

**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 Universal	)	CC Docket No. 96-45
Service	)	
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

**PETITION FOR RECONSIDERATION OF  
PUERTO RICO TELEPHONE COMPANY, INC.**

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## I. INTRODUCTION AND SUMMARY

Puerto Rico Telephone Company, Inc. (“PRT”) hereby petitions the Commission for reconsideration of its *Order* refusing to adopt a new high-cost support mechanism to address the agency’s statutory responsibilities for insular areas and the documented needs of Puerto Rico.<sup>1</sup> Reconsideration is appropriate under Section 1.429 of the Commission’s rules where an order rests on erroneous conclusions of law or fact.<sup>2</sup> That standard is easily met here. The Commission’s failure to adopt any universal service mechanism – despite the passage of fourteen years since Congress directed that action be taken and its rejection of a targeted mechanism for Puerto Rico in this case – conflicts with the Communications Act (“Act”) and fundamental principles of administrative law. Section 254 of the Act, by its terms, requires the Commission to adopt a specific insular mechanism that supports comparatively high loop costs in Puerto Rico.

Section 254 also requires the Commission to ensure that insular areas such as Puerto Rico are provided telecommunications and information services “reasonably comparable,” *id.* § 254(b) to those available in urban areas. The *Order* incorrectly concluded that the presence of any telephone service – wireline or wireless – is sufficient. The Act, however, requires comparability – namely, that insular residents receive the same choices as urban residents. Because wireline and wireless services are available in urban areas, then they also must be made available in insular areas. However, the Commission effectively relegates Puerto Ricans to fewer communications choices than other residents of the United States by effectively deciding

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<sup>1</sup> *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, FCC 10-57 (rel. Apr. 16, 2010) (“*Insular Order*” or “*Order*”).

<sup>2</sup> 47 C.F.R. § 1.429.

that wireline service is not worthy of support by virtue of the presence of wireless alternatives in Puerto Rico.

Aside from the Commission's statutory duty to implement an insular mechanism, the Commission's declination to do so here is arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The *Order* reversed course on the Commission's prior tentative conclusion to adopt an insular mechanism addressing the documented needs of Puerto Rico that it found to be both legally and factually required. The *Order* did so citing "changed circumstances" that cannot be substantiated on the record. For the first time, and contrary to its own precedent, the Commission determined that it should assess the availability of wireless services in evaluating whether to establish a universal service mechanism despite Congress's designation of certain regions as needing such support. Indeed, the Commission's prior decisions and the companion *Qwest Remand Order*<sup>3</sup> continue to focus predominantly on wireline providers' costs of serving the supported service area. In advancing this new approach, the *Order* failed adequately to consider the potential implications of this conclusion on Puerto Rico and, in particular, the health of its current and future wireline infrastructure. As a result, despite fourteen years of proceedings and demonstrations, the Commission still did not adequately take into account the compelling and significant costs faced by PRT as a wireline carrier serving an insular area. And, as such, the Commission arbitrarily treated insular areas, such as Puerto Rico, differently from rural and high cost areas, which may still apply for and receive loop support.

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<sup>3</sup> *High-Cost Universal Service Support, Federal-Joint Board on Universal Service, 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, Order on Remand and Memorandum Opinion and Order, WC Docket No. 05-337, CC Docket No. 96-45, FCC 10-56 (rel. Apr. 16, 2010) ("Qwest Remand Order").*

The *Order*, along with the Commission’s existing universal service policies as applied to Puerto Rico, ultimately harm Puerto Ricans by failing to support wireline infrastructure, which is needed not only to provide voice services comparable to those available in the mainland United States but also as the foundation for next generation, high speed broadband deployment. As the Commission recently explicitly recognized, it “indirect[ly] fund[s] . . . broadband-capable networks today through our legacy high-cost programs.”<sup>4</sup> Nevertheless, the *Order* asks Puerto Rico and PRT to wait for yet another comprehensive universal service proceeding to address these issues. Since Puerto Rico is already far behind the mainland in broadband deployment, further delay will only allow continued erosion of its wireline infrastructure and ultimately harm Puerto Rico’s prospects for ubiquitous broadband deployment. As a result, the Commission should expeditiously reconsider the *Order* and adopt an insular mechanism that will provide explicit universal service loop support to address Puerto Rico’s elevated costs to deploy wireline infrastructure.

**II. SECTION 254 REQUIRES THE COMMISSION TO ESTABLISH A SPECIFIC INSULAR MECHANISM THAT SUPPORTS ELEVATED INTRASTATE LOOP COSTS.**

**A. The Commission Has a Statutory Duty Under Section 254(b)(3) to Adopt a Universal Service Mechanism for Insular Areas.**

Section 254(b) speaks in plain and mandatory terms. It provides that the Commission “shall” base its universal service support mechanisms on the principle that consumers in “insular” areas should have access to telecommunications services that are reasonably

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<sup>4</sup> *Connect America Fund*, Notice of Inquiry and Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 10-58 ¶ 53 (rel. Apr.21, 2010) (“*Connect America Fund NPRM*”).

comparable to those in urban areas.<sup>5</sup> Section 254(b)(3) specifically lists “insular” areas as a category separate and apart from “rural” and “high cost” areas, thus requiring the Commission to address the lack of access to telecommunications services in insular areas such as Puerto Rico.<sup>6</sup> Contrary to the Commission’s erroneous conclusion,<sup>7</sup> the text and structure of Section 254(b)(3) *mandate* a separate universal service mechanism for insular areas. Although the statute seeks to achieve the goal of reasonably comparable rates and services for insular areas,<sup>8</sup> Congress articulated the means by which the Commission is required to achieve that result.

