

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

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

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON THE NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION

On December 15, 2009, the Federal Communications Commission (“FCC” or “Commission”) released a Further Notice of Proposed Rulemaking (“NPRM”) to “respond[] 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 The NPRM followed an April 5, 2009 Notice of Inquiry (“NoI”) meant “to refresh the record regarding the issues raised ... in the *Qwest II* decision.”²

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337 (“96-45/05-337”), FCC 09-112 (rel. December 15, 2009), ¶ 1, citing *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (“*Qwest II*”).

² FCC 09-28 (rel. April 8, 2009), ¶ 1, also citing *Qwest II*.

The *Qwest II* remand occurred in 2005. Soon after, the Commission took comment on the issues raised by the remand.³ But the Commission never acted on those comments.

Early in 2009, several of the petitioners in *Qwest II* applied to the Tenth Circuit for a writ of mandamus compelling the Commission to act on the remand.⁴ As stated by the Commission, “[T]he 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, 2010.”⁵ The issuance of the current NPRM is the second step in that commitment.

In the NPRM, the Commission “tentatively conclude[s] ... that the Commission should not attempt wholesale reform of the non-rural high-cost mechanism at this time....”⁶ The National Association of State Utility Consumer Advocates (“NASUCA”)⁷ agrees.⁸ As NASUCA stated in response to the NOI,

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

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

⁵ NPRM, ¶ 9.

⁶ *Id.*, ¶ 1.

⁷ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. 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).

The immediate task before the Commission is to respond to the *Qwest II* remand of the non-rural high-cost fund. The Commission need not and should not address issues of broader consequence and significance, which will complicate the decision process and make meeting the Commission’s commitment to the Court more difficult.⁹

In the NPRM, the Commission “seek[s] comment on certain interim changes to address the court’s concerns....”¹⁰ NASUCA provides comment in these areas.

The Commission provides, as a justification for not attempting wholesale reform at this time, the fact 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. 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.¹¹

NASUCA agrees with this premise. Yet these factors also argue against the Commission now also seeking comment “to address ... changes in the marketplace.”¹² These changes

NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

⁸ The Maine Office of Public Advocate (“Maine OPA”), a NASUCA member, has requested not to be associated with these comments. The Maine OPA will be filing separate comments with the Maine Public Utilities Commission and the Vermont Public Service Commission.

⁹ NASUCA NOI Comments (May 8, 2009) at 3.

¹⁰ NPRM, ¶ 1.

¹¹ Id. The Commission has recently sought a one-month extension for the National Broadband Plan. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295546A1.pdf.

¹² NPRM, ¶ 1.

are also beyond the scope and the strict necessity of the *Qwest II* remand, as were a number of the items raised in the NOI.¹³

The bottom line of the NPRM is the Commission’s conclusion that 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.¹⁴

This is correct, and the Commission’s tentative conclusions should be made final (for this context), and should satisfy the Tenth Circuit.

As stated by the Commission,

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. 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. 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.” 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.” 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. The court further noted that the Commission based the two standard deviations *cost* benchmark on a

¹³ See, e.g., NASUCA NOI Comments at 4 (regarding unifying the non-rural and rural high-cost funds); id., n.15 (regarding identical support rule and contribution mechanism); id. at 53-54 (regarding broadband issues).

¹⁴ NPRM. ¶ 3.

finding that *rates* were reasonably comparable, without empirically demonstrating in the record a relationship between costs and rates.¹⁵

Thus the test is whether the Commission, in the NPRM, has addressed the Court's concerns. Unfortunately, just as in the NOI, the Commission has moved off in some unnecessary directions, and has missed some opportunities. But we will first discuss the ways in which the Commission's tentative conclusions in the NPRM adequately address the issues raised by the Tenth Circuit.

II. MAINTAINING THE CURRENT MECHANISM ON AN INTERIM BASIS

The Commission asserts that the current mechanism should be considered “interim” in nature, given the “pending adoption and implementation of the National Broadband Plan...”¹⁶ But it is not necessary to get into a discussion of the Commission's legal authority to adopt “interim” mechanisms, because as demonstrated in the NPRM, each of the justifications of the elements of the non-rural high cost mechanism questioned by the Tenth Circuit set forth in the NPRM (and elsewhere in this record) is sufficient to support a **permanent** mechanism.¹⁷ The one exception is with regard to “advancing” universal service, which the Commission has adequate information to accomplish based on this record.

¹⁵ *Id.*, ¶ 7 (footnotes omitted; emphasis in original).

