

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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

COMMENTS OF AT&T INC.

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I. INTRODUCTION

Fourteen years have passed since Congress enacted and President Clinton signed into law the Telecommunications Act of 1996 (1996 Act), requiring the Commission and the states to fundamentally restructure communications markets by opening them to competition.

Recognizing that the implicit subsidies on which the Commission and the states then relied to achieve ubiquitous plain old telephone service (POTS) at affordable rates could not survive in a competitive marketplace,¹ Congress also required the Commission and states to overhaul their universal service support policies and adopt mechanisms that would meet universal service objectives in a competitive environment.² Over a decade ago, the Commission adopted a high-

¹ Prior to the 1996 Act, carriers were granted exclusive franchises and a guaranteed return on investment in return for a requirement that they serve all customers in their service territories at affordable rates irrespective of their costs of serving any particular customer or geographic area of those territories. State and federal regulators thus relied on a complex web of implicit subsidies to achieve universal service objectives. Those subsidies, as both Congress and the Commission have recognized, became untenable in markets open to competition because new entrants (which were not saddled with carrier of last resort or other service obligations) could cherry-pick high revenue, low cost customers and areas, leaving incumbents to serve high cost areas but without the implicit subsidies on which they had relied to make low rates possible in those areas.

² See 47 U.S.C. § 254.

cost support mechanism for so-called “non-rural” carriers³ that, it claimed, satisfied its statutory obligations in section 254, but which actually ignored most of Congress’s stated universal service objectives. And, rather than replacing unsustainable implicit subsidies with explicit universal service support, which both Congress and the Commission repeatedly have acknowledged would be necessary to meet those objectives in a competitive environment, the Commission continued to rely on statewide averaging (and thus implicit subsidies) as the central pillar for its “non-rural” support mechanism. Since then, the Tenth Circuit twice has struck down the Commission’s fatally flawed “non-rural” support mechanism for failing adequately to fulfill the full range of Congress’s universal service objectives,⁴ and twice the Commission has sought to dress up that mechanism in the vain hope that it would at last pass muster.

Now, almost a year after it committed to complete action on reform of the “non-rural” support mechanism by April 16, 2010 (in order to forestall a writ of mandamus by the Tenth Circuit compelling such action), the Commission has announced that it cannot (and, indeed, need not) complete that reform by the agreed-upon deadline. Specifically, in the *FNPRM*, the Commission stated that it anticipates recommending in the National Broadband Plan (NBP) that it should redirect its high-cost universal service support to broadband infrastructure deployment rather than legacy telecommunications services, and that it thus would be futile to undertake

³ Calling this mechanism the “non-rural” high-cost support mechanism is a misnomer insofar as the carriers receiving support (or, more accurately, not receiving support) actually serve the lion’s share of consumers in rural areas.

⁴ The Court acknowledged that those objectives might not be fully compatible, and held that the Commission could balance and trade objectives off each other, but only where the Commission reasonably found that it could not fully reconcile and fulfill all of them – a finding it never has made and likely could not. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2003) (*Qwest I*); *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest II*).

“wholesale reform” of its high-cost program to support only legacy POTS services.⁵ The Commission further stated that it would not be able to implement its anticipated NBP universal service recommendations by April 16, 2010, and that, in any event, such reform is unnecessary because the existing mechanism complies with the statute.⁶ It thus proposes to maintain the existing mechanism, without change, as an interim measure until it can act on its anticipated NBP universal service recommendations.

Although AT&T believes the Commission could – and should – have completed comprehensive reform of its high cost support mechanisms long ago, we agree that, at this stage, the Commission should simply get on with shifting the focus of its high-cost support mechanisms to broadband rather than reforming them to continue supporting just POTS. As we have explained previously, given existing marketplace conditions and likely developments, doing so would fail to satisfy the Commission’s obligations under section 254 and respond to the court’s remands.⁷

But we could not disagree more with the Commission’s assertion that its existing non-rural support mechanism complies with the statute, even on an “interim basis.”⁸ If the Commission unwisely were to adopt its tentative conclusion that the existing mechanism complies with the Act, its third attempt to sustain that already twice invalidated mechanism – by

⁵ *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 09-112, ¶ 1 (rel. Dec. 15, 2009) (*FNPRM*).

⁶ *Id.* at ¶ 3.

⁷ Comments of AT&T Inc., *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*; WC Docket No. 05-337 and CC Docket No. 96-45 (filed May 8, 2009) (*AT&T Tenth Circuit USF NOI Comments*).

