Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Reducing Universal Service Support In Geographic Areas That Are Experiencing Unsupported Facilities-Based Competition	)))	RM-11584

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION PETITION FOR REDUCING HIGH-COST UNIVERSAL SERVICE SUPPORT

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January 22, 2010

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I. INTRODUCTION

On November 5, 2009, the National Cable & Telecommunications Association ("NCTA") filed a Petition with the Federal Communications Commission ("FCC" or "Commission"), which the Commission has assigned Docket No. RM-11584. The Petition requested the Commission to "establish procedures to reduce the amount of universal service support provided to carriers in those areas of the country where there is extensive, unsubsidized facilities-based voice competition and where government subsidies no longer are needed to ensure that service will be made available to consumers."[1] The Commission has put the Petition out for public comment.[2] Twenty-four sets of comments were filed.

II. SUMMARY OF NASUCA'S POSITION

The National Association of State Utility Consumer Advocates ("NASUCA")[3] had indicated tentative support for the Petition in comments filed on National Broadband Plan Public Notice No. 19 regarding the interfaces among the National Broadband Plan, universal service support and intercarrier compensation.[4] In the over-used phrase,

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[1] Petition at i.

[2] Public Notice DA 09-2558 (rel. December 8, 2009)

[3] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[4] NASUCA Comments (December 7, 2009) at 4, 13, 18, 20-21.

however, "the devil is in the details," and after further review of the Petition and of the initial comments, although NASUCA supports many of the principles behind the Petition, our support for the Petition itself must be significantly qualified.

First, although NASUCA generally supports the second prong of NCTA's test ("Trigger 2") that support should not be necessary where states have substantially deregulated local service rates,[5] there remain questions about the level of price-deregulation that should trigger the test. And there must be a fall-back protection if the state action creates substantial risk for universal service.

With regard to the first prong of NCTA's test ("Trigger 1"), however, there may be superficial attractiveness in the Petition's statement that

> [t]he Commission's high-cost support mechanisms are premised on the assumption that a particular location would not have affordable service available but for the support provided by the program. But in markets with extensive facilities-based competition, that assumption no longer holds true. The presence of one or more unsubsidized wireline competitors generally should be sufficient to ensure that consumers will have access to reasonably priced service even if government subsidies are reduced or eliminated.[6]

Yet beyond the question of whether the presence of a single facilities-based competitor represents true competition (rather than a duopoly), the key issue is that the "competition" from the typical cable provider is usually provided by bundles of services,

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[5] NCTA Petition at 14-17.

[6] Petition at i.

both bundles of telecommunications services[7] and bundles of telecommunications services with information and video services. The ILEC services supported by the federal high-cost fund are not bundled services: They are the stand-alone basic services defined by the FCC in 47 C.F.R. § 54.401. The fact that cable companies provide competition for ILEC bundles does not mean that there is competition for this basic service.

NASUCA has previously stated that:

> On many occasions NASUCA has proposed measures to ensure that the mechanism meets its statutory purpose: that telecommunications services in rural areas – and especially the rates for those services – are reasonably comparable to those in urban areas. NASUCA believes that, in many respects, the current high-cost mechanism is unnecessarily large, and can be substantially reduced even while the statutory goal is met. … Elimination of support where it is not necessary would free up high-cost funds for other purposes, like broadband deployment.[8]

NCTA's Trigger 1 appears to be far too blunt a tool to accomplish the necessary reductions in excess funding.

Other higher priority solutions would include the elimination of the identical support rule, which essentially subsidized competition.[9] The Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO") also notes

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[7] To the extent that these services are provided using Internet protocol, there is of course the continuing debate created by previous Commission orders over whether these services are in fact "telecommunications services" or are "information services." NASUCA firmly believes that most of the services NCTA is referring to in its Petition as competitive are telecommunications services, and NCTA's entire argument falls apart if that is not true.

[8] NASUCA NBP Notice # 25 Comments at 4 (footnote omitted). See AT&T Comments at 10-12. Where there is a real need for additional support, such as that demonstrated by the longstanding request from Wyoming, additional support should be provided.

[9] See NCTA Petition at 12-14. AS NCTA's proposed rule states, the "support" being referred to is **all** high-cost support, that is "Subpart D (High-Cost Fund), Subpart J (lAS), or Subpart K (ICLS)…." Id., Attachment A at 1. Despite the claims of some – see, e.g., Qwest Communications International Inc. ("Qwest) at 3 – none of the piece-parts of the high-cost fund should be exempted from a review to determine whether they are necessary.

some actions that should be higher priority than NCTA's rulemaking.[10] Despite the appearance that the NCTA's Trigger 1 is focused on ensuring that support goes only to those areas where there is no unsupported competition, the "competition" referred to is not really competition for the basic, currently-supported service.