Section 254(b)’s textual commitment of a universal mechanism for insular areas is buttressed by other provisions of the Act.<sup>9</sup> Section 151, for example, directs the Commission “to make available, so far as possible, *to all the people of the United States*, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient Nation-wide . . . wire and radio communication service with adequate facilities at reasonable charges.”<sup>10</sup> Similarly, Section 706 requires the Commission to “encourage the deployment . . . of advanced

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<sup>5</sup> 47 U.S.C. § 254(b).

<sup>6</sup> *See, e.g., Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998) (“It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.”) (internal quotation marks and citation omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (explaining that a law must be read “to give effect, if possible, to every clause and word of a statute”); *see generally* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (6th ed. 2000).

<sup>7</sup> *Insular Order* ¶ 23.

<sup>8</sup> *Id.*

<sup>9</sup> *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following the “cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context”); *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.”).

<sup>10</sup> 47 U.S.C. § 151 (emphasis added).

telecommunications capability *to all Americans*.”<sup>11</sup> These provisions, in conjunction with Section 254(b), represent a non-discretionary duty to establish a specific insular support mechanism.

Indeed, the Commission expressly acknowledged this mandatory duty in its *2005 NPRM*. In that decision, the Commission unanimously reached a tentative conclusion to adopt an independent mechanism for insular areas that would address the significant disparities in access to telephone service in areas such as Puerto Rico. Not only did the Commission “tentatively conclude that section 254(b) provides the Commission with the authority to establish a new interim support mechanism for insular areas,”<sup>12</sup> but the Commission also agreed that “Congress intended that consumers in insular areas, as well as in rural and high-cost areas, have access to affordable telecommunications and information services.”<sup>13</sup> The Commission understood that the only way to satisfy the congressional mandate of universal service for insular areas was to establish “a special support mechanism, in combination with the Commission’s low-income program, [to] help to combat the problem of low subscribership in Puerto Rico.”<sup>14</sup> This conclusion is consistent with the Commission’s previous acknowledgment that Congress intended to provide universal service support for the benefit of consumers in insular areas.<sup>15</sup>

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<sup>11</sup> 47 U.S.C. § 706 (emphasis added).

<sup>12</sup> *2005 NPRM* at 19746, ¶ 33.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g., Rural Health Care Support Mechanism, Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 24613, at 24632-33 ¶ 42 (2004) (noting “Congressional intent ... support[ing] the adoption of special mechanisms by which to calculate support for insular areas”).*

Finally, even if Section 254(b) is somehow ambiguous, which it is not, the Commission’s interpretation of the statute is unreasonable. The Commission cannot arbitrarily choose to give effect to some words of a statute, but ignore others. Yet, that is precisely what the Commission has been doing for over fourteen years. Section 254(b)(3) specifically identifies three regions entitled to receive universal service support—rural, insular, and high cost areas. The Commission has chosen to comply with this statutory command by adopting specific high cost funding mechanisms to address the unique needs of two of the three regions identified in the statute. Put simply, the Commission’s conclusion that Section 254(b) does not mandate a separate insular mechanism is betrayed by its decision to ensure universal service for “rural” and other “high cost” areas through the adoption of separate and distinct rural and high-cost funds.<sup>16</sup>

**B. Section 254(b) Requires the Commission to Support All “Reasonably Comparable” Telecommunications and Information Services in Insular Areas That Are Available in Urban Areas, Including Wireline Telecommunications Services.**

The text of Section 254 provides that Congress intended for the Commission to ensure that insular areas have “reasonably comparable” “telecommunications and information services”

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<sup>16</sup> Moreover, the funds provided to Puerto Rico under the high-cost program are not sufficient to meet this specific statutory mandate. *Insular Order* ¶¶ 37-42. As explained in PRT’s comments and more fully below, the Commission’s use of the forward-looking cost model to determine high-cost support does not adequately account for the unique challenges faced by carriers providing service in insular areas like Puerto Rico. The Commission specifically declined to adopt the forward-looking cost model for rural areas because the Commission had not adequately assessed rural areas unique costs. *See Federal-State Joint Board on Universal Service*, Ninth Report and Order, 14 FCC Rcd 20432, 20439, ¶ 11 (1999). Both Congress, in Section 254(b), 47 U.S.C. § 254(b), and the Commission, have recognized that insular areas have unique costs. *See Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 20 FCC Rcd 19731, 19746, ¶ 33 (2005) (“2005 NPRM”). However, rather than assessing these costs – or as it did with rural areas, table any adoption of a forward-looking cost model until it could adequately assess them – the Commission wrongly lumped insular areas into the high cost forward-looking model without adequately evaluating whether the model actually reflects them – which it does not.

as those available in urban areas.<sup>17</sup> In particular, Section 254 states that “the Commission shall base policies for the preservation and advancement of universal service” on the principle that “[c]onsumers in all regions of the Nation, including . . . those in rural, insular, and high cost areas, should have access to telecommunications and information *services* . . . that are reasonably comparable to those services provided in urban areas . . . .”<sup>18</sup> Section 254(b)(1) further provides that “[q]uality” telecommunications and information services should be available “at just, reasonable, and affordable rates.”<sup>19</sup>

This language leaves no room for the Commission’s interpretation that merely ensuring the availability of one type of telecommunications and information services, such as wireless service, will meet the statute’s command that “reasonably comparable” and “quality” telecommunications and information services be made available in Puerto Rico and other insular areas.<sup>20</sup> Because other areas have access to *both* wireline and wireless services, then insular areas are entitled to “reasonably comparable” wireline *and* wireless service under the statutory command of Section 254(b)(3). Under the Commission’s view, however, Section 254 would condone a result where consumers in Puerto Rico have no access to wireline service as long as wireless service is available to a substantial majority of the population. Such a result, incorrectly endorsed by the Commission in this proceeding, is irreconcilable with the text, structure, and purpose of Section 254.