⁸ *FNPRM* at ¶ 3.

slapping an “interim” label on it and hoping for the best – is likely to be a strike, rather than a charm, and will only invite the Tenth Circuit finally to call the Commission out and vacate its order.⁹

II. DISCUSSION

A. The Commission Should Adopt AT&T’s Interim Proposal To Recalibrate Non-Rural Carrier Support Pending Completion Of The Transition Of Legacy High-Cost Support To A New Broadband Fund.

Last May, AT&T reiterated its support for transitioning high-cost support awarded under the legacy mechanisms to two new broadband funds (one for fixed network providers and one for mobile wireless providers). At that time, we explained that transitioning legacy *wireline* support will likely require more time than transitioning mobile wireless competitive eligible telecommunications carrier (CETC) support to a new advanced mobility fund (which, under our proposal, would be completed in five years). As a consequence, we noted, the Commission must make several modifications to its existing non-rural carrier support mechanism, pending the completion of this transition, in order to respond to the Tenth Circuit’s remand orders and to comply with section 254(b). For the reasons discussed in Section II.B., *infra*, we believe it doubtful that maintaining the current, invalidated mechanism on an “interim” basis (which could last five years or longer) would survive judicial review. Accordingly, we urge the Commission to adopt AT&T’s interim proposal.

AT&T’s proposal does not suffer from the well-documented flaws of the current mechanism. These flaws, as the Tenth Circuit held in its latest order invalidating that mechanism, include:

⁹ AT&T questions how a mechanism that has been in place for eleven years (despite being struck down twice – most recently five years ago) can fairly be called “interim.”

- The Commission’s definition of “sufficient” unlawfully “ignores the vast majority of § 254(b) principles by focusing solely on the issue of reasonable comparability in § 254(b)(3)” and although the Commission is “compelled to balance the § 254(b) principles to the extent that they conflict,” the Commission “failed to demonstrate that its balancing calculus takes into account the full range of principles Congress dictated to guide the Commission in its actions.”¹⁰
- The Commission’s definition of “reasonably comparable” has “ensured that significant variance between rural and urban rates will continue unabated” and its “selection of a comparability benchmark based on two standard deviations appears no less arbitrary than its prior selection of a 135% cost-support benchmark,”¹¹ and further failed “to preserve and advance universal service” as required by section 253(b).¹²
- The Commission “based the two standard deviations *cost* benchmark on a finding that *rates* were reasonably comparable, without empirically demonstrating a relationship between the costs and rates surveyed in this context,” and thus failed to be supported “fully” on “the basis of the record before it.”¹³

Having invalidated the Commission’s definitions of “sufficient” and “reasonably comparable” along with the cost-support mechanism, the Tenth Circuit did not address the Petitioners’ “remaining claims with respect to the sufficiency of federal support for non-rural carriers and the

¹⁰ *Qwest II*, 398 F.3d at 1234.

¹¹ *Id.* at 1236-37.

¹² *Id.* at 1237.

¹³ *Id.* at 1237 (emphasis in original).

industry as a whole.”¹⁴ Nonetheless, as AT&T and others have repeatedly established over the past decade, insofar as it relies (by design) on statewide averaging and thus rapidly disappearing implicit subsidies, the existing mechanism plainly is not sufficient (nor, for that matter, is it predictable) to preserve and advance universal service consistent with the objectives set forth in section 254(b) in a competitive marketplace. AT&T notes in this regard that, although it serves approximately one-quarter of all rural switched access lines, AT&T receives high-cost model support in only three of its 22 ILEC states.¹⁵ Thus, not only is the amount of explicit support disbursed under the existing mechanism insufficient, it also is not “specific” (i.e., targeted to those areas where support is needed to preserve and advance universal service), as required by the statute.¹⁶

To comply with congressional directives, and the Tenth Circuit’s mandate, the Commission must make the following changes to the existing mechanism. First, the Commission must abandon statewide averaging in favor of more targeted support to wire centers or census block groups (or portions of census block groups) within wire centers to ensure that support is directed to those areas where it is needed. The Commission should identify “rural” or “high-cost” areas based on the Census Bureau’s definition of “rural.”¹⁷ Next the Commission should identify which of those “rural” areas are also “high-cost” areas. AT&T suggests that the Commission make this determination based on population density. In deciding where on the

¹⁴ *Id.* at 1238.