III. SUMMARY OF THE INITIAL COMMENTS

Unsurprisingly, comments were filed by smaller incumbent rural carriers whose support would be threatened, including organizations like Independent Telephone & Telecommunications Alliance ("ITTA"); National Exchange Carrier Association ("NECA")[11]; National Telecommunications Cooperative Association ("NTCA"); OPASTCO[12]; the Rural ILEC Associations, Texas Statewide Telephone Cooperative, Inc.; the Washington Independent Telecommunications Association, the Oregon Telecommunications Association and the Colorado Telecommunications Association; and the Western Telecommunications Alliance ("WTA"). Comments in opposition were also filed by individual companies like Pioneer Communications, Inc. ("Pioneer").[13]

Among the larger incumbent carriers, positions were mixed: CenturyLink and

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[10] OPASTCO Comments at 2.

[11] NECA asserts that the NCTA Petition addresses rate-of-return carriers (NECA Comments at 1); the Petition also addresses price-cap carriers.

[12] OPASTCO asserts that NCTA's proposal would threaten ubiquitous broadband deployment. OPASTCO Comments at 2; see also WTA Comments at 2; NTCA Comments at 3-4. Once again, carriers that have received high-cost funds supposed to support only the voice services authorized under the current high-cost USF, that have used those funds to created broadband-based networks, confuse their right to such support. See generally, NTCA Comments. As NASUCA has argued, once the Commission officially defines broadband as a supported service, and creates a separate fund to support broadband deployment, the OPASTCO arguments will lose their force.

[13] Also consulting firms that serve small ILECs, like Alexicon Telecommunications Consulting and GVNW Consulting. Alaska Communications Systems ("ACS") essentially takes no position on the Petition other than to support NCTA's exemption of tribal lands from its proposal. ACS Comments at 1.

Windstream Communications, Inc. ("Windstream") support their "Broadband Now" proposal, which CenturyLink says will accomplish the end of moving support away from areas where NCTA members have deployed cable.[14] Qwest, itself having sought significant additional amounts of federal support,[15] nonetheless supports a rulemaking to consider a process for eliminating support in areas with unsupported wireline competition.[16] Windstream also identifies this as a problem.[17] AT&T Inc. ("AT&T") says it supports "wring[ing] savings" from the high-cost fund, but opposes NCTA's petition.

Opposition also comes from the Rural Cellular Association ("RCA"), Rural Independent Competitive Alliance ("RICA"), and the USA Coalition,[18] whose members might lose support under the proposal because of the removal of the support they receive that is identical to the ILEC support being challenged by NCTA. Sprint Nextel Corporation ("Sprint"), on the other hand, agrees with NCTA in many respects, but does not explicitly support the Petition, instead suggesting "additional steps" for the

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[14] CenturyLink Comments at ii. "Broadband Now" was also proposed by Consolidated Communications, Frontier Communications, and Iowa Telecommunications (being acquired by Windstream). This is not the place to respond to this broad proposal; NASUCA hopes to provide some response in the reply comments on the National Broadband Plan ("NBP") permitted by NBP Public Notice No. 30 (DA 10-61, rel. January 13, 2010).

[15] See, e.g., 96-45/05-337, Qwest ex parte (May 5, 2008); see id., NASUCA Comments on the Notice of Inquiry (May 8, 2009), at 54-60.

[16] Qwest Comments at 1.

[17] Windstream Comments at 2.

[18] The USA Coalition curiously asserts that the facilities-based competition NCTA points to may be based on implicit subsidies. USA Coalition Comments at 12. Rejecting the idea of eliminating ILEC explicit support because of the possibility of implicit support within a cable company stretches Congressional intent almost beyond recognition.

Commission to take.[19] Wireless carrier NTCH, Inc. ("NTCH") supports NCTA, but suggests that NCTA "does not go far enough…."[20]

Cable companies like Charter Communications, Inc. ("Charter"), Comcast Corporation ("Comcast") and Time Warner Cable Inc. ("TW Cable") – also understandably – support NCTA's petition. Unfortunately, these commenters provide little additional factual support for the petition. So we are left with a typical division among industry members, which does not bode well for any sort of expedited rulemaking in this area.