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<sup>17</sup> 47 U.S.C. § 254(b)(3).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> 47 U.S.C. § 254(b)(1)

<sup>20</sup> *Insular Order* ¶ 27 (“Thus, on this record, a decline in *wireline* subscribership . . . is not determinative given the overall increase in telephone subscribership in Puerto Rico.”) (emphasis in original).

This conclusion is buttressed by the Commission’s own definition of “reasonably comparable.” In the *Qwest Remand Order*, adopted concurrently with the *Insular Order*, the Commission determined that “rural rates are ‘reasonably comparable’ to urban rates under section 254(b)(3) if they fall within a reasonable range of the national average urban rate” using the costs of *wireline* providers.<sup>21</sup> This definition (which necessarily assumes the universal availability of wireline services by using wireline costs as a definitional benchmark) fatally undermines the Commission’s conclusion in the *Insular Order* that wireless services alone may satisfy the “reasonably comparable” mandate of Section 254(b)(3). In other words, the Commission has simultaneously concluded that wireless service is sufficient for purposes of determining whether insular areas have access to services that are “reasonably comparable” to urban areas, but has established wireline costs, without regard to the cost of wireless service, as the benchmark for defining “reasonably comparable.” Either wireline service is the proper benchmark for the “reasonably comparable” assessment or it is not. But the Commission cannot, consistent the APA’s requirement of “reasoned decisionmaking,” adopt logically inconsistent standards to measure “reasonably comparable” service.<sup>22</sup>

Moreover, the National Broadband Plan does not excuse the Commission’s failure to meet the statutory mandate to provide reasonably comparable “telecommunications *and*

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<sup>21</sup> *Qwest Remand Order* ¶¶ 52-53, 63.

<sup>22</sup> *Air Line Pilots Ass’n v. FAA*, 3 F.3d 449, 453 (D.C. Cir. 1993) (holding that a “DOT Order presents an interpretation of the EPP which is internally inconsistent and therefore unreasonable and impermissible under *Chevron*”); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (“We find the Commission’s analysis . . . to be internally inconsistent and inadequately explained, and thus we conclude that its ultimate finding . . . was arbitrary and capricious and not supported by substantial evidence on the record considered as a whole.”); *cf. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (describing “[a]gency inconsistency” as a possible “reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]”).

information services” to consumers in Puerto Rico.<sup>23</sup> As explained above, Section 254 provides the Commission with a clear and unambiguous statutory command to ensure that consumers in insular areas have access to reasonably comparable “telecommunications *and* information services.”<sup>24</sup> That the National Broadband Plan is part of the Commission’s effort to promote wider use of information services does not mean that the agency can ignore its statutory obligation to provide reasonably comparable “telecommunications” services. Even if implementation of the National Broadband Plan might be “more difficult” with a separate insular support mechanism,<sup>25</sup> which is far from certain, the Commission does not have the discretion to ignore a mandatory directive imposed on it by Congress because it may conflict with the Commission’s regulatory objectives. “A statute is the command of the sovereign, and an agency implementing a statute may not ignore, or provide its own substitute for, a standard articulated in the statute.”<sup>26</sup>

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<sup>23</sup> See *Insular Order* ¶¶ 43-46.

<sup>24</sup> 47 U.S.C. § 254(b)(3) (emphasis added).

<sup>25</sup> In any event, as noted below, wireline infrastructure is critical to broadband deployment and fully consistent with the goals of the National Broadband Plan. See *infra* at 22. Indeed, as explained below, Puerto Rico’s broadband deployment lags significantly behind the rest of the nation. See Industry Analysis and Competition Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2008*, at Table 21 (Feb. 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296239A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf) (finding that only 24% of households in Puerto Rico have high-speed Internet access connections, compared with 60% across the rest of the United States). Providing the requested insular support to Puerto Rico, as is required by statute, will only serve to help Puerto Rico narrow this gap.

<sup>26</sup> *Friends of Richards-Gebaur Airport v. Federal Aviation Admin.*, 251 F.3d 1178, 1195 (8th Cir.2001).

### **III. THE COMMISSION’S ORDER IS ARBITRARY AND CAPRICIOUS UNDER SECTION 706 OF THE APA.**

The *Order* is arbitrary and capricious under Section 706 of the APA.<sup>27</sup> The *Order* reversed course on its unanimous preliminary finding that an insular fund was both legally and factually needed, citing “changed circumstances” that simply do not exist. The *Order* overstated both the increased telephone subscribership in Puerto Rico and the amount of universal service support that PRT and Puerto Rico currently receives. Critically, the *Order* ignored evidence of the unique costs that apply specifically to insular areas as opposed to other high cost areas. Lastly, despite the Commission’s recognition that Puerto Rico’s telephone subscribership was “materially lower” than the rest of the nation,<sup>28</sup> the *Order* arbitrarily concluded that no additional universal service support should be available, even though the Commission provides such support to rural and high cost areas.

#### **A. The Order Reversed Course on the Insular Fund Proceeding Based on “Changed Circumstances” That Do Not Exist.**

The *Order* reversed course from its preliminary finding that an insular fund is legally and factually needed without sufficiently explaining the basis for its departure.<sup>29</sup> In a unanimous decision, the Commission reached a tentative conclusion that it should adopt an independent mechanism for insular areas that would address the significant disparities in access to wireline telephone service in areas such as Puerto Rico.<sup>30</sup> Indeed, the Commission previously

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<sup>27</sup> 5 U.S.C. § 706.

