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

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

COMMENTS OF RURAL CELLULAR ASSOCIATION

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SUMMARY

Delays in the Commission's scheduled submission of its National Broadband Plan to Congress are now forcing it to take only interim action in addressing concerns expressed by the U.S. Court of Appeals for the Tenth Circuit in its *Qwest II* decision regarding the non-rural universal service support mechanism. Nonetheless, Rural Cellular Association believes that the Commission's focus should continue to be on the issues and principles that will shape comprehensive universal service reform. RCA addresses several of these issues and principles in these Comments, in response to the Commission's *Further Notice of Proposed Rulemaking*.

The Non-Rural Support Mechanism.—The Commission should take steps to ensure that the non-rural support mechanism both preserves and advances universal service, by making support fully portable between funding recipients, by targeting support as accurately as possible, and by promoting competitive entry in areas supported by non-rural high-cost funding. The Commission also should base support on a forward-looking economic cost model and should use a cost benchmark of no more than 125 percent of the national urban average as the basis for non-rural support.

Sufficiency and Affordability.—It may make sense, as the Commission argues, to determine "sufficiency" by balancing the needs of consumers in rural and high-cost areas against the level of universal service contributions assessed to carriers and the overall affordability of nationwide rates for telecommunications services. But RCA is concerned about the way the Commission might undertake this balancing process. RCA urges the agency to consider effective steps to limit fund growth (such as requiring full portability of funding and using forward-looking economic cost instead of embedded cost to calculate support) that will not threaten to undermine the preservation and advancement of universal service.

RCA also believes that the Commission's tentative proposal to rely on the overall level of subscribership penetration as a barometer for evaluating the sufficiency of support mechanisms and the affordability of rates is ill-considered. For example, there is no obvious nexus between the level of subscribership penetration rates and the reasonable comparability of rural and urban rates and services, nor does it seem that the Commission's resting on the laurels of what it calls "unprecedented" levels of telephone subscribership is the best way for the agency to meet its statutory responsibility to advance universal service.

Reasonable Comparability of Rates and Services.—The Commission should use a benchmark of no more than 125 percent of the national urban average as the basis for measuring rate comparability, because such a benchmark will tend to reduce the gap between rural and urban rates, thus responding to concerns expressed by the Tenth Circuit.

The Commission must also recognize that Section 254 of the Communications Act of 1934 (as added by the Telecommunications Act of 1996) requires not only rate comparability, but also comparability between rural and urban telecommunications and information services. One way for the Commission to meet this statutory mandate is to ensure sufficient high-cost funding for competitive services, and to encourage deployment of mobile voice and mobile broadband services that are reasonably comparable to those available in urban areas.

Finally, RCA supports defining "reasonably comparable" rural and urban rates in terms of rates for bundled services because, for example, restricting the comparability analysis to local rates leads to distorted results due to different rate structures in rural and urban areas.

The "Big Picture" of Comprehensive Universal Service Reform.—Although the *Further Notice* is focused on taking interim action that keeps the current non-rural high-cost mechanism in place, RCA encourages the Commission to look beyond these interim steps, and to continue to

work toward comprehensive reform that builds a new paradigm for preserving and advancing universal service. The foundations of this new paradigm should be using high-cost support to promote broadband services in rural and high-cost areas, and ensuring that funding mechanisms effectively support deployment of mobile wireless services.

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COMMENTS OF RURAL CELLULAR ASSOCIATION

Rural Cellular Association ("RCA"),[1] by counsel, hereby submits comments in response to a Further Notice of Proposed Rulemaking[2] adopted by the Commission in response to the decision of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in the *Qwest II* case.[3] The court's decision remanded the Commission's rules for providing high-cost universal service support to non-rural carriers.

I. INTRODUCTION.

While RCA appreciates the scheduling dilemma faced by the Commission and the agency's inability to take more than interim action at this juncture as it continues its efforts to reform its non-rural support mechanism while also complying with the congressional mandate to

[1] RCA is an association representing the interests of nearly 100 regional and rural wireless licensees providing commercial services to subscribers throughout the nation and licensed to serve more than 80 percent of the country. Most of RCA's members serve fewer than 500,000 customers. Several of RCA's members have received eligible telecommunications carrier ("ETC") status and are currently receiving high-cost support in numerous states, including Wisconsin, Nebraska, Oklahoma, Illinois, North Carolina, Wyoming, Montana, Texas, Iowa, Missouri, Kansas, Mississippi, Alabama, and Kentucky.

[2] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, 2009 WL 4833969 (rel. Dec. 15, 2009) ("*Further Notice*").

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

develop a National Broadband Plan, RCA welcomes this opportunity to address a number of issues and tentative conclusions presented in the *Further Notice* that may have important implications for the future course of the agency's universal service policies. These implications have prompted RCA not only to address the Commission's proposed interim actions but also to place this chapter of the ongoing *Qwest II* saga in the larger context of universal service reform.

II. DISCUSSION.

In the following sections, RCA examines the reasonableness of the Commission's proposal to take only interim steps regarding revisions to the non-rural support mechanism, and also addresses various issues raised by the Commission, and tentative conclusions reached by the agency, concerning the operation of the support mechanism and the definitions of "sufficient" support mechanisms, "reasonably comparable" rates and services, and "affordable" rates. In addition, RCA discusses the need for the Commission to develop new paradigms as it proceeds with the task of adopting comprehensive universal service reform.