¹⁵ Moreover, despite serving some of the most rural areas of the country, AT&T receives state high-cost universal service support in just six of its 22 ILEC states and that support is diminishing, in some cases significantly. *See, e.g.,* California and Texas.

¹⁶ 47 U.S.C. § 254(b)(5).

¹⁷ *See* U.S. Census Bureau, Census 2000 Urban and Rural Classification, *available at* http://www.census.gov/geo/www/ua/ua_2k.html.

population density scale to define an area as “high cost,” the Commission will have to balance several section 254(b) principles. The more areas that are supported, the greater the risk that the overall fund size will become too large. As the D.C. Circuit and the Fifth and Tenth Circuits have recognized, at some point, increasing the size of the fund, and thus the contribution burden on subscribers in urban areas, will implicate both affordability and sufficiency of support.¹⁸

Second, after identifying the areas in which non-rural carriers are eligible to receive high-cost support, the Commission must then determine how much, if any, support such carriers should receive. The Commission should make this calculation by applying a rate comparability benchmark that is comprised of the following elements: an “urban” rate¹⁹ (e.g., \$25) that would be used as the basis for comparison with rates in rural and high-cost areas, and a comparability factor (e.g., 1.2) that would be used to determine whether rates in high-cost areas are “reasonably comparable” to the urban rate benchmark (which, in this example and using the numbers provided above, would result in a comparability benchmark of \$30). The lower the comparability factor, the more universal service support would be required to ensure that rates in high-cost areas are reasonably comparable to those in urban areas. Thus, as is the case with establishing what population density threshold should be considered “high cost,” the

¹⁸ *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (“excessive funding may itself violate the sufficiency requirements of the Act. . . . [E]xcess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.”); *Qwest II*, 398 F.3d at 1234 (excessive subsidization affects affordability of telecommunications services thus violating section 254(b)(1)); *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1102 (D.C. Cir. 2009) (*RCA*) (“the Commission must consider not only the possibility of pricing some customers out of the market altogether, but the need to limit the burden on customers who continue to maintain telephone service”) & 1103 (“it is hard to imagine how the Commission could achieve the overall goal of § 254 – the “preservation and advancement of universal service,” [] if the USF is ‘sufficient’ for purposes of § 254(b)(5), yet so large that it actually makes telecommunications services less ‘affordable,’ in contravention of § 254(b)(1)”).

¹⁹ This rate could be the national average urban rate, median urban rate or some average above the median rate.

Commission will have to balance the principles of section 254(b) when setting the comparability factor.²⁰

Third, the Commission should make available support in those areas that exceed the rate comparability benchmark in two circumstances: to reduce rates in rural and high-cost areas where rates exceed the benchmark, and to fund an appropriate portion of any gap between the cost of providing supported services in high-cost areas and the expected retail revenues associated with those supported services (or some other measure).²¹ Finally, the Commission should condition support on reductions in intrastate access charges because only by doing more to eradicate implicit access subsidies will the Commission have any ability to gauge whether its non-rural high-cost support mechanism is, in fact, “sufficient.” Recipients of federal high-cost support should be required to reduce their intrastate access charges both to account for any increases in end-user rates needed to reach the comparability benchmark and for any support received through the reformed high-cost support mechanism.

AT&T’s interim proposal is superior to the existing mechanism in several respects. By identifying rural and high-cost areas at a more granular level, the Commission finally would provide “specific” support to non-rural carriers.²² Similarly, the rate comparability benchmark will enable the Commission to narrow the gap between rural and urban rates and thus “advance

²⁰ Setting this factor too high runs the risk that the Tenth Circuit will conclude, as it did with the current comparability benchmark of two standard deviations, that the variance between rural and urban rates is too great to comply with section 254(b)(3). See *Qwest II*, 398 F.3d at 1236.

²¹ Such revenues should be calculated assuming that end-user rates are at the comparability benchmark. This “as if” calculation will ensure that the federal mechanism does not support unfairly low rates. As we noted in our May 2009 comments, the Commission could calculate costs in one of several ways, including using the existing cost model. Since this model is already used at the wire center level in the ten states that qualify for support, AT&T respectfully disagrees with the Commission that the model is not an “appropriate tool” to use in order to distribute support on a disaggregated – and interim – basis. See *FNPRM* at ¶ 27.