<sup>28</sup> *Insular Order* ¶ 49.

<sup>29</sup> *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”) (“an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”)

<sup>30</sup> 2005 *NPRM* at 19746, ¶ 33.

acknowledged Congress' intent to "support the adoption of special mechanisms by which to calculate support for insular areas."<sup>31</sup> The 2005 NPRM was also premised on the assumption that wireline deployment was the central aim of Section 254(b)(3) and expressly stated that this fundamental statutory goal was going unmet.<sup>32</sup> The Commission justified its reversal on what it deemed to be extraordinary subscribership improvements to basic telephone service in Puerto Rico between 2005 and 2009.<sup>33</sup> This is unsustainable for several reasons.<sup>34</sup>

First, the Order's conclusion that "a decline in wireline subscribership . . . is not determinative"<sup>35</sup> because of the existence of wireless service directly contradicts its previous determination – on multiple occasions – "that mobile wireless service and wireline telephone services are not perfect substitutes."<sup>36</sup> Further, this conclusion is not supported by the record.

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<sup>31</sup> See, e.g., *Rural Health Care Support Mechanism*, Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 24613, at 24632-33 ¶ 42 (2004).

<sup>32</sup> Based on wireline penetration rates submitted in the record by PRT, the Commission found that, "through section 254(b), Congress intended that consumers in insular areas, as well as in rural and high-cost areas, have access to affordable telecommunications and information services. We believe that the low penetration rates in Puerto Rico demonstrate that this goal is not being met and that the Commission could be doing more to help the residents of Puerto Rico." See 2005 NPRM at 19746, ¶ 33.

<sup>33</sup> See *Insular Order* ¶ 20.

<sup>34</sup> The Commission similarly cannot sustain its contention that the 0.3 percent increase in the size of the universal service fund that would result from the creation of an insular mechanism would lead to "excess subsidization of the universal service fund,' which may actually detract from 'universal service by causing rates to unnecessarily rise.'" *Insular Order* ¶ 36. Just one month ago, the Commission found that a 0.3 percent to 0.6 percent increase in high cost fund "will not have a significant impact on the overall size of the fund." *High-Cost Universal Service Support, Jurisdictional Separations, Coalition for Equity in Switching Support Petition for Reconsideration*, Report and Order and Memorandum Opinion and Order, WC Docket No. 05-337 & CC Docket No. 80-286, FCC 10-57 (rel. Mar. 18, 2010).

<sup>35</sup> *Insular Order* ¶ 27.

<sup>36</sup> *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Areas*, Mem. Op. and Order, 23

Commenters noted that wireless services could not be a substitute for access to wireline telecommunications services and that wireline infrastructure would be critical to advanced communications.<sup>37</sup> It also runs contrary to the overarching purposes of Section 254(b)(3) as implemented by the Commission, the historical focus of which has always included wireline as well as wireless service – indeed, at its inception, the USF program was concerned primarily with bringing basic landline telephone service to all consumers, and it has certainly never before been understood to concern *only* wireless service. The Federal-State Joint Board, for example, has declined to recommend requirements that would “render carriers that utilize wireline technologies ineligible for federal support.”<sup>38</sup> “This would drastically reduce the number of entities that could provide all of the core services in high-cost areas and could leave many communities without . . . basic service” and “would be inconsistent with the goal of promoting the universal availability of the core services and would not serve the public interest.”<sup>39</sup>

*Second*, the *Order* drew conclusions about the need for universal service support from changes in subscribership data that are statistically unreliable. The *Order*’s comparison of telephone subscribership rates in Puerto Rico between 2005 and 2008 compares apples to

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F.C.C.R. 11729, 11743, ¶ 30 (2008) (recognizing that mobile wireless service and wireline telephone services are not perfect substitutes); *see also High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Order*, 23 FCC Rcd 8834, ¶ 22 (2008) (noting that “the majority of households do not view wireline and wireless services to be direct substitutes.”).

<sup>37</sup> See Minority Media & Telecommunications Council, Communications Workers of America, Hispanic Technology and Telecommunications Partnership, Hispanics in Information Technology and Communications, League of United Latin American Citizens, National Association of Hispanic Publications, National Puerto Rican Coalition, Office of Communication of the United Church of Christ, Inc., and Union de Trabajadores de Comunicaciones, Reply Comments, CC Docket No. 96-45, WC Docket No. 05-337 at 11 (May 26, 2006).

<sup>38</sup> *Federal-State Joint Board on Universal Service, Recommended Decision*, 17 FCC Rcd 14095, ¶39 (Fed-State Jt. Bd. 2002).

<sup>39</sup> *Id.*

oranges and does not measure the availability of qualifying replacement service that comports with the requirements of Section 54.101(a)(2) of the Commission rules, 47 C.F.R. § 54.102(a)(2). In 2008, the Census Bureau changed the wording in the question related to telephone service from “Is there telephone service available in this house, apartment, or mobile home from which you can both make and receive calls?”<sup>40</sup> to “Does this house, apartment, or mobile home have telephone service from which you can both make and receive calls? *Include cell phones.*”<sup>41</sup> The Commission entirely left out of its analysis, however, that before this change in the questionnaire, the reported telephone subscribership level in Puerto Rico consistently was measured between approximately 73 and 80 percent in 2007 – between 14-21 percent below the national average.<sup>42</sup> The Commission’s decision to base its refusal to create a universal service mechanism for insular areas like Puerto Rico on the clearly inconsistent statistical data for 2008 is arbitrary and capricious within the meaning of the APA.<sup>43</sup> In any event, rather than showing that voice service is ubiquitous in Puerto Rico, particularly in the more sparsely populated interior portions of the island, the increased numbers likely capture some access to “a cell phone” whether or not such service is a qualifying replacement for universal service purposes.<sup>44</sup>

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<sup>40</sup> 2007 Puerto Rico Community Survey Questionnaire at Question 11, *available at* <http://www.census.gov/acs/www/Downloads/Special/PRico/QuestE07PR.pdf>.