A. Although the Commission Can Take Only Interim Action in Response to the Court Remand, It Must Also Keep Its Focus on the Principles That Should Govern Comprehensive Universal Service Reform.

The Commission tentatively concludes that it should not pursue any "fundamental reform" of the non-rural high-cost support mechanism at this time,[4] and that any changes it does adopt to this mechanism "should be interim in nature."[5] RCA reluctantly agrees with these tentative conclusions, since it is reasonable to await the Commission's release of the National Broadband Plan before the agency fashions comprehensive universal service reform that will include

[4] *Further Notice* at para. 12.

[5] *Id*. at para. 13.

revisions to the non-rural high-cost mechanism.[6] Nonetheless, RCA believes it is appropriate to reemphasize at this time that the Commission should adhere to several core principles as it reforms the non-rural high-cost funding mechanism and addresses the concerns raised by the Tenth Circuit in *Qwest II*. RCA frames these principles as follows:[7]

First, the new non-rural support mechanism should drive carriers toward efficient investments and the efficient operation of their networks.

Second, the principle of competitive and technological neutrality adopted by the Commission pursuant to Section 254 of the Communications Act of 1934 ("Act") should form the underpinning of the new non-rural support mechanism.

Third, the Commission's interpretation and application of the principles contained in Section 254(b) of the Act, and its design of a modified support mechanism for non-rural carriers, should be undertaken with a view toward facilitating the broadband policies that the agency will submit to Congress in March in the National Broadband Plan.

Fourth, the Commission should ensure that its modifications to the non-rural mechanism result in funding that is sufficient for consumers to receive the supported services while also avoiding any unnecessary increases in federal support mechanisms.

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[6] The Commission's ability to implement universal service reforms, consistent with the recommendations in the National Broadband Plan, in time for the April 16, 2010, deadline for the Commission's response to the court's remand, has been made even more problematic by the fact that the February 17, 2010, due date for the National Broadband Plan now has been pushed back, at the Commission's request, to March 17, 2010. *See, e.g.*, Letter from Julius Genachowski, Chairman, FCC, to John D. Rockefeller, Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Jan. 7, 2010.

[7] The discussion in the text, as well as other portions of these Comments, are drawn in part from RCA's comments in response to a Notice of Inquiry in this proceeding. *See* RCA Comments on *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) (filed May 8, 2009) ("RCA Remand NOI Comments").

B. The Commission Should Use a Cost-Based Support Mechanism, Adopt the Cost Benchmark Proposed by the Vermont and Maine Commissions, and Consider Further Steps To Preserve and Advance Universal Service.

RCA argues in the following sections that the non-rural support mechanism should be based upon costs rather than carriers' retail rates, that the Commission should replace the 2.0 standard deviation benchmark with a cost benchmark of no more than 125 percent of the national urban average, and that the Commission should consider adopting full portability of high-cost support and other measures designed to preserve and advance universal service.

1. Non-Rural Universal Service Support Should Be Based on Forward-Looking Economic Cost.

RCA agrees with the Commission's tentative conclusion "that it is appropriate to distribute universal service support in high-cost areas based on estimated forward-looking economic cost rather than on retail rates . . . ."[8] The Commission has long held the view that "the proper measure of cost for determining the level of universal service support is the forward-looking economic cost of constructing and operating the network facilities and functions used to provide the supported services . . . ."[9] Finding that using forward-looking economic costs will create support mechanisms that make certain that support corresponds to the efficient costs of providing supported services, the Commission has concluded that a forward-looking cost model "will preserve and advance universal service and encourage efficiency because support levels will be based on the costs of an efficient carrier[,]"[10] and that "a forward-looking economic cost meth-

[8] *Further Notice* at para. 21.

[9] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8899 (para. 224) (1997) ("*First Report and Order*") (subsequent history omitted). *See id*. at 8936 (para. 293).

[10] *Id*. at 8899 (para. 225) (footnote omitted).

odology creates the incentive for carriers to operate efficiently and does not give carriers any incentive to inflate their costs or to refrain from efficient cost-cutting."[11]

The forward-looking cost model demonstrably forces efficient carrier operations and thus serves the statutory purpose of preserving and advancing universal service. RCA also agrees with the Vermont and Maine public utility commissions, however, that the current forward-looking cost model should be revised and updated to improve its accuracy.[12] The Vermont and Maine commissions suggest, for example, that customer location data inputs must be updated (in part because the use of old data has produced erroneous allocations of new special access lines to rural wire centers, "inaccurately reduc[ing] the estimated cost differences between urban and rural areas"[13]), that newer calculation methods are needed to locate feeder and distribution plant, and that better assumptions must be developed regarding carriers' investment costs, carriers' expenses, and the effects of geography on costs.[14]

Although RCA recognizes that these revisions and updates to the cost model are not likely to be accomplished in the near term,[15] the timetable needed to revise and modernize the current cost model should not deter the Commission from moving forward with this process, es-

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[11] *Id*. at 8900 (para. 226).

[12] *See* Vermont Public Service Board, Vermont Department of Public Service, and Maine Public Utilities Commission Comments on *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*") (filed Mar. 27, 2006) ("Vermont and Maine Comments") at 38-39. *See also Further Notice* at para. 23.

[13] Vermont and Maine Comments at 38.