²² 47 U.S.C. § 254(b)(5).

universal service.”²³ In addition, by providing the Commission with several critical variables to set (e.g., where on the population density scale to define a “high-cost area,” how high or low to set the comparability factor, what portion of any gap between the cost of providing the supported services in high-cost areas and the expected retail revenues associated with those supported services should be funded), AT&T’s proposal gives the Commission the tools it needs to establish a “sufficient” and “predictable” mechanism that balances all of the relevant principles of section 254(b), including “affordability.”

B. The Commission Is Unlikely To Receive Substantial Deference From The Tenth Circuit For Its “Interim” Rules.

The Commission has, on occasion, received substantial deference from the courts after adopting “interim” rules pending completion of a comprehensive proceeding.²⁴ The Commission obviously is banking on receiving such deference from the Tenth Circuit if it adopts the *FNPRM*’s tentative conclusions (i.e., to maintain the status quo on an “interim” basis) in its April 16, 2010 order. In deciding whether to afford the Commission substantial deference, the D.C. Circuit has held that the Commission must demonstrate that “‘existing, possibly inadequate rules’ had to be frozen to avoid ‘compounding present difficulties.’”²⁵ More recently, the D.C. Circuit upheld the Commission’s interim rules capping high-cost support to CETCs, noting that the Commission “recognized the *irreparable harm* to the USF and the telecommunications

²³ *Id.*; *Qwest II*, 398 F.3d at 1236.

²⁴ *See, e.g., RCA*, 588 F.3d at 1106 (“Courts, including this one, have deferred to the Commission’s decisions to enact interim rules based on its predictive judgment that such rules were necessary to preserve universal service”).

²⁵ *MCI Telecomms. Corp. v. FCC*, 750 F.2d 137, 141 (D.C. Cir. 1984).

markets generally that might result from waiting until comprehensive reform . . . was adopted” before addressing the “inequities and inefficiencies” resulting from the identical support rule.²⁶

If the Commission’s only option to address the Tenth Circuit’s concerns regarding the “sufficiency” of support is simply to increase the amount of support disbursed through its existing, invalidated non-rural carrier support mechanism so that more money would be funneled to just those few areas that receive it today, then plainly the Commission would be justified in maintaining the status quo pending completion of its post-NBP comprehensive proceeding. However, as we explained above, that is not the Commission’s only option. Instead, the Commission can take interim action that would not only “avoid compounding present difficulties,” but *alleviate* the infirmities of the current mechanism. AT&T’s interim proposal also has the benefit of responding to the *Qwest II* remand and complying with the statute.

Far from causing any “irreparable harm to the USF and the telecommunications markets generally,” AT&T’s interim proposal would facilitate the transition from legacy wireline high-cost support to a new broadband-focused high-cost mechanism by, among other things, targeting support to those areas that are truly “high cost” and conditioning federal high-cost support on reductions in intrastate access charges so that these implicit subsidies are not carried into the new broadband mechanism. Implicit subsidies are an issue that the Commission will have to confront at some point and, the longer it delays, the more intractable the problem will be and the greater the damage it will inflict on the industry. Accordingly, we believe the Commission should tackle it now.²⁷ Adopting AT&T’s proposal may result in some increase to the size of the non-rural

²⁶ *RCA*, 588 F.3d at 1106 (emphasis added).

²⁷ In the alternative, the Commission could do nothing since, as we have explained before, access charge revenues are steadily shrinking each year and will disappear altogether in a broadband world. If the Commission does nothing, however, it should recognize that the carriers that currently rely on such

carrier support mechanism. But, based on where it sets the variables or dials, discussed above, the Commission will control the size of this increase. That is, under AT&T's proposal, the Commission can balance the principles of section 254(b), as instructed by the Tenth Circuit, in determining what level of support is "sufficient" to meet the statute's other universal service objectives, including affordability.

It would be a mistake, however, for the Commission to reject AT&T's proposal on the basis that it will result in some increase to the USF, particularly when the size of the increase is within the Commission's control and, in the decade since the Commission created the non-rural mechanism, it has *never* demonstrated that the amount of support made available to non-rural carriers is "sufficient."²⁸ Moreover, under AT&T's proposal any increase in explicit support likely would be more than counterbalanced by reductions in implicit support. In its *FNPRM*, the Commission expresses concern about any "significant" increase to the amount of support that non-rural carriers currently receive under the existing mechanism and it rejects several of the proposals on which it sought comment in its *Tenth Circuit Second Remand NOI* on this basis.²⁹ Although the Commission does not define what it believes would be a "significant" increase that is thus unacceptable, it appears that \$1.2 billion, the price tag of Qwest's proposal, would be "significant."³⁰

revenues will no longer have that revenue stream in order to maintain or upgrade their facilities to continue providing the services that are supported by universal service.