<sup>41</sup> 2008 Puerto Rico Community Survey at Question 8(g), *available at* <http://www.census.gov/acs/www/Downloads/Special/PRico/QuestE08PR.pdf> (emphasis in original).

<sup>42</sup> *Universal Service Monitoring Report*, CC Docket No. 98-202, Table 6.4 (rel. Dec. 2009) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-295442A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295442A1.pdf) (“2009 *Universal Service Monitoring Report*”).

<sup>43</sup> *See, e.g., Lloyd Noland Hosp. and Clinic v. Heckler*, 762 F.2d 1561, 1568 (11th Cir. 1985) (“It is . . . an abuse of discretion to base a regulation on faulty data.”) (citing *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir.1977)).

<sup>44</sup> *See* 47 C.F.R. § 54.101(a).

*Third*, even the increased subscribership percentage relied upon in the *Order* is significantly below the national average and substantially below any other state – providing conclusive evidence of the need for additional universal service support for Puerto Rico. As the Commission acknowledged, Puerto Rico still remains more than six percent behind the national average in telephone subscribership, even incorporating wireless penetration.<sup>45</sup> In fact, more than 200,000 households have no access to wireline infrastructure.<sup>46</sup> Indeed, the Commission candidly recognized “that there may be a significant number of low-income consumers in Puerto Rico who remain unable to afford access to voice telephone service” and that “subscribership in Puerto Rico remains materially lower than in any other jurisdiction reported by the Census Bureau.”<sup>47</sup> As Commissioner Copps explained, “[b]ut better is not good enough for the good people of Puerto Rico. Voice penetration there still falls significantly below the national average. Furthermore, the insular nature of Puerto Rico, as well as its low median household income—roughly one third of the national median household income—create a unique situation which should not be overlooked any longer. More is needed here.”<sup>48</sup> Despite its recognition of the problem, the *Order* failed to address elevated-cost issues that are the root cause. In short, the “more” that is “needed” by Puerto Rico is an insular universal service mechanism that will allow

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<sup>45</sup> See *Insular Order* ¶ 20. The Commission’s most recent figure for Puerto Rico’s telephone penetration rate (91.9%) is still well below the penetration rate in all U.S. states (98.2%) and New Mexico (95.7%), the state with the lowest penetration rate. *Universal Service Monitoring Report* at Table 6.4.

<sup>46</sup> See Letter from Nancy J. Victory, Counsel to PRTC, to Marlene H. Dortch, CC Docket No. 96-45, WC Docket No. 05-337 (filed April 12, 2010).

<sup>47</sup> *Insular Order* ¶ 49.

<sup>48</sup> *Id.* at 41 (Concurring Statement of Commissioner Copps).

these unserved households to obtain access to the basic wireline services mandated by Section 254(b)(3) of the Act.

*Fourth*, the *Order* erroneously and inappropriately gave great weight to the other forms of financial support that carriers in Puerto Rico receive as a basis for refusing to create an insular universal service mechanism. Foremost, the *Order* relied on cherry-picked data to support its conclusion. Instead of considering the far more relevant high-cost support data from 2009, the *Order* conveniently relied on inflated high-cost funding data from 2008 to support its decision.<sup>49</sup> The *Order* acknowledged that PRT received only \$9.7 million in universal service funding in 2009 and that, although PRT is projected to receive approximately \$39.5 million in interstate common line support (“ICLS”) in 2010,<sup>50</sup> the Commission conceded that this projection “may be adjusted to the extent any further true-ups of 2008 support are required or if PRTC’s line counts continue to decline.”<sup>51</sup> But the *Order*’s reliance on the inflated 2008 data vastly overstates the total support that PRT receives and makes it unlikely that PRT is the fourth highest recipient of universal service disbursements. This is particularly true because of the large number of competitive ETCs in Puerto Rico that receive universal service support based on the “identical support” provided to PRT. If PRT’s per line support is adjusted downward, so is the support for wireless ETCs. Without the inflated ICLS support amounts included in its analysis, Puerto

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<sup>49</sup> *Insular Order* ¶ 17 & n.52.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* The Commission also fails to acknowledge that although the level of support in Puerto Rico is exceeded only by Mississippi, Texas, and Kansas, *id.*, the telephone penetration rate in all three of those states far exceeds that in Puerto Rico. *Universal Service Monitoring Report* at Table 6.4 (showing the following telephone penetration rates for each state: Mississippi (96.9%), Texas (98.0%), and Kansas (98.9%)).

Rico's total universal service support is approximately \$23 million, which is used to provide low income residents basic telephone service.<sup>52</sup>

In any event, the *Order's* reliance on low-income and interstate access charge replacement support as the basis for refusing to provide the support for high intrastate loop costs demanded by Section 254(b)(3) is inappropriate, and such support should not be considered. Accordingly, the *Order* failed to supply a reasoned basis, using relevant and accurate data, to substantiate its reversal of course regarding the adoption of an insular mechanism.