IV. THE NCTA PETITION DOES NOT AUTOMATICALLY REDUCE SUPPORT.

Despite the claims of some, the process describes by the NCTA does not inevitably or automatically deprive an ILRC of high-cost support.[21] NCTA's process would allow a carrier to prove that support was needed before it was actually lost.[22] And we understand NCTA's proposal to require disaggregation and recalibration of support for the non-competitive areas.[23]

Yet the process as proposed is problematic because of difficulties with the triggers

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[19] Sprint Comments at ii. On review, it appears that the steps are far more numerous than the two identified by Sprint. See id. at 15-18 (demand stimulation for broadband); 18-20 (directing USF support to targeted individuals); and 22-28 (intercarrier compensation and special access reform. Sprint would also have the Commission fix the problems of applying a numbers-based USF contribution mechanism to low-use prepaid wireless customers. Id. at 20-22. NASUCA agrees that such would be necessary under a numbers-based contribution mechanism, which is one of the many reasons NASUCA opposes such a mechanism. Yet Sprint's focus on universal subscribership (id. at 4) ignores the affordability and reasonable comparability goals of § 254.

[20] NTCH Comments at 1.

[21] See AT&T Comments at 2.

[22] NCTA Petition at 17-20.

[23] See AT&T Comments at 9.

a party could raise in order to require the recipient to show that the support was needed. These are more fully described below.

V. ISSUES REGARDING "TRIGGER 2": THE EXISTENCE OF DEREGULATED RATES

NASUCA has previously supported the position inherent in Trigger 2, on the basis that where a state has deregulated its rates – leaving the rates to be set at the whim of the telephone company – there is little basis on which the state can certify that the rates of the services designated for universal service support are affordable and reasonably comparable to urban rates,[24] or, more precisely, **that the rates would be unaffordable or no longer reasonably comparable in the *absence* of federal high-cost support**. As NCTA states,

> Where a state has made such a finding and deregulated local exchange service provided by the ILEC (*whether provided on stand-alone basis or as part of a bundled offering*), the fundamental premise for providing a government subsidy is thrown into doubt and a process for reducing, if not eliminating completely, high cost support for the ILEC should be initiated.[25]

NASUCA would strongly differ, however, with the emphasized language: If a state has deregulated bundled rates, but maintained regulation for stand-alone basic service, then there is much less reason to question whether the support is necessary.[26]

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[24] 47 U.S.C. § 254(c).

[25] NCTA Petition at 14 (emphasis added).

[26] Sprint proposes a whole new test for whether support is needed. Sprint Comments at 13. This is not the place for a response to this radical proposal.

Where a state has deregulated its basic service rates,[27] customers in other states should no longer be required to support the rates subject to the deregulated rate structures. The elimination of support for areas with deregulated rates has also been proposed by others in the industry – most notably AT&T.[28] NCTA provides examples, including states served by AT&T, where the state has deregulated rates.[29]

ITTA argues that support is necessary even where rates have been deregulated because of the COLR obligation.[30] But that deregulation should allow the COLR carrier to recover its COLR costs from its own rates and customers, rather than requiring customers of other companies and in other states to pay for that obligation.

Yet situations may develop in which state deregulation of rates and the elimination of high cost fund support results in rates that are unreasonably high relative to urban rates. In this event it will be incumbent upon states and the Commission to take action to ensure that rates are just and reasonable, affordable and reasonably comparable. But because the primary responsibility for the deregulation lies with the states, it should

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[27] NCTA's proposed rule says that "rates will be considered deregulated if there is no regulation of the rate charges for local exchange service offered on a stand-alone basis…." (Petition , Attachment A at 1-2), which seems circular. NASUCA would view deregulated rates as those that do not require any approval by the state commission, whether or not they are tariffed. Situations where the amount of increases are capped, or increases are allowed within a band, are closer questions. (The lack of rate regulation of telecom cooperatives – e.g., WTA Comments at 16 – should be viewed as an exception.)

[28] 05-337/96-45, AT&T Comments on Notices of Proposed Rulemaking (April 17, 2008) at 22.

[29] NCTA Petition at 15-16. AT&T quibbles with the extent of that deregulation, but appears to focus on whether there are competitive tests that precede the deregulation. AT&T Comments at 9. This really doesn't matter for the question of whether support is still needed *where the tests are passed*. And contrary to the arguments of others (e.g., RICA at iv) the deregulation of rates is not intended to be proof of the existence of competition; instead, it removes the basis for requiring other customers to support the deregulated rates.

[30] ITTA Comments at 13.

be the state that has primary responsibility to correct this situation; consumers in other states should not be required to bear the burden of correcting the state's actions.