[14] *Id*. at 39. CostQuest Associates ("CostQuest") also has identified several issues relating to the model currently used by the Commission for determining universal service funding. *See* CostQuest Comments on *Comprehensive Reform FNPRM* (filed Nov. 26, 2008) "CostQuest Comprehensive Reform Comments"), Attachment, James W. Stegeman, Dr. Steve Parsons & Mike Wilson, "The Advanced Services Model: Proposal for a Competitive and Efficient Universal Service High-Cost Approach for a Broadband World" ("Advanced Model Paper"), at 20.

[15] *See* Advanced Model Paper at 4 (outlining a timetable for revisions to the current model that would likely take over a year).

pecially in light of the demonstration made by CostQuest of the advancements that can be accomplished through use of current network costing models.[16] As RCA has recently explained,[17] improvements in costing models have made them highly versatile and able to develop costs for various types of telecommunications networks operated by incumbent carriers and competitive carriers. These models can use either historical or forward-looking costs, and also can utilize different types of economic costs (*e.g.*, total service long run incremental costs, total element long run incremental costs, long run total cost).

The cost models rely on the use of geographic information system ("GIS") input data, which enables the construction of data bases that link various physical and demographic data to specific geographic locations. Cost modeling utilizing GIS data can enable the Commission to identify the costs of the most efficient, least-cost service providers and to focus on the technology that is "the least-cost, most-efficient, and reasonable technology for providing the supported services that is currently being deployed."[18]

2. The Commission Should Use a Cost Benchmark of No More Than 125 Percent of the National Urban Average.

RCA disagrees with the Commission's tentative conclusion not to adopt the proposal made by the Vermont and Maine commissions that the Commission use a cost benchmark of no more than 125 percent of cost.[19] Use of the 125 percent threshold would be responsive to the Tenth Circuit's directive because non-rural support, coupled with the reasonable comparability

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[16] *Id*. at 22-32.

[17] RCA Comments on FCC Public Notice, "Comment Sought on the National Cable & Telecommunications Association Petition for Rulemaking To Reduce Universal Service High-Cost Support Provided to Carriers in Areas Where There Is Extensive Unsubsidized Facilities-Based Competition," DA 09-2558, GN Docket No. 09-51, WC Docket No. 05-337, RM-11584, rel. Dec. 8, 2009 (filed Jan. 7, 2010) at 19.

[18] *First Report and Order*, 12 FCC Rcd at 8913 (para. 250).

[19] *Further Notice* at para. 25.

definition,[20] would tend to lower rates in rural and high-cost areas (as compared to continued use of the 2.0 standard deviation as the benchmark), thus serving the goal of preserving and advancing universal service.

The Commission's justification for rejecting the proposal made by the Vermont and Maine commissions is that the proposal "would increase significantly the overall amount of high-cost support for non-rural carriers."[21] RCA disagrees with this rationale[22] because other actions the Commission can take will be effective in limiting growth in support mechanisms. For example, continued use of an updated forward-looking cost model will introduce greater carrier efficiencies that will, in turn, reduce upward pressures on the size of the support mechanism. Continued application of the principle of competitive and technological neutrality will promote competitive entry and reward carriers' efficient operations, thus further reducing pressures on fund growth. The narrow targeting of support will have the same salutary effect.[23] In addition, as discussed in more detail *infra*, a Commission decision to make universal service support portable to the carrier that "wins" the customer will also significantly reduce the size of the support mechanisms. RCA is confident that, taken together, these various initiatives and policies will serve to more than offset any increases in the size of the support mechanisms resulting from use of the 125 percent benchmark.

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[20] See the discussion regarding measuring reasonable comparability in Section II.D.1., *infra*.

[21] *Further Notice* at para. 25 (footnote omitted).

[22] RCA does acknowledge that using a benchmark of 125 percent of the national average urban rate for purposes of the non-rural support mechanism will have the likely effect of increasing the level of funding needed, because the new benchmark will narrow the gap between rates in rural and urban areas and, by doing so, will increase the amount of disbursements for which non-rural carriers qualify. RCA Remand NOI Comments at 32. This is a matter of concern to RCA, because wireless carriers pay significantly more into the fund than they draw out. But, as RCA discusses in the text, there are other options for reducing the level of support.

[23] The targeting of support is discussed in Section II.B.3., *infra*.

3. The Commission Should Take Further Action To Ensure That the Non-Rural Support Mechanism Preserves and Advances Universal Service.

The Commission asks whether it may be possible to adopt at this time some elements of proposals for reform of the non-rural high-cost mechanism, and whether there are other interim adjustments that the Commission should make to the non-rural mechanism that could be implemented quickly, through an order issued no later than April 16, 2010.[24] Although it may not be practical to undertake interim adjustments to the non-rural mechanism within the restrictive timeframe faced by the Commission, RCA nonetheless reiterates its earlier suggestions for actions the Commission should consider as it continues its efforts to design a non-rural high-cost mechanism that preserves and advances universal service.[25]

One way to ensure that the non-rural funding mechanism preserves and advances universal service is to make the support fully portable. In discussing the high-cost support mechanism for non-rural carriers, the Commission has concluded that:

> When a line is served by an eligible telecommunications carrier, either an ILEC or a CLEC, through the carrier's owned and constructed facilities, the support flows to the carrier because that carrier is incurring the economic costs of serving that line.
>
> . . .
>
> A competitive carrier that has been designated as an eligible telecommunications carrier shall receive universal service support to the extent that it captures subscribers' lines formerly served by an ILEC receiving support or new customer lines in that ILEC's study area. At the same time, the ILEC will continue to receive support for the customer lines it continues to serve. We conclude that paying the support to a CLEC that wins the customer's lines or adds new subscriber lines would aid the emergence of competition.[26]

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[24] *Further Notice* at para. 27.