**B. The Order Failed to Consider the Unique Needs of Insular Areas Such As Puerto Rico.**

The *Order* also failed to consider “relevant data” related to insular areas and the unique costs and burdens of providing telephone service in Puerto Rico.<sup>53</sup> More than a decade ago the Commission acknowledged the formidable challenges facing insular areas: “insular areas generally have subscribership levels that are lower than the national average, largely as a result of income disparity, compounded by the unique challenges these areas face by virtue of their locations.”<sup>54</sup> The *Insular Order* nevertheless ignored the significant challenges faced by insular

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<sup>52</sup> *Insular Order* ¶ 19.

<sup>53</sup> *State Farm*, 463 U.S. at 43 (explaining that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (citations omitted); see *Rural Health Care Support Mechanism*, Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 24613, ¶ 42 (2004); see also *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶ 430 (1996) (recognizing “the special circumstances faced by carriers and consumers in the insular areas of the United States”).

<sup>54</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 112, 314, 414-415 (1997); see also *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, 14 FCC Rcd 21177, ¶ 5 (1999) (noting that “[t]elephone penetration rates among low-income consumers, and in insular, high-cost, and tribal lands lag behind the penetration rates in the rest of the country”); *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved*

carriers. PRT faces unique challenges in serving Puerto Rico, including the significantly higher operational costs it faces as compared to other carriers its size,<sup>55</sup> such as:

- higher shipping-related costs, because all the supplies necessary for creating and maintaining a telecommunications infrastructure must be shipped and stored at considerable expense.<sup>56</sup>
- higher operational costs associated with the topography of Puerto Rico, such as the rough, hilly terrain and heavy tropical vegetation in sparsely populated inland areas that result in “telecommunications transmission facilities requir[ing] additional guying and anchoring and the distances between points [being] increased”;<sup>57</sup> and
- higher operational costs associated with the climate of Puerto Rico, which is “corrosive and inhospitable to telecommunications equipment,” leading to accelerated deterioration of equipment, and severe tropical weather in the

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*and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶ 32 (2000) (finding that “subscriberhip levels are below the national average in ... certain insular areas”).

<sup>55</sup> The Commission has no basis to consider PRT's parent, América Móvil – an entirely separate company – in the evaluation of PRT's size and scale, as the Commission does not do so when considering the size and scale of rural carriers. *See Insular Order* ¶ 38.

<sup>56</sup> *See generally* Comments of the Public Service Commission of the United States Virgin Islands, CC Docket No. 96-45, at 3-4 (Dec. 17, 1999) (“VIPSC Comments”); Comments of the Government of Guam, CC Docket No. 96-45, at 3 (Dec. 17, 1999).

<sup>57</sup> *See VIPSC Comments* at 4; *see also* Comments of PRT, CC Docket No. 96-45, at 6-7 (Dec. 17, 1999).

Caribbean requires frequent reconstruction of existing infrastructure due to storm and hurricane damage.<sup>58</sup>

- a customer base with the lowest per capita income as compared to any U.S. state (approximately one-third of the national average and less than half that of the lowest U.S. state),<sup>59</sup> 44.8 percent of which live below the poverty line.<sup>60</sup>

Moreover, the *Order* incorrectly dismissed PRT's high average loop cost by comparing it to the rural high cost loop benchmark. That benchmark understates the need for loop support because, contrary to the Commission's stated intention at the time that the rural growth factor was adopted, rural carrier line loss has undermined the benchmark's calculation which was intended to allow for growth in the rural fund, not contraction.<sup>61</sup> As a result of this unintended

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<sup>58</sup> *VIPSC Comments* at 4. *See also Federal-State Joint Board on Universal Service, Order, FCC 05-178, ¶ 2* (Oct. 14, 2005); *Comments of Puerto Rico Telephone Company, Inc., CC Docket No. 96-45, at 7-8* (Dec. 17, 1999). For example, in 1999, Hurricane George caused more than \$80 million in damages to PRT facilities. In 2004, Hurricane Jeanne caused \$9.2 million in damage. *See, e.g., Letter from Nancy J. Victory, Counsel for PRT, to Jeffrey Carlisle, Chief, Wireline Competition Bureau, CC Docket No. 96-45, at 2* (Mar. 28, 2005); *Petition for Clarification and/or Reconsideration of the Puerto Rico Telephone Company, Inc., CC Docket No. 96-45, at 9 n.19* (Jan. 14, 2004).

<sup>59</sup> The Puerto Rico Community Survey's most recent estimates show that Puerto Rico's per capita income is \$10,022. *See Puerto Rico Selected Economic Characteristics 2008, Puerto Rico Community Survey, American Fact Finder, available at* <http://factfinder.census.gov/>. By contrast, the national average per capita income is \$27,589 and the per capita income in Mississippi, the lowest on the mainland, is \$20,228. *See United States Selected Economic Characteristics 2009, American Community Survey, American Fact Finder, available at* <http://factfinder.census.gov/>.

<sup>60</sup> Alemayehu Bishaw and Trudi J. Renwick, *Poverty 2007 and 2008: American Community Survey, American Community Survey Reports* (Issued Sep. 2009), *available at* <http://www.census.gov/prod/2009pubs/acsbr08-1.pdf>.

<sup>61</sup> When the Commission adopted the rural growth factor, it expected the rural fund to grow by at least 1 percent per year. But as rural carriers have experienced significant line loss, the rural growth factor has had the unintended consequence of decreasing the support available to rural carriers by increasing the average unseparated loop cost that justifies distribution from the fund. *See Federal-State Joint Board on Universal Service Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on*

anomaly, the rural benchmark is inappropriately high and cannot be the basis for denying support to insular areas. Because the rural benchmark has not functioned as intended, the Commission should not compound the problem by applying the same benchmark to insular areas. In any event, the statute requires that the Commission establish a separate insular mechanism that addresses the unique needs of insular areas and provides sufficient support for those areas. Any benchmark used in the insular mechanism must achieve that statutory mandate.