¹⁶ NPRM, ¶ 21.

¹⁷ And it would be more than slightly ludicrous to treat the non-rural high-cost mechanism as “interim” at this point, given that the current mechanism was adopted in 2003 and remanded in 2005. That would seem to justify the Commission's delay in resolving these issues because they were overtaken by unanticipated events.

III. DEFINITION OF “SUFFICIENT”

As the Commission correctly states,

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.” 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. The court was “troubled by the Commission’s seeming suggestion that other principles, including affordability, do not underlie federal non-rural support mechanisms.” “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.”¹⁸

In the NPRM, the Commission correctly recognizes – as pointed out by NASUCA¹⁹ among others – that the principles in 47 U.S.C. § 254(b) are varied, that the universal service programs it has adopted are also varied, and that no one program can be expected to fulfill each and every one of the principles.²⁰ As the Commission states, “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.”²¹ This should be a “sufficient” explanation for the Tenth Circuit.

The Commission notes that “the Tenth Circuit expressed specific concern that the Commission’s non-rural mechanism may not be ‘sufficient’ to advance the principle of *affordability*.”²² The Commission seeks specific comment on this issue. NASUCA

¹⁸ NPRM, ¶ 29.

¹⁹ See NASUCA NoI Comments at 34-43.

²⁰ NPRM, ¶¶ 30-31.

²¹ *Id.*, ¶ 31.

²² *Id.*, ¶ 32, citing *Qwest II*, 398 F.3d at 1234 (emphasis in NPRM).

would refer the Commission to the extensive discussion relating affordability to the rest of § 254(b) in NASUCA’s Comments on the NoI, showing the reasons why the principle of affordability should be subsidiary to the principle of reasonable comparability, especially because “given the current level of urban rates, rural rates that are reasonably comparable to urban rates are likely to be affordable.”²³

IV. DEFINITION OF “REASONABLY COMPARABLE”

The Commission states,

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.”²⁴

In the first place, as asserted by NASUCA, “part of the problem with the Tenth Circuit’s analysis was that it was based, perforce, on the Commission’s **lack** of rural rate analysis.”²⁵

Unfortunately, that lack of analysis is not really cured in the NPRM. This is despite the fact that NASUCA has on more than one occasion presented the Commission with more than enough data on which such an analysis could be based.²⁶

²³ NASUCA NoI Comments at 38; see generally *id.* at 37-39 and Appendix F.

²⁴ NPRM, ¶ 38, quoting *Qwest II*, 398 F.3d at 1236.

²⁵ NASUCA NoI Comments at 24.

²⁶ See, e.g., *id.* at 13-21, 24-30 and Appendix E.

The fact is, as the data presented by NASUCA shows, the rural rates of non-rural carriers are, in general, reasonably comparable to urban rates.²⁷ But absent analysis of those rates, it is difficult for the Commission to say whether the non-rural high-cost program has “advanced” universal service. Yet the data presented by NASUCA allows such analysis, and NASUCA has proposed that the Commission narrow the range of unsupported rural rates, which would advance universal service even if the other elements of the current non-rural high-cost mechanism were maintained.²⁸ This can be done in the context of the current proceeding.²⁹

The Commission does correctly “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.”³⁰ Further, it **does not** “make sense to interpret this statutory principle as requiring that *all* rural rates be no higher than the lowest urban rate....”³¹ As explained by NASUCA, this would stretch the concept of “reasonable comparability” beyond all reason.

²⁷ There are exceptions, but they could be dealt with under existing mechanisms if the Commission would use those mechanisms. The best example is the request by the State of Wyoming for additional support for its non-rural carrier’s rural rates, which the Commission has not acted on. Other states have likely been discouraged from seeking similar relief due to the Commission’s inaction.

²⁸ See NASUCA NoI Comments at 32. It is probably not enough for the Commission to assert the new focus on broadband as sufficient to “advance” universal service (NPRM, ¶ 41); all of the piece parts of universal service, taken together, should serve that purpose. See NASUCA NoI Comments at 31.

²⁹ NASUCA had also proposed expanding the definition of “rural” areas to include more territory (id.; see also id., Appendix I), but that is not necessary to maintain the legality of the current mechanism pending broader reform.

³⁰ NPRM, ¶ 39. See NASUCA NoI Comments at 25-31.

³¹ Id., ¶ 40 (emphasis in original).