²⁸ See *Qwest I*, 258 F.3d at 1201-02, 1205; *Qwest II*, 398 F.3d at 1234, 1238.

²⁹ *FNPRM* at ¶¶ 13, 25, 26.

³⁰ *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45, Notice of Inquiry, 24 FCC Rcd 4281, ¶ 9 (2009) (*Tenth Circuit Second Remand NOI*).

While we agree that the Commission should not quadruple the size of the existing mechanism in this interim phase (e.g., the Qwest proposal), the Commission also should reject, just as summarily, requests to cap the non-rural carrier funding mechanism during the transition to a new broadband-focused fund. The mechanism that the Commission finally presents to the Tenth Circuit in response to *Qwest II* will be the mechanism by which non-rural carriers will continue to receive support for several more years, after receiving inadequate support under the existing mechanism for more than a decade, (unless, of course, the Tenth Circuit vacates the Commission’s rules out of frustration). Thus, capping what is already an insufficient amount for at least several years not only would be inconsistent with the statute (because, among other things, it fails to “preserve” – let alone “advance” – universal service”),³¹ it would hinder non-rural carriers’ ability to deploy broadband infrastructure in their unserved areas, contrary to Congress’s directive that the Commission adopt a plan that “ensure[s] that all people of the United States have access to broadband capability.”³²

The transition to a new broadband fund, under any proposal, will not occur in a mere few years for several reasons. First, the statute requires that the Commission’s mechanisms be “predictable.”³³ Consequently, the Commission cannot simply flash-cut legacy high-cost support and remain compliant with the statute. Second, with a contribution factor in excess of 14 percent, the Commission cannot jumpstart its universal service NBP initiatives with an infusion of additional dollars. As we have explained previously, every \$100 million increase per quarter

³¹ See *RCA*, 588 F.3d at 1106.

³² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009) (ARRA).

³³ 47 U.S.C. § 254(b)(5).

in the size of the USF causes a 5.4 percent increase to the contribution factor.³⁴ Doubling (for example) the first quarter 2010 funding demand (from \$2.106 billion to \$4.212 billion) would result in a staggering *33 percent* contribution factor, which plainly would violate the affordability principle of section 254(b).

The Commission can mitigate some of the impact of any increase to the size of the fund by expanding the contribution base, and reforming its contribution methodology, as AT&T and others have proposed for several years. Specifically, the Commission can and should overhaul its current universal service contribution methodology, which is based on interstate telecommunications revenues, in favor of a more stable and technology neutral methodology that is based on telephone numbers and/or connections.³⁵ Because contributors and USAC will require a year and a half to implement a new methodology, we have asked the Commission to act as quickly as possible. Unfortunately, to date, the Commission has made no progress in this area.

Third, the Commission could experiment with several broadband pilots before committing to one or two of the most effective strategies for refocusing its high-cost program to

³⁴ See AT&T Petition for Immediate Commission Action to Reform its Universal Service Contribution Methodology, WC Docket No. 06-122, at 11-12 & n.30 (filed July 10, 2009) (*AT&T Contribution Methodology Reform Petition*) (explaining that, for example, if the Commission were to expand its Lifeline program to include a \$300 million dollar broadband component, as some have recommended, the contribution factor in effect at the time of AT&T's petition – 12.9 percent – would have increased to 13.4 percent).

³⁵ See, e.g., Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122 and CC Docket No. 96-45 (filed Sept. 11, 2008); Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122 and CC Docket No. 96-45 (filed Sept. 23, 2008); Letter from Mary L. Henze, AT&T, and Kathleen Grillo, Verizon, to Marlene Dortch, FCC, WC Docket No. 06-122 and CC Docket No. 96-45 (filed Oct. 20, 2008); Letter from Mary L. Henze, AT&T, to Marlene Dortch, FCC, WC Docket No. 06-122 and CC Docket No. 96-45 (filed Oct. 29, 2008). Under the AT&T/Verizon telephone numbers proposal, a \$100 million dollar increase to the universal service fund would result in a per telephone number charge increase of merely \$0.014. See *AT&T Contribution Methodology Reform Petition* at 15.

a new broadband fund. Allowing these pilots to run for a sufficient amount of time in order to collect data to evaluate the success of the pilots also will necessarily prolong the amount of time in which the Commission's "interim" mechanism remains effective.