[25] *See* RCA Remand NOI Comments at 27-29.

[26] *First Report and Order*, 12 FCC Rcd at 8932 (paras. 286-287).

Portability promotes competition, which gives rise to more efficient carrier operations, and increased subscribership in rural and high-cost areas due to the downward pressure on rates that is generated by competitive markets. Promoting competitive entry also enables the deployment of technologically innovative networks that will make advanced services available to consumers.

In addition, the non-rural support mechanism should not restrict support to a single ETC (or to an incumbent and only one competitor) in a given geographic area. Restricting competitive entry would not be consistent with the goal of the Telecommunications Act of 1996 ("1996 Act")[27] to promote both universal service and competition in local exchanges.[28] Section 214 of the Act clearly contemplates multiple competitors becoming qualified to receive support.[29] The court in *Alenco* made clear that the statute requires that the market must govern the provision of services in rural and high-cost markets:

> the [USF funding] program must treat all market participants equally—for example, *subsidies must be portable*—so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. . . . [T]his principle is made necessary not only by the economic realities of competitive markets *but also by statute*.[30]

Concerns have been expressed that allowing competitive entry in rural and high-cost markets would cause unwarranted growth in high-cost funding.[31] Portability solves this problem. If high-cost funding is fully portable among all carriers, both incumbents and competitive ETCs, then competitive entry and the presence of multiple carriers in a given rural or high-cost market can-

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[27] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[28] *See Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000) ("*Alenco*").

[29] *See* 47 U.S.C. § 214(e)(2).

[30] *Alenco*, 201 F.3d at 616 (emphasis added).

[31] *See 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, 1524 (2008) (Statement of Kevin J. Martin).

not create any upward pressure on high-cost funding mechanisms because the amount of support in a given service area is limited by the number of customers served in that area.

Finally, in making modifications to the non-rural mechanism, the Commission should ensure that the mechanism targets support as accurately as possible, because doing so will help achieve the objective that support does not exceed the amount necessary to achieve statutory goals and will also promote competitive entry.[32] Moreover, RCA encourages the Commission to rely upon broadband mapping initiatives that are currently underway as a principal means of ensuring the accurate targeting of support for broadband services.[33]

C. The Commission Should Take a More Balanced Approach to Its Evaluation of the Sufficiency of Universal Service Support Mechanisms and the Affordability of Service.

A prevailing theme discussed by the Commission in the *Further Notice* is that determining the sufficiency of universal service support should be done by balancing the needs of consumers in rural and high-cost areas against the level of universal service contributions assessed to carriers and the overall affordability of nationwide rates for telecommunications services. The Commission tentatively concludes that this approach will guard against unsustainable growth in the size of universal service funding mechanisms.

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[32] In discussing non-rural service areas, the Commission has made clear that large service areas may be problematic because they could impede the targeting of support and competitive entry. *See First Report and Order*, 12 FCC Rcd at 8849 (para. 184).

[33] *See* RCA Comments, American Recovery and Reinvestment Act of 2009 Broadband Initiatives, NTIA Docket No. 090309298-9299-01 (filed Apr. 13, 2009) at 28 (citing the Broadband Data Improvement Act, Pub. L. 110-385 (47 U.S.C. § 1301 note) (2008)). RCA agrees with Verizon that:

> As the Commission and other policymakers consider efforts to increase the availability of broadband in rural areas, it is essential that they rely on hard data that identify where the gaps in broadband availability actually are so that attention and finite resources will be effectively and efficiently targeted to those areas.

Verizon and Verizon Wireless Comments on Rural Broadband Strategy Public Notice, GN Docket No. 09-29 (filed Mar. 25, 2009), at 3.

RCA discusses the merits of the Commission's tentative approach in the following sections, and also evaluates the soundness of the Commission's suggestion that weight should be given to telephone subscribership penetration rates in determining the sufficiency of support and the affordability of rates.

1. There May Be a Reasonable Basis for the Analytical Approach Suggested by the Commission, But RCA Is Concerned About How the Proposed Approach Would be Applied.

The Commission suggests that, in determining whether the level of universal service support is "sufficient" to achieve the purposes of Section 254, the Commission's analysis should take into account the asserted fact that "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."[34] This analysis leads the Commission to 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.[35]

While RCA generally does not disagree with the analytical framework proposed by the Commission, RCA also believes that several factors must be taken into account in undertaking the balancing of Section 254 principles proposed by the Commission.

First, the Commission has numerous options for reducing the size of the high-cost mechanism, some of which are better than others in serving the universal service and competitive goals of the 1996 Act. Requiring full portability, and that high-cost disbursements to rural in-

[34] *Further Notice* at para. 31.

[35] *Id*. at para. 33.

cumbent local exchange carriers ("LECs") be based on forward-looking economic cost instead of embedded cost, are two examples of steps the Commission can take to reduce upward pressures on funding while also promoting competitive entry in rural and high-cost areas.