It should be obvious that NCTA's second prong (or "Trigger 2," regarding the existence of deregulated rates) does not contain a requirement for showing a competitive option in the geographic area under review. In that respect, it will be difficult to show the "ILEC costs that … would not be incurred but for the provision of service to customers that do not have a competitive option…."[31] Rather, the showing would be "of the ILEC costs that cannot be recovered through rates for the services (regulated and unregulated) provided over the network in the portion of the study area with no competition" **for the entire area**. This refinement needs to be made for the second phase of the NCTA test to reflect the reality of the first phase of the test.

VI. ISSUES REGARDING TRIGGER #1 (THE EXISTENCE OF FACILITIES-BASED COMPETITION)

As noted above, NASUCA's primary concern with NCTA's proposal that the existence of non-supported facilities-based competition require the recipient of support to justify that receipt is that the "competition" typically provided by, e.g., cable companies, is **not** competition for the supported basic service provided by the ILEC. The cable companies and other providers are not required to offer stand-alone basic service,[32] and are certainly not required to offer it at affordable regulated[33] rates.

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[31] NCTA Petition at 17 (emphasis added).

[32] See, e.g., Windstream Comments at 12.

[33] Where the ILECs' basic service rate is deregulated, the implications of Trigger 2 (discussed above) take precedence over the competitive issues discussed here.

This makes AT&T's claim (purporting to agree with NCTA) that "in areas with competition, [carrier of last resort] COLR obligations are unnecessary to ensure that consumers have access to competitively-priced, high quality services"[34] essentially illusory. The competition referred to must be competition for stand-alone basic service, not for some multi-featured bundle.

If a facilities-based competitor that does not receive support **does** offer stand-alone basic service, **and** that service is provided at a rate that is competitive with the ILEC's stand-alone basic service, **and** that service is offered throughout the ILEC's territory, then the issue of whether the ILEC's support is really needed is a significant one. It is doubtful, however, whether these conditions are met in many places throughout the country. If even one of these conditions is not met, then removal of support may prove problematic.[35]

Another concern that is glossed over by the proposal is that, as acknowledged by NCTA, the "competition" may not exist throughout the study area under review.[36] Currently, as many of the carriers acknowledge, support is averaged across study areas.[37] Under NCTA's proposal, support would be denied in the portion of the study area where there is competition (as NASUCA asserts here, that "competition" must be for stand-

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[34] AT&T Comments at 7; see also Sprint Comments at 6.

[35] This makes Sprint's proposal that the "Commission simply determine that in areas with facilities-based competitors, no USF support is necessary" (Sprint Comments at 14) simplistic in the extreme.

[36] Although NCTA supplied a study that purported to show that cablecos do in fact serve large portions of study areas, many of the comments cast serious doubt on the results of the study. NECA Comments at 3-13; WTA Comments at 8-11; Windstream Comments at 8-12. The number of counter-examples provided indicates, at the very least, that the NCTA process may not be very effective in identifying areas where there is fairly ubiquitous unsupported competition, in order to eliminate support in those areas.

[37] See, e.g., WTA Comments at 20.

alone basic service), and may be awarded in the areas where there is no competition.[38] There is no assurance, however, that the total support that would be required in the non-competitive higher-cost areas in order to keep rates affordable and reasonably comparable is less than the support being currently provided.[39]

Although NCTA downplays the issue, the ILEC still retains COLR obligations in the areas where there is competition – obligations that the competitor cable companies are not required to meet.[40] NCTA does not consider how the costs of that obligation are to be met in the areas where support is to be withdrawn. One way, of course, would be for the ILEC to recover those revenues by increasing the rates for the stand-alone basic service to levels that are unaffordable or no longer reasonably comparable to urban rates.[41] This would harm universal service, but would likely help the competing cableco by making its bundled prices seem more reasonable.

Finally, NASUCA questions whether, for larger and non-rural carriers in particular, an entire study area is the appropriate or necessary unit for analysis. Rural carriers – at least the smaller rural carriers -- tend to have small contiguous study areas.

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[38] NASUCA does not agree with ITTA that under the NCTA proposal only facilities actually located in the non-competitive areas would be able to be supported. See ITTA Comments at 8, 9.

[39] NECA Comments at 18-20. Although NASUCA seldom agrees with AT&T, this is one issue where we are apparently in accord. See AT&T Comments at 5-6.

[40] See NECA Comments at 16-18. In addition, to the extent that cable providers seek or are able to avoid state service quality regulation – perhaps by asserting some exemption for Voice over Internet Protocol ("VoIP") service, this is another service differential that does not benefit consumers. See also WTA Comments at 11 (cablecos avoiding common carrier regulation). Thus Sprint's assertion that the current USF "excludes cable providers" (Sprint Comments at 4) is a falsehood; if a cableco were able and willing to meet the obligations of being an eligible telecommunications carrier ("ETC") (which includes a COLR responsibility), then a cable provider could get high-cost funding.