If the Commission imprudently adopts its tentative conclusions and attempts to maintain its invalidated non-rural carrier support mechanism on an "interim" basis, it will be called upon by the Tenth Circuit to explain why it should be afforded substantial deference. The facts here have more in common with those before the D.C. Circuit in *Competitive Telecomms. Ass'n v. FCC (CompTel)*³⁶ than they do with *RCA*. In the former decision, the D.C. Circuit declined to uphold an "interim" rule perpetuating non-cost-based rates that had been in place for thirteen years without any "discernable progress" to transition the interim rule to a final, cost-based rule. Similarly, by the time that the Commission transitions legacy wireline support to a new broadband funding mechanism, it is probable that its non-rural carrier support mechanism, which the Tenth Circuit first invalidated back in 2001, will have been in place for more than thirteen years, the amount of time that the D.C. Circuit found unreasonable in *CompTel*. Moreover, the Commission can point to no progress toward bringing its non-rural carrier support mechanism into compliance with the statute or the Tenth Circuit's remand orders. By no stretch of the imagination could the incremental, though entirely superficial, proposed modifications contained in the FNRPM constitute "progress" if adopted. We discuss the inadequacies with these proposals below.

³⁶ *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996).

C. The Few Proposed Changes To The Non-Rural Carrier Support Mechanism And How The Commission Interprets Certain Statutory Definitions Amount To Nothing More Than Window Dressing And Should Not Be Adopted.

The Commission requests comment on whether it should supplement its ineffectual annual state certification of rates with a carrier certification that the carrier offers bundled local and long distance service at “reasonably comparable” rural and urban rates.³⁷ The Commission also seeks comment more generally on whether it should continue defining reasonably comparable rates in terms of local rates only.³⁸ The simple response to these questions is, unless the Commission is prepared to begin supporting long distance service through its non-rural carrier mechanism, then it need not bother with examining the reasonable comparability of the rural and urban rates of bundled service offerings. It is unclear to AT&T why the Commission would embark down a path of reviewing additional POTS data when, as the Commission itself implicitly acknowledges in the *FNPRM*, it is likely to transition its high cost program to broadband. If the Commission determines that it should fund long distance telecommunications services, and AT&T is not advocating that it do so, the Commission cannot rely on annual certifications (provided by either states or carriers) to demonstrate that rates are reasonably comparable unless it is prepared to act if a state or carrier certifies that rates are not reasonably comparable and additional federal support is necessary. Over five years ago, the Wyoming Commission and the Wyoming Office of Consumer Advocate filed a petition with the Commission seeking additional federal high-cost support for the non-rural carrier operating in Wyoming after demonstrating that the non-rural carrier’s rural rates in Wyoming were not

³⁷ *FNPRM* at ¶ 20.

³⁸ *Id.* at ¶¶ 15-19.

reasonably comparable to urban rates.³⁹ To date, the Commission has failed to act on this petition. AT&T sees little point in maintaining, let alone expanding, what can only be charitably described as the paper tiger that is its annual state certification requirement.

In response to the Tenth Circuit's directive that, *for its non-rural carrier support mechanism*, the Commission "articulate a definition of 'sufficient' that appropriately considers the range of principles identified in the text of the statute," the Commission essentially concludes that it need not bother so long as at least one of its universal service programs – which could be its "rural carrier" high-cost support mechanisms – satisfies the principles in section 254(b).⁴⁰ AT&T could not agree more that the Commission's policies have destined its "non-rural carrier" support mechanism to be "just one relatively small segment" of the Commission's universal service scheme.⁴¹ That mindset, unfortunately, is the reason why the carriers that provide service in the majority of the nation's rural and high-cost areas receive a disproportionately small amount of universal service support and why the Commission has been unable to persuade the Tenth Circuit that this mechanism complies with the statute.

In the *AT&T Tenth Circuit USF NOI Comments*, we discussed at length all of the relevant principles that the Commission must consider as it revises its high-cost mechanisms.⁴² We do not repeat that analysis here but ask that the Commission incorporate it into the record in

³⁹ See Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier, CC Docket No. 96-45 (filed Dec. 21, 2004). AT&T believes that Commission inaction has likely dissuaded other states from taking the necessary steps, as Wyoming did, to eliminate implicit access subsidies.

