LUKAS, NACE,
GUTIERREZ & SACHS, LLP

8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
703 584 8678 • 703 584 8696 Fax

www.fcclaw.com

Russell D. Lukas
David L. Nace
Thomas Gutierrez*
Elizabeth R. Sachs*
David A. LaFuria
Pamela L. Gist
Todd Slamowitz*
Todd B. Lantor*
Steven M. Chernoff*
Katherine Patsas Nevitt*

Consulting Engineers
Ali Kuzehkanani
Leila Rezanavaz

Of Counsel
George L. Lyon, Jr.
Leonard S. Kolsky*
John Cimko*
J. K. Hage III*
John J. McAvoy*
Hon. Gerald S. McGowan*
Tamara Davis Brown*

*Not Admitted in VA

April 28, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: Written Ex Parte Presentation
CC Docket No. 96-45
WC Docket No. 05-337
GN Docket Nos. 09-47, 09-51, 09-137

Dear Madame Secretary:

On March 3, 2010, the Alliance of Rural CMRS Carriers ("ARC") submitted a proposal for the imposition of a cap on per-line universal service high-cost support received by incumbent local exchange carriers ("LECs"), as a means of making universal service funding available for broadband initiatives.[1] The proposal is intended "as an interim step to assist the Commission in repurposing federal universal service high-cost support."[2]

Subsequently, on March 10, 2010, the Independent Telephone and Telecommunications Alliance ("ITTA"), the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), and the Western Telecommunications Alliance ("WTA") (collectively, the "ILEC Associations" or "Associations") filed an *ex parte* letter with the Commission addressing the ARC Proposal.[3] Today, ARC responds to the various arguments advanced in the ILEC Associations Letter.

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[1] Letter from David A. LaFuria, Counsel for the Alliance of Rural CMRS Carriers, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337, GN Docket Nos. 09-47, 09-51, 09-137 (filed Mar. 3, 2010) ("ARC Letter"), enclosing the "Alliance of Rural CMRS Carriers Interim Per-Line Cap Proposal ("ARC Proposal"). The carriers participating in the ARC Proposal are Cellular South, Inc., NE Colorado Cellular, Inc., d/b/a Viaero Wireless, Smith Bagley, Inc., and MTPCS, LLC, d/b/a Cellular One.

[2] ARC Letter at 1.

[3] Letter from Joshua Seidemann, Vice President, Regulatory Affairs, ITTA, Stuart Polikoff, Vice President – Regulatory Policy and Business Development, OPASTCO & Derrick Owens, Director of Government Affairs, WTA, to

I. The National Broadband Plan Represents a Compelling Reason to Adopt the ARC Proposal.

During last week's Public Meeting announcing new proceedings to implement the National Broadband Plan, Chairman Genachowski emphasized the need to manage growth in the universal service fund and to reduce inefficient spending on legacy voice networks. In the *Notice of Inquiry and Notice of Proposed Rulemaking* ("*NPRM*") released on the same day, the Commission proposed "to contain growth in legacy high-cost support mechanisms as a critical first step to transitioning to a more efficient and accountably funding mechanism, recognizing that consumers across America ultimately pay for universal service."[4]

In contrast, the ILEC Associations advance familiar arguments that seek to continue to prop up ILECs with inefficient support while ignoring the urgent need for new funding for the Commission's broadband initiatives. In light of the sweeping changes now underway, the Associations' backward-looking arguments do not merit serious consideration.

Two years have passed since the Commission imposed its interim cap on universal service high-cost support received by wireless competitive eligible telecommunications carriers ("ETCs"). During these two years, much has changed, and much has stayed the same. The most significant change, of course, is that now, thanks to the Commission's efforts, a comprehensive blueprint exists for the adoption of government policies to bring high-speed broadband services to all Americans.[5] The Broadband Plan calls for the development of sweeping reforms so that the universal service program can spearhead the deployment of broadband