[41] This would be mitigated if the attempt to increase rates were required to consider all of the revenues that the ILEC receives, not just those from basic service and the USF, as proposed by NCTA for the "non-competitive" areas. See NCTA Petition at 18. Thus AT&T's assertion that the ILEC would be unable to increase its rates to make up for the loss of support (AT&T Comments at 3) is misleading..

Non-rural carriers' study areas tend to encompass entire service territories within a state, and larger rural carriers' study areas also tend to be diverse. Thus the chances of either the competitive test or the "similarity-of-cost-characteristics" test being met for the entirety of a study area do not appear to be high. The Commission should consider whether, as a flipside to the incumbent carriers' urging that support be determined on a wire-center basis,[42] **removal** of support should also be considered on a more granular basis.

VII. THE COSTS AND REVENUES THAT SHOULD BE CONSIDERED IN DETERMINING WHETHER SUPPORT IS NEEDED.

NASUCA disagrees with NCTA that the only costs that will need to be considered in evaluating whether support is needed are loop costs.[43] Contrary to NCTA, as shown by the rural incumbent carriers,[44] switching and overhead costs must be attributable to the non-competitive area, and cannot simply be allocated to (or dumped on) the competitive portions of a study area.

Further, given the structure of NCTA's test – where the examination will be of areas where there has been no demonstration of competition[45] – carrier-of-last resort ("COLR") costs and issues are highly relevant. As NASUCA stated in the NBP Notice No. 25 comments,

> The COLR responsibility imposed by tradition and sometimes by state law, typically on incumbent carriers, is the one key justification for

[42] NASUCA continues to support awarding support to non-rural carriers based on statewide average costs.

[43] NCTA Petition at 18. (This assumes that a properly-constructed competitive test is used.)

[44] See, e.g., WTA Comments at 14.

[45] Especially where the petition is based on deregulated rates, rather than on the existence of facilities-based wireline competition.

> continuing universal service support. But that COLR responsibility is, perhaps without exception, focused on traditional voice service.[46]

Only COLR costs in non-competitive areas should be considered for support. As NCTA states,

> It is important to distinguish between the costs attributable to POLR requirements and the costs of operating in a competitive marketplace. In an area where a cable operator or other unsubsidized wireline competitor has built facilities and offers voice services, each providers' cost of operating and maintaining facilities is a cost attributable to *competition.* For example, any suggestion that the only reason an ILEC would maintain its facilities in a competitive area is because of a POLR obligation is based on a warped view of how competitive markets operate.[47]

On the other hand, the use of "rates for the services (regulated **and** unregulated)"[48] for comparison to the costs of providing service, in order to determine whether there needs to be support, is entirely appropriate.[49] (Actually, it should be the **revenues** from those services that are considered.) As incumbent and other carriers have continually pointed out, modern networks are multi-use networks; the assumption that a network will be providing only the basic service currently supported by the high-cost fund is simply unrealistic.[50] WTA states, "The typical WTA member relies upon high-cost support from the federal USF program for approximately 30-to-40 percent of its *regulated* revenue stream."[51]

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[46] NASUCA NBP Notice No. 25 Comments at 20-21.

[47] NCTA Petition at 19 (emphasis in original).

[48] Id. at 20 (emphasis added).

[49] See Sprint Comments at 11-13. Sprint's apparently new more-detailed proposal for dealing with this issue (id. at 7-10) should be presented in a forum more conducive to detailed response.

[50] See WTA Comments at 9-10. And if the supported services are expanded to include broadband, the assumption will be even more unrealistic if not totally illogical.

[51] See id. at 5 (emphasis added).

VIII. CONCLUSION

As noted above, the ideas behind NCTA's proposal seem to make sense. But the implementation would be difficult,[52] and many of the details behind the proposal may result in harm to the consumers who are protected by the current high-cost fund. Thus there is no pressing need for a separate rulemaking on the NCTA Petition; these issues are better accomplished in the Commission's more generic USF proceedings.[53]

Respectfully submitted,

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[52] NASUCA is sympathetic to ITTA's concerns that implementation would create an "administrative morass…" ITTA Comments at 16; see also NECA Comments at 22-25, NTCA Comments at 20-21.

[53] This includes the review of the high-cost fund for non-rural carriers. AT&T, among others, asserts that the non-rural fund must be better targeted, and points to the Tenth Circuit's two rejections of the non-rural high-cost fund. This argument ignores that "lack of targeting" was not one of the grounds on which the Tenth Circuit rejected the Commission's non-rural high-cost rules.