The unique nature of insular areas also is demonstrated by the fact that the ratio of universal support paid to wireline versus wireless service providers in Puerto Rico (30%-70%) is steeply inverted compared with the rest of the country (70%-30%).<sup>62</sup> The unique aspects of Puerto Rico – such as a lack of wireline infrastructure in certain areas (over 200,000 households remain unserved),<sup>63</sup> significant additional operational costs, and the difficulty in recovering those costs over a large subscriber base due to the unique demographic challenges in Puerto Rico<sup>64</sup> – in combination with the Commission’s existing identical support rule have lead to dramatically

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Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244 ¶13 (2001). (“We adopt a ‘rural growth factor’ that allows the high-cost loop support fund to grow based on annual changes in the Gross Domestic Product-Chained Price Index (GDP-CPI) and the total number of working loops of rural carriers. We find that allowing the fund to grow in this fashion over the next five years will enable rural carriers to make prudent investments in rural America.”); *See also* National Exchange Carrier Association, Inc., Overview and Analysis of 2009 USF Data Submission at 3, *available at* <http://www.fcc.gov/wcb/iatd/neca.html> (describing decrease in rural loops and resulting decrease in rural fund cap).

<sup>62</sup> *See Insular Order* ¶ 18.

<sup>63</sup> *Id.* n.95.

<sup>64</sup> For example, as the Commission noted, consumer incomes in Puerto Rico are markedly lower than those on the mainland, *see Order* ¶ 49. In addition, consumers in insular areas experience a disproportionately high cost of living that can be seen in the increased cost of basic commodities and consumer goods as compared to the mainland. *See Estudios Tecnicos Inc., Economic Conditions: Puerto Rico and the United States*, at 2 (Jan. 31, 2006) (noting that basic commodities such as electricity cost 70 percent more in Puerto Rico than on the mainland, while basic consumer goods such as a Honda Pilot cost 20 percent more in Puerto Rico than in the United States).

different results in Puerto Rico compared to the mainland U.S. Yet the Commission undervalued the relevance of these differences in order to defend its decision to deny PRT additional high cost loop support, and, as discussed in greater detail in Section IV below, these differences will have long-lasting policy implications for Puerto Rico's wireline infrastructure.

**C. The Order Arbitrarily Treated Carriers That Serve Insular Areas Differently from Carriers That Serve Rural Areas.**

Although the *Order* made much of the economies of scope and scale that benefit PRT,<sup>65</sup> the Commission ultimately concluded that “subscriberhip in Puerto Rico remains materially lower than in any other jurisdiction reported by the Census Bureau,” and that “[e]vidence in record suggests that infrastructure does not yet reach some subscribers, so some people may not be subscribing because they cannot afford to pay the special construction charges associated with building facilities to reach them.”<sup>66</sup> However, the Commission concluded that additional low-income support is needed, rather than funding that would directly support infrastructure build-out.<sup>67</sup>

By contrast, when dealing with carriers in rural areas that benefit from similar, and perhaps greater, economies of scope and scale, the Commission provides a separate mechanism by which to apply for supplemental support.<sup>68</sup> Indeed, citing the higher rates paid by consumers in rural areas, the Commission granted such supplemental support to Wyoming on the same day

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<sup>65</sup> See *Insular Order* ¶ 39.

<sup>66</sup> *Id.* ¶ 49.

<sup>67</sup> *Id.* The additional \$70 support solves nothing because the cost to build out these lines far exceeds that amount, rising as high as several thousand dollars in some cases.

<sup>68</sup> See 47 C.F.R. § 54.316.

it denied wireline infrastructure support to Puerto Rico.<sup>69</sup> This disparate treatment simply cannot be the product of reasoned decisionmaking.

#### **IV. THE COMMISSION'S ORDER DISSERVES THE PUBLIC INTEREST.**

By denying PRT additional high cost loop support through an insular mechanism, the *Order* has denied the people of Puerto Rico access to expanded critical wireline infrastructure that PRT has voluntarily committed to build and that could be used for both voice and broadband services. More than that, the Commission's overall universal service policy approach in Puerto Rico has harmed the island by encouraging the erosion of its wireline infrastructure. As a result, after more than fourteen years of waiting for the Commission to address the unique needs of insular areas, the people of Puerto Rico will continue to be plagued by the longstanding implications of lagging wireline infrastructure investment. Failing to address these problems today and instead promising to address Puerto Rico's broadband infrastructure problems in a future comprehensive proceeding, will only set Puerto Rico further behind compared with the rest of the nation.

##### **A. Additional Support Through an Insular Mechanism Would Be Used to Build Out Infrastructure Given PRT's Voluntary Commitments.**

Despite the *Order's* claims to the contrary,<sup>70</sup> the provision of additional loop support to PRT through an insular mechanism will lead directly to greater investment in wireline infrastructure in Puerto Rico. While the Commission has never required recipients of high cost funding to make commitments as to how such funding would be spent, PRT has voluntarily offered to make build-out commitments, for example offering to commit to apply the insular

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<sup>69</sup> *Qwest Remand Order* ¶ 84.