V. THE RELATIONSHIP BETWEEN RATES AND COSTS

As the Commission noted, the *Qwest II* court objected to the fact “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.”³² The problem was, however, that the Commission simply failed to adequately explain the real-world disjunction between costs and rates that prevents such an “empirical” demonstration,” caused by the intervening factor of state rate regulation.

As the Commission previously stated,

This approach does not consider rates directly. Instead, it uses costs as an indicator of a state's ability to maintain reasonable comparability of rates within the state and relative to other states. We conclude that the underlying assumption in the Joint Board's recommendation -- that a relationship exists between high costs and high rates -- is a sound one, because rates are **generally** based on costs. **We adopt this approach, in part, because states possess broad discretion in developing local rate designs.** State rate designs may reflect a broad array of policy choices that affect actual rates for local service, intrastate access, enhanced services, and other intrastate services. A state facing costs substantially in excess of the national average, however, may be unable through any reasonable combination of local rate design policy choices to achieve rates reasonably comparable to those that prevail nationally. **Through an examination of the underlying costs, instead of the resulting rates, we can evaluate the cost levels that must be supported in each state in order to develop reasonably comparable rates.** Because responsibility for such support is shared at the federal and state levels, determining the federal portion based on costs rather than rates allows the federal jurisdiction to help accomplish the goal of rate comparability without having to evaluate states' policy choices affecting those rates.³³

³² *Id.*, ¶ 7 (emphasis in original).

³³ *Seventh Report and Order*, ¶ 32 (footnotes omitted). See also NASUCA NoI Comments at 24.

As previously noted, many of the Tenth Circuit’s concerns could have been addressed if the Commission had actually looked at the data before it. Likewise, it would have been possible for the Commission to demonstrate **whether** there was a relationship between rates and costs – if it had combined the NASUCA rate data with the data from its cost model. Perhaps that is still possible in the time remaining before April 16, 2010. Otherwise, the Commission will have to rely on the policy justification it raised in the *Seventh Report and Order*.³⁴

VI. THERE IS NO CURRENT NEED FOR THE NEW “RATE COMPARABILITY REVIEW AND STATE CERTIFICATION PROCESS” DESCRIBED IN THE NPRM.

The Commission tentatively concludes that it “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.”³⁵ Of course that practice should continue; that reporting represents the most fundamental way in which the adequacy of high-cost support can be demonstrated. If rural rates are reasonably comparable to urban rates, the goal of the statute is met.³⁶

³⁴ The Commission’s view of this issue should be due deference under the standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁵ NPRM, ¶ 14, citing 47 C.F.R. § 54.316; *Order on Remand*, 18 FCC Rcd at 22601-14, ¶¶ 70-92.

³⁶ Which is not to say that the use of the current “weighted average plus two standard deviations” standard is the best means of advancing universal service.

But the Commission also asks whether it “should define ‘reasonably comparable rural and urban rates in terms of rates for bundled telecommunications services.’”³⁷ In the first place, this issue is not one raised by the Tenth Circuit, and hence is not necessary to be considered in the narrow timeframe remaining before April 16, 2010.

Further, the services that are subject to the reasonable comparability standard are those that are supported under 47 U.S.C. § 254(c). And bundles of telecommunications services have not yet been found to meet the definition under that section. Until the Commission finds that bundles meet the definition – and prepares to provide support for those bundles – then the new reasonable comparability definition is irrelevant. And it is premature to discuss whether supporting bundles is “consistent with the public interest, convenience and necessity.”³⁸

VII. CONCLUSION

As previously discussed by NASUCA, many of the Tenth Circuit’s issues arose from the Commission’s failure to adequately explain the basis for its decisions, or to use the record that was before it.³⁹ Much of that can be cured at this point. But it is not clear what would happen if the Commission failed to adequately address all of – or any single one of – the Tenth Circuit’s issues that led to the remand of the non-rural high-cost mechanism. Based on those issues, it does not appear that the court would issue an order

³⁷ NPRM, ¶ 15.

³⁸ 47 U.S.C. § 254(c)(1)(D). NASUCA has previously and consistently argued that comparable calling areas are crucial for the definition of comparable local services, as referred to in the NPRM (at ¶ 18), see, e.g., 96-45 NASUCA Comments on State Rate Review Process (January 14, 2004) at 5-10, but, again, this is not the time or place for considering the issue.

³⁹ NASUCA NoI Comments at 24-32.

that made any of the parties that seek more support, or the parties that hope that there will be less support, happy. NASUCA hopes the Commission will act in order to address the needs both of those consumers who receive the high-cost support and of those who are called upon to supply it.

Respectfully submitted,

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