Less salutary options are to impose one-sided caps on high-cost funding,[36] and to reject measurements of rate comparability that would shrink the gap between rural and urban rates.[37] The cap imposed on wireless competitive ETCs in the *Interim Cap Order*—by definition—is harmful to competition and competitive entry, since it keeps high-cost funding flowing to incumbent rural LECs while shutting off any increases in funding to the incumbents' competitors. This assault on competition, in turn, is harmful to consumers in rural and high-cost areas, since they lose the customer benefits that competition delivers. In addition, as RCA has discussed, if the Commission were to implement full portability and a forward-looking cost methodology for rural incumbent LECs' high-cost support, doing so would make it possible to utilize comparability benchmarks that would advance universal service, in keeping with the Tenth Circuit's directives, without placing significant upward pressure on the high-cost mechanism.

Second, if the Commission takes the balancing approach it is proposing in the *Further Notice*, it should be a "weighted" balancing. Such an approach has been endorsed by the Tenth Circuit:

> Under the Act, the FCC's duty [to base its universal policies on the principles listed in Section 254(b)] is mandatory. . . . However, we posited [in *Qwest I*] that while "the FCC must base its policies on the [Section 254(b)] principles, . . . any particular principle can be trumped in the appropriate case. . . . [T]he FCC may

[36] *See High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 2009 WL 4722826 (D.C. Cir. decided Dec. 11, 2009) (imposing an interim cap on high-cost fund disbursements to wireless competitive ETCs, but refraining from capping high-cost disbursements to rural incumbent LECs).

[37] RCA opposes the Commission's tentative conclusion to reject the proposal made by the Vermont and Maine commissions to measure comparability by using a benchmark of not more than 125 percent of nationwide urban rates. See Section II.D.1., *infra*.

> exercise its discretion to balance the principles against one another when they conflict, but may not depart from them altogether to achieve some other goal."[38]

The court thus has given the Commission a fair degree of leeway to account for the principles in Section 254(b) in connection with its fashioning of a definition of "sufficient" support. The statutory principles of reasonable comparability and affordability, and the principle of competitive and technological neutrality adopted by the Commission pursuant to Section 254(b)(7) of the Act, should be given more weight than the other principles listed in Section 254(b) because these principles are more directly related to the specific purposes of non-rural high-cost support.

Third, the devil of the Commission's proposed balancing test is in the details, and it is therefore important for the Commission to focus on the need to make fact-based determinations regarding (1) what constitutes "unsustainable" growth in the high-cost fund; (2) the comparability and affordability of rates in areas served by non-rural carriers; (3) the affordability of rates in other areas; and (4) what constitutes a "fair and equitable" level of contributions from carriers. If the Commission's efforts to balance Section 254 principles are not informed by these facts, then these efforts might turn out to be nothing more than shots in the dark.

The *Interim Cap Order* provides a model for how the Commission should *not* engage in this balancing process. To take one example, the Commission found in the *Interim Cap Order* that a cap was justified because, without the cap, continued growth in the fund "would require excessive (and ever growing) contributions from consumers to pay for this fund growth."[39] The Commission did not, however, engage in any analysis of what would constitute an "excessive"

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[38] *Qwest II*, 398 F.3d at 1234 (quoting *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2003)).

[39] *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 7).

level of contributions, nor did it take into account evidence in the record that recent growth in the size of the fund was having only a minuscule effect on contribution levels.[40]

Instead of following the *Interim Cap Order* model of making decisions without looking at the facts, the Commission should consider a formulation it developed more than a decade ago:

> In determining the size of the new federal mechanism to enable reasonably comparable local rates, we must fulfill our statutory obligation to assure sufficient, specific, and predictable universal service support without imposing an undue burden on carriers and, potentially, consumers to fund any increases in federal support. Because increased federal support would result in increased contributions and could increase rates for some consumers, we are hesitant to mandate large increases in explicit federal support for local rates in the absence of clear evidence that such increases are necessary either to preserve universal service, or to protect affordable and reasonably comparable rates, consistent with the development of efficient competition.[41]

Thus, even "large increases" in funding should be mandated if there is "clear evidence" that they are necessary to achieve statutory purposes. In RCA's view, the approach taken in the *Seventh Report and Order* also should be interpreted to require "clear evidence" regarding the impact of high-cost fund increases on consumer contribution levels and rates. It would be neither fair nor equitable for the Commission to simply presume—as it did in the *Interim Cap Order*—that increases in the high-cost funding would result in "excessive" increases in contributions.

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[40] *See* Comments of RCA and Alliance of Rural CMRS Carriers on *Federal-State Joint Board on Universal Service; High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Recommended Decision, 22 FCC Rcd 8998 (Fed.-State Jt. Bd. 2007), filed June 6, 2007, at 13-15 (presenting data illustrating that the level of contributions would not rise significantly in the absence of a cap on wireless competitive ETC high-cost disbursements).

[41] *Federal-State Joint Board on Universal Service; Access Charge Reform*, CC Docket No. 96-45, CC Docket No. 96-262, Seventh Report and Order, 14 FCC Rcd 8078, 8111-12 (para. 69 (1999) ("*Seventh Report and Order*")

2. The Commission's Proposed Reliance Upon Telephone Subscribership Penetration Rates, in Evaluating Sufficiency of Support and Affordability of Rates, Is Misplaced.

The Commission cites the fact that the telephone subscribership penetration rate, as of July 2009, was 95.7 percent,[42] and then tentatively concludes that "[g]iven the unprecedented level of telephone subscribership, . . . 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."[43] This tentative conclusion asks subscribership penetration rates to carry much more weight than they can bear.