<sup>70</sup> *See Insular Order* ¶ 28.

funding for the provision, maintenance, and upgrading of broadband facilities, with the priority of extending broadband capabilities to lines that are not broadband-capable today.<sup>71</sup>

The Commission has recognized that wireline loop infrastructure serves the dual purpose of enabling both voice and broadband service.<sup>72</sup> Furthermore, the Commission has also acknowledged the specific importance of wireline broadband services to consumers seeking high-speed connections in the foreseeable future.<sup>73</sup> As such, even though the Commission has not yet explicitly funded broadband facilities, incumbent telephone companies have made significant loop improvements using universal service funding that will also facilitate broadband deployment.<sup>74</sup> The adoption of an insular mechanism would allow PRT to do so as well.

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<sup>71</sup> Such investment would be separate from, and in addition to, any infrastructure investment pursuant to the commitment of América Móvil in WT Docket No. 06-113. Letter from Michael G. Jones, Willkie Farr & Gallagher, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 06-113 (March 23, 2007). See Letter from Nancy J. Victory, Counsel, Puerto Rico Telephone Company, Inc. to Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC, CC Docket No. 96-45 at 3 (Nov. 4, 2004); Letter from Nancy J. Victory, Counsel, Puerto Rico Telephone Company, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45 & WC Docket No. 05-337 (filed Apr. 2, 2010).

<sup>72</sup> See, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“Packet-based technology is now deployed throughout wireline networks and is used in many circumstances, including increasingly to perform the switching and routing functions associated with POTS and the processing functions that permit broadband Internet access service.”); see also *Connect America Fund NPRM*.

<sup>73</sup> “Wireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers.” *Connecting America: The National Broadband Plan* at 41 (rel. Mar. 16, 2010) available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“*National Broadband Plan*”).

<sup>74</sup> *Insular Order*, Capps Concurring Statement at 41 (“While some areas of the country are seeing such [broadband] service now, or may see it in the near future, the record shows that there are areas in Puerto Rico that have no infrastructure. Not only is voice service not available, but there is no wireline foundation for broadband service either—putting the people of Puerto Rico that much further from getting the broadband service that we recognize as a necessity in the Digital Age.”).

**B. The Commission Has Harmed Puerto Rico by Starving the Island’s Wireline Infrastructure of Needed Universal Service Support.**

The *Order* asserted that its universal service policies are a great success in Puerto Rico,<sup>75</sup> but in fact these policies are eroding support for critical wireline infrastructure. The *Order* emphasized the amount of ICLS that Puerto Rico receives.<sup>76</sup> As an initial matter, this line of justification conflates fundamental differences between the Commission’s existing rural high cost loop support and non-rural high cost model support mechanisms with its access charge replacement mechanisms, such as ICLS. These two types of mechanisms serve different purposes. On the one hand, the non-rural high cost loop mechanism and high cost model support are loop support mechanisms adopted to support areas of the country with high average loop costs. On the other hand, ICLS was adopted to replace implicit universal service subsidies collected from other carriers through interstate access charges.<sup>77</sup> By conflating these mechanisms, the Commission ignores the fact that, despite the ICLS support received, Puerto Rico still lacks support for high intrastate loop costs.

Similarly, the *Order* failed to address the universal service policy implications of competitive ETCs receiving 72 percent of all high-cost universal service support in Puerto Rico.<sup>78</sup> The Commission has previously tentatively concluded that it should eliminate the rule that awards these carriers “identical support” because these carriers do not have the same

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<sup>75</sup> “[T]he dramatic increase in high-cost support for wireless competitive ETCs in Puerto Rico relative to PRTC, the only wireline ETC, is entirely consistent with the high-cost program, as it is currently designed.” *Insular Order* ¶ 31.

<sup>76</sup> See *Insular Order* ¶¶ 17-20.

<sup>77</sup> See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 (2001).

<sup>78</sup> *Insular Order* ¶ 18.

investment incentives that an incumbent telephone company would have.<sup>79</sup> Without analysis as to how this inversion has affected Puerto Rico’s infrastructure investment, the *Order* concluded only that Puerto Rico’s universal services needs are met. The Commission’s position here is also fundamentally at odds with its recently issued Notice of Proposed Rulemaking and its National Broadband Plan, which recommended cost-cutting measures for existing voice support and creating funding mechanisms for broadband that would target just one provider per geographic area.<sup>80</sup> Accordingly, the *Order’s* emphasis on the aggregate amount of universal service support Puerto Rico receives today turns a blind eye to the likelihood that such amount would decrease under the Commission’s proposed universal service policy objectives.

The end result is that, once again, after more than fourteen years, PRT and the people of Puerto Rico must wait to address the specific needs of insular areas through a future universal service proceeding.<sup>81</sup> Meanwhile, the underfunding of infrastructure investment in Puerto Rico continues.

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<sup>79</sup> “Because a competitive ETC’s per-line support is based solely on the per-line support received by the incumbent LEC, rather than its own network investments in an area, the competitive ETC has little incentive to invest in, or expand, its own facilities in areas with low population telecommunications services in rural, insular and high-cost areas. Instead, competitive ETCs have a greater incentive to expand the number of subscribers, particularly those located in the lower-cost parts of high-cost areas, rather than to expand the geographic scope of their networks.” *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, 1472, ¶ 10 (2008) (citations omitted).

<sup>80</sup> See *Connect America Fund NPRM* ¶ 10; *National Broadband Plan* at 145.

<sup>81</sup> See *Insular Order* ¶ 46 (“If PRTC were to receive additional support for voice service pursuant [to] its proposed non-rural insular mechanism, it likely would be more difficult to transition that support to focus on areas unserved or underserved by broadband.”).

**V. CONCLUSION**

For the reasons set forth herein, PRT petitions that the Commission reconsider its decision to deny PRT's proposal to create an interim insular funding mechanism pursuant to its statutory duty under Section 254.

Respectfully submitted,

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