] *See* 47 C.F.R. § 24.321(a).

[49] *See Trends in Telephone Service* at Table 5.3.

[50] *See id.*

[51] *See* 47 C.F.R. § 90.814(b).

[52] *See* 47 C.F.R. § 22.99.

[53] *See* 47 C.F.R. §§ 22.757, 22.759.

and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

18. As discussed above, the Further Notice seeks comment on whether it should define "reasonably comparable" rural and urban rates in terms of rates for bundled local and long distance services, and on whether the Commission should require carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates.[54] Under the Commission's current rules, states are required to review annually their residential local rates in rural areas served by non-rural carriers and certify that those rural rates are reasonably comparable to urban rates nationwide, or explain why they are not.[55] If the Commission were to define reasonably comparable rates in terms of bundled local and long distance services, the states would not have jurisdiction over some (or all) of the components of those bundles. Accordingly, the Further Notice seeks comment on whether the Commission's rate review and certification rules also should apply to non-rural carriers, and whether such data would assist the Commission in monitoring these rates over time so that the Commission can adjust its definition of reasonably comparable rates over time.[56] We do not have an estimate of potential compliance burdens, but anticipate that commenters will provide the Commission with reliable information on any costs and burdens on small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

19. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.[57]

20. As discussed above, the Further Notice seeks comment on whether the Commission should amend its rate review and certification rules to require non-rural carriers to certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates,[58] which, if adopted, may impose a reporting, record keeping, or other compliance burden on some small entities. We anticipate that the record will reflect whether the overall benefits of such a requirement would outweigh the burdens on small entities, and if so, suggest alternative ways in which the Commission could lessen the overall burdens on small entities. We encourage small entity comment.

F. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules

21. None

[54] *See* Further Notice, paras. 14-20.

[55] *See* 47 C.F.R. §54.316.

[56] *See* Further Notice, para. 20.

[57] *See* 5 U.S.C. § 603(c).

[58] *See supra* para. 18.

CONCURRING STATEMENT OF COMMISSIONER ROBERT M. McDOWELL

Re: *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Earlier this year, the Commission committed in this matter to the following schedule: to release a notice of inquiry no later than April 8, 2009, to issue a Further Notice of Proposed Rulemaking (FNPRM) no later than December 15, 2009, and to release a final order no later than April 16, 2010. By meeting the first and now the second deadline, the Commission is keeping up with its procedural commitments in this matter. I am concerned, however, that the substance of this FNPRM does not go far enough to answer some of the court's fundamental questions regarding the non-rural high-cost mechanism.

I recognize that the FNPRM cites the upcoming (and intervening) National Broadband Plan deadline of February 17, 2010, as the reason that the Commission does not use this FNPRM as an opportunity to explore reform options. Nevertheless, I do not think that the Commission's work on the National Broadband Plan should foreclose the Commission from exploring a variety of reform ideas in this matter. In the meantime, I look forward to working with my colleagues, and all stakeholders, in fashioning meaningful and comprehensive Universal Service reform as expeditiously as possible. Thus, I respectfully concur.

STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45.

If there is one familiar refrain heard in the halls of the Commission, as well as in the halls of Congress, it is that the Universal Service Fund is in dire need of an overhaul. Such an overhaul, by definition, cannot be effectuated by one or two small changes. Rather, we must examine each of the interlocking pieces in order to develop a stronger, more effective Fund. The Commission must ensure that all U.S. consumers—no matter where they live— have access to affordable communications services, including broadband.

Fortunately, we are on our way to accomplishing this goal. As part of our work on the National Broadband Plan, our broadband team is conducting a top-to-bottom review of the Fund with an eye toward making meaningful recommendations about exactly how the Commission should approach comprehensive reform. We have an opportunity to make real progress at this time in order to assure the effectiveness of this essential service. I agree that we must issue this FNPRM to address the concerns of the 10th Circuit regarding our current universal service rules, and we must not lose sight of the bigger picture. It is crucial that the Commission immediately turn to the task of addressing wholesale reform of the Fund upon the release of the National Broadband Plan.

CONCURRING STATEMENT OF COMMISSIONER MEREDITH A. BAKER

Re: *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

I have long felt strongly that the Universal Service Fund is well overdue for a comprehensive overhaul, in light of significantly changed circumstances in the communications marketplace. For now, however, we must work within the fund that we have, and we must address a remand related to the existing non-rural high-cost universal service support mechanism. I support our efforts to release this Further Notice of Proposed Rulemaking in a timely manner to comply with the Commission's commitments in the course of the Tenth Circuit appeals.

I concur today, however, because I am concerned about whether the tentative conclusions in this item, if ultimately adopted, fully satisfy the concerns of the court. We have committed to address this remand by April 2010, and I expect that the non-rural high-cost mechanism will be considered as part of comprehensive reform as well. I hope a robust record will be developed, and I look forward to supporting an order in this proceeding that both resolves the court's concerns and makes sense in light of the National Broadband Plan.

I am encouraged that the item states our intent to move forward with comprehensive reform in the wake of the National Broadband Plan, and I look forward to working with my Commission colleagues to develop a thoughtful, practical, and pragmatic universal service program that is appropriately tailored for the future of communications.