First, there is no obvious connection between the level of subscribership penetration rates and the reasonable comparability of rural and urban rates and services. The fact that the nationwide subscribership penetration rate is 95.7 percent sheds no light on whether rates for telecommunications services in areas served by non-rural carriers are comparable to rates in urban areas. The relevance of subscribership penetration rates to the comparability of rural and urban *services* is even more remote. This is especially true if the Commission expands the types of services that are included in defining reasonably comparable rural and urban rates.[44] Given the lack of any nexus between subscribership penetration rates and rate and service comparability, there is no basis for concluding that the "unprecedented level" of subscribership could support a conclusion that funding mechanisms are sufficient to ensure reasonable comparability.

Second, the statute tells us that the Commission's task is to pursue policies designed "to make [telecommunications service] available, so far as possible, to *all the people* of the United

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[42] *Further Notice* at para. 32.

[43] *Id*. at para. 34.

[44] See Section II.D.3., *infra*.

States . . . ."[45] The statute does not talk about 95.7 percent of the people. Even if sufficiency could be reasonably defined in terms of subscribership penetration rates—which RCA does not believe to be the case—then a penetration rate of 95.7 percent falls short of the mark. Concluding that universal service funding no longer needs to rise above its current levels (or may be reduced) because we have arrived at an "unprecedented level" of subscribership penetration would seem to ignore the dictates of the statute.

Third, the Commission is also charged with the task of developing and implementing sufficient funding mechanisms to "advance universal service."[46] It is not clear how the Commission's tentative conclusion that current funding levels "are at least sufficient (and may be more than enough)" can be squared with this statutory obligation to advance universal service. Other indicators are more probative than the current level of subscribership penetration rates in "evaluat[ing] whether the current non-rural high-cost mechanism is 'advancing' universal service in satisfaction of section 254(b)(5)[.]"[47]

For example, the Tenth Circuit has concluded that the Commission's current measurement of rate comparability is untenable because the Commission's use of a comparability benchmark at the urban national average plus 2.0 standard deviations focuses the definition on preserving rate disparities that existed in 1996 "while ignoring [the agency's] concurrent obligation to advance universal service, a concept that certainly could include a narrowing of the existing gap between urban and rural rates."[48]

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[45] Section 1 of the Act, 47 U.S.C. § 151 (emphasis added).

[46] 47 U.S.C. §254(b)(5).

[47] *Further Notice* at para. 40.

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

D. The Commission Should Respond to the Tenth Circuit's Concerns Regarding Reasonable Comparability by Using a Fixed Numerical Standard To Measure Comparability and by Promoting Competitive Entry.

As noted above, the Tenth Circuit in *Qwest II* rejected the Commission's definition of "reasonably comparable,"[49] and the Commission now asks how it should respond to the court's concerns.[50] RCA argues in the following sections that a successful response should be based upon a new measurement of comparability that relies upon a benchmark of not more than 125 percent of nationwide urban rates. In addition, since the statutory "reasonably comparable" standard applies to services as well as rates, RCA encourages the Commission to ensure sufficient high-cost funding for competitive services as an effective way to meet the statutory standard. Finally, RCA supports defining "reasonably comparable" rural and urban rates in terms of rates for bundled services.

1. The Commission Should Measure Comparability by Using a Benchmark of Not More Than 125 Percent of Nationwide Urban Rates.

The Tenth Circuit rejected the Commission's definition of "reasonably comparable" rates because it concluded that the definition "rests on a faulty, and indeed largely unsupported, construction of the Act."[51] The court explained that the statute requires that "reasonably comparable" rates must be defined in a manner that preserves *and* advances universal service,[52] but found that the Commission erroneously focused its definition on preserving rate disparities that existed 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."[53]

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[49] *See Further Notice* at para. 38.

[50] *Id*. at para. 40.

[51] *Qwest II*, 398 F.3d at 1235.

[52] *Id*. at 1235-36.

[53] *Id*. at 1236.

The court then concluded that the Commission's use of a comparability benchmark at the urban national average plus 2.0 standard deviations "is rendered untenable because of the impermissible statutory construction on which it rests."[54] The Tenth Circuit noted that, by using this benchmark, "the FCC has ensured that significant variance between rural and urban rates will continue unabated."[55]

The Commission can satisfy the court that the agency's definition of "reasonably comparable" will preserve and advance universal service by basing comparability on a fixed numerical standard that is more aggressive than the 2.0 standard deviation benchmark the Commission currently uses. RCA agrees with the Vermont and Maine commissions that using a fixed numerical standard has the benefit of clearly delineating the range that the Commission considers to be reasonably comparable.[56] Using a clear-cut numerical standard avoids any ambiguity or confusion regarding the agency's test for reasonable comparability.

The Commission should abandon its use of a standard deviation benchmark not only because of the concerns expressed by the court, but also because, as the Vermont and Maine commissions have pointed out, the 2.0 standard deviation yardstick has had the effect of "stretching the comparability standard and tolerating more and more rate disparity over time."[57] To the extent the standard deviation benchmark has this effect of expanding, rather than contracting, the tolerable gap between rural and urban rates, it cannot be concluded that use of the benchmark for determining rate comparability advances universal service.

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[54] *Id*. at 1237.

[55] *Id*. at 1236.

[56] *See* Vermont and Maine Comments at 29.

[57] *Id*. at 30. According to the Vermont and Maine commissions, when rates are widely dispersed, the standard deviation benchmark works in a way that forgives wide differences in rates. *Id*.

The Commission should replace its standard deviation benchmark with a benchmark of not more than 125 percent of nationwide urban rates.[58] RCA agrees with Qwest that reducing "the current benchmark to 125 percent of the national average urban rate, and provid[ing] federal support above that threshold"[59] will advance universal service, because it will narrow the gap that exists between rural and urban rates and that is tolerated by the 2.0 standard deviation benchmark.

The Tenth Circuit in *Qwest II* rejected the Commission's comparability standard (which, the court noted, equated to 138 percent of the nationwide average rate) because the standard failed to narrow existing rate differences.[60] Using a lower measure will directly meet the court's concern because it will have the effect of narrowing the existing gap between rural and urban rates. By doing so, the use of a 125 percent benchmark will strengthen the Commission's case that it has created a standard that produces reasonably comparable rates.

2. The "Reasonably Comparable" Test Applies to Services as Well as Rates, and the Commission Can Meet the Comparable Services Test by Providing High-Cost Funding for Competitive Services.

The principle of reasonable comparability in Section 254(b)(3) of the Act applies not only to rates, but also to "telecommunications and information *services*, including . . . advanced telecommunications and information *services* . . . ."[61] The Commission must therefore demon-

[58] *See id*. at 20-23; Qwest Comments on *Remand NPRM* (filed Mar. 27, 2006), at 23 (arguing that Bureau of Labor Statistics data show that a rate corresponding to a 125 percent benchmark is affordable for rural consumers); Letter from R. Steven Davis, Senior Vice President – Federal Relations, and Shirley Bloomfield, Senior Vice President – Public Policy, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 (filed May 5, 2008), Proposal for Implementing the Tenth Circuit's Remand in *Qwest II*) ("Qwest Proposal"), at 24.

[59] Qwest Proposal at 4.

[60] *Qwest II*, 398 F.3d at 1236-37.

[61] 47 U.S.C. § 254(b)(3) (emphasis added).

strate that its definition of "reasonably comparable" includes the advancement of reasonably comparable services in rural and high-cost areas.

An effective way for the Commission to meet the requirement is to ensure sufficient high-cost funding for competitive services. Section 254(b)(3) has established the principle that consumers in rural and high-cost areas are entitled to mobile voice and mobile broadband services that are reasonably comparable to those available in urban areas. The Commission can ensure that reasonably comparable services are available in rural areas by enforcing its own principle that universal service support mechanisms must operate on a competitively and technologically neutral basis to ensure that competitive carriers have the ability to deliver high-quality services to rural areas.[62]

RCA also believes that service quality should be an important component of the Commission's definition of "reasonably comparable" service. The goal of *advancing* universal service will be frustrated if high-cost support is insufficient to enable competitive carriers to deploy sufficient infrastructure to ensure a level of service quality reasonably comparable to that available in urban areas. All of RCA's members can attest that many consumers who need and demand mobile wireless service in rural and high-cost areas are reluctant to "cut the cord" because of concerns regarding wireless service coverage, signal strength, and related service quality issues.

[62] *See First Report and Order*, 12 FCC Rcd at 8802 (para. 48) (concluding that competitively neutral rules will ensure "that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers"); *Western Wireless Corporation*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231 (para. 8) (2000).

3. The Commission Should Define "Reasonably Comparable" in Terms of Bundled Services.

Given the changes that have occurred in the telecommunications marketplace in recent years, including burgeoning levels of subscription to mobile wireless services and the growing numbers of consumers who are "cutting the cord" and using wireless exclusively for their telecommunications services, RCA supports defining "reasonably comparable" rural and urban rates in terms of rates for bundled services. Expanding the range of services included in the comparability analysis would be more in keeping with the current realities of the marketplace, and would thus better ensure that consumers in areas served by non-rural carriers have access to service packages that are comparable to those commonly available in urban areas. In carrying out the rate comparability analysis, the Commission should include service packages, offered by competing intermodal providers, that include long distance services and advanced telecommunications and information services.[63]

Another reason for expanding the "reasonably comparable" definition beyond local rates, so that it includes bundles of services, is the fact that the rate structures in many rural areas have very small local calling areas, which has the effect of limiting the utility of local service for customers because there are relatively few terminating access lines within the calling area. Because of this, customers may pay low rates for their local service, but they also incur substantial charges for toll calls outside their small local calling areas. In these circumstances, the relatively low rates for local service make rural/urban comparisons impossible. Customers in urban areas are generally able to call many thousands of numbers within an exchange because population densities in their local calling areas are much higher.

[63] *See* 47 U.S.C. § 254(b)(3).

Finally, RCA opposes any requirement that carriers must certify that they offer bundled local and long distance services at reasonably comparable rural and urban rates.[64] Carriers should not bear the burden of making any assessment or judgment of whether their rates are "reasonably comparable" within the meaning of definitions developed as part of the regulatory process. Imposing such an obligation would be particularly inappropriate and onerous if a carrier would be exposed to any liability or penalty upon a subsequent determination by the Commission that the carrier's assessment or judgment in its certification was inaccurate or erroneous.

E. As the Commission Moves Beyond Its Interim Rules for Non-Rural Support Mechanisms, Its Focus Should Shift Toward Mobile Wireless Technologies and Broadband.

Although the main purpose of the *Further Notice* is to present a proposed explanation of why the Commission intends to continue to use the current non-rural high-cost mechanism as an interim mechanism while the agency pursues its development of a National Broadband Plan, RCA believes that it also is appropriate to look beyond these interim measures in order to consider future steps toward universal service reform. As the Commission continues its consideration of comprehensive reform, it would not make sense for the agency to ground high-cost support rules in wireline-carrier-centric mechanisms that invest substantial amounts of high-cost funding to support infrastructure that delivers fixed voice service. The Commission's universal service policies must break away from underwriting the last century's copper wire technology geared to the provision of voice service, and move to a new paradigm that will work better to both preserve *and advance* universal service.

Ensuring that high-cost mechanisms effectively and appropriately support the operations of wireless carriers should be a central component of this new paradigm. RCA believes that such

[64] *See Further Notice* at para. 20.

reforms will serve the statutory goals of putting consumers first[65] and fostering competition in local exchanges throughout the country. The growing demand for mobile wireless services in both rural and urban areas, and the public safety and economic benefits of mobile wireless services in rural areas, highlight the direction in which technology is driving the telecommunications and information services marketplace. Universal service reforms need to keep pace.

In addition, as RCA noted in its Remand NOI Comments, in order for Commission policies to continue to advance universal service, the next horizon for the Commission to pursue is the utilization of high-cost support to promote the deployment of broadband service in rural and high-cost areas. The fact is that "[i]f you're not connected [to broadband], you're sitting out the dance."[66] Given the importance of broadband in national commerce, education, health care, and the daily lives of workers and consumers throughout the country, the focus of universal service support mechanisms should shift away from voice-grade copper wires and in the direction of facilities and technologies capable of delivering broadband services at sufficient speeds, and for reasonable prices, to consumers in rural and high-cost areas who currently do not have any access to broadband services.

The $7.2 billion in broadband funding that is being distributed through the National Telecommunications and Information Administration's Broadband Technology Opportunities Program[67] and the Rural Utilities Service's broadband grant and loan programs[68] is a useful step, but not all of this funding will find its way to rural and high-cost areas, nor will the amount of this

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[65] *See Alenco*, 201 F.3d at 620 (finding that "[t]he Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*") (emphasis in original).

[66] Howard Berkes, *Stimulus Stirs Debate over Rural Broadband Access*, NPR.ORG, Feb. 16, 2009, accessed at http://www.npr.org/templates/story/story.php?storyId=100739283 (quoting Dee Davis, Director, Center for Rural Strategies).

[67] American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115, Division B, Title VI.

[68] *Id*., Division A, Title I (Distance Learning, Telemedicine, and Broadband Program).

funding be nearly enough for the ubiquitous deployment of "reasonably comparable" broadband services in rural America.

The importance of broadband, and the inadequate degree of its current availability in rural and high-cost areas, give impetus to RCA's suggestion that a new universal service paradigm should focus not only on mobile wireless services, but also on broadband deployment. There are three central components of this task.

First, the Commission needs to solve the problems associated with making broadband a supported service for universal service purposes. The prohibition on the use of universal service funding for the deployment of broadband facilities, networks, and services should be lifted.

Second, the Commission should develop definitions of "reasonably comparable" and "sufficient" support in this proceeding in a manner that facilitates the agency's implementation of a comprehensive rural broadband strategy and its development of a comprehensive National Broadband Plan, and that enable the deployment of mobile wireless broadband services in rural and high-cost areas. Advanced wireless technologies that are nearing widespread deployment offer the prospect of bringing broadband speeds to rural areas that are comparable to those available in urban areas. The Commission's definition of reasonable comparability should enable and promote the deployment of these technologies.

Third, the Commission's principle of competitive and technological neutrality should govern its development of support mechanisms for broadband service. Competition, the marketplace, and technological innovation should drive the deployment of broadband in rural and high-cost areas. Mobile wireless broadband services provide unique and expanding benefits to consumers, particularly in rural areas, and the Commission's broadband policies should not impede the deployment of these services. In this regard, RCA encourages the Commission to reject Em-

barq's proposal that "broadband" be defined as downlink capacity of at least 1.5 Mbps.[69] If such a speed were used as a prerequisite for eligibility to receive high-cost support for broadband services, many mobile wireless broadband providers would be ineligible for support.

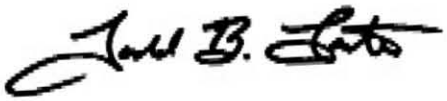
III. CONCLUSION.

Although the Commission has tentatively concluded in the *Further Notice* that circumstances will prevent it from meeting its April 16, 2010 deadline for addressing issues remanded by the Tenth Circuit in its *Qwest II* decision and taking comprehensive action to reform the non-rural high-cost funding mechanism, the Commission nonetheless has presented a number of tentative conclusions, and has raised several issues, in the *Further Notice* that may have important implications for the ongoing debate concerning fundamental universal service reform.

RCA appreciates the opportunity extended by the Commission to participate in this debate, and respectfully urges the Commission to give consideration to these Comments.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION



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[69] *See* Letter from David C Bartlett, Vice President – Federal Government Affairs, Embarq, to Chairman Kevin J. Martin, Commissioner Michael J. Copps, Commissioner Jonathan S. Adelstein, Commissioner Deborah Taylor Tate, and Commissioner Robert M. McDowell, FCC, CC Docket No. 96-45, WC Docket No. 05-337 (filed Sept. 18, 2008), A Plan to Promote Broadband Deployment and Reform High-Cost Support Without Increasing Overall USF Levels, at 1.