⁴⁰ *FNPRM* at ¶ 31 ("The Commission crafted a variety of mechanisms that – collectively – address the section 254(b) principles.").

⁴¹ *Id.*

⁴² *AT&T Tenth Circuit USF NOI Comments* at 8-17.

response to its request for comments “on the principles the Commission should consider in designing the non-rural high-cost mechanism and in determining whether the level of support is ‘sufficient.’”⁴³ It should be plain from our May 2009 comments that the Commission cannot consider just two principles (reasonable comparability and affordability) to the exclusion of all of the others, as it proposes to do in the *FNPRM*. It is equally implausible for the Commission to conclude that, based on the latest telephone subscribership levels (which, of course, include all technologies such as VoIP and wireless), the amount of support disbursed to non-rural carriers is not only sufficient but, possibly, “more than enough” to ensure that these carriers, which serve areas that are among the most high-cost and rural in the country, will be able to continue offering “reasonably comparable and affordable rates that permit widespread access to basic telephone service.”⁴⁴ Indeed, even the Commission itself appears to recognize that any such conclusion is insupportable: just one paragraph later, the Commission observed that its non-rural carrier support mechanism provides only a “specific and predictable methodology” and, thus, seemingly concedes that its methodology does not distribute a “sufficient” amount of support.⁴⁵

Finally, the Commission seeks comment on how it should respond to the Tenth Circuit’s concerns that the Commission’s existing comparability benchmark guarantees that “significant variance between rural and urban rates will continue unabated.”⁴⁶ On remand, the court directed the Commission to define “reasonably comparable” in a manner that both preserves and advances (a “concept that certainly could include a narrowing of the existing gap between urban

⁴³ *FNPRM* at ¶ 31.

⁴⁴ *Id.* at ¶ 34.

⁴⁵ *Id.* at ¶ 35. As we have noted before, the only “predictable” aspect of the Commission’s current non-rural carrier support mechanism is that we will not receive “sufficient” or “specific” support.

⁴⁶ *Qwest II*, 398 F.3d at 1236.

and rural rates”) universal service.⁴⁷ While AT&T’s high-cost broadband proposal clearly “advances” universal service,⁴⁸ our interim proposal also is directly responsive to the Tenth Circuit’s concern because, for the first time, the Commission would provide support to non-rural carriers to reduce rates in rural and high-cost areas where rates exceed a newly created rate comparability benchmark. Instead of squandering time pursuing claims that the Commission has “advanced” universal service by virtue of the increase in telephone penetration rates since it began its universal service programs,⁴⁹ the Commission should adopt both AT&T’s interim and longer term high-cost proposals.

III. CONCLUSION

Of course the Commission will be unable to develop a record, let alone issue an order implementing the NBP’s expected recommendation to refocus the existing high-cost program to support broadband before April 16, 2010. In its April 2010 order responding to the Tenth Circuit’s second remand, the Commission does have sufficient time, however, to craft a “complete plan for supporting universal service”⁵⁰ post-NBP. As part of that complete plan, the Commission should describe a two-pronged approach to satisfy the court’s remands. First, the Commission should explain that, during the transition to a new broadband fund, it will act immediately to recalibrate non-rural carrier support. AT&T recommends that the Commission recalibrate this mechanism based on our interim proposal (described above in Section II.A.) as it

⁴⁷ *Id.* at 1236-37.

⁴⁸ *See FNPRM* at ¶ 41.

⁴⁹ *Id.* at ¶ 40.

⁵⁰ *Qwest I*, 258 F.3d at 1205.

satisfies the statutory requirements in section 254(b) and addresses the Tenth Circuit’s concerns with the existing mechanism. Second, the Commission should provide the court with a roadmap explaining how it intends to transition legacy wireline high-cost support to the new broadband fund for fixed network providers (i.e., a fund that balances all of the relevant universal service principles). Again, AT&T suggests that the Commission adopt our high-cost broadband proposal.⁵¹ The roadmap should include deadlines for action to demonstrate that the Commission takes seriously its obligation to respond to the court’s concerns in an “expeditious manner.”⁵²

Respectfully Submitted,

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⁵¹ See, e.g., Comments of AT&T Inc., *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 and CC Docket No. 96-45 (filed Apr. 17, 2008).

⁵² *Qwest II*, 398 F.3d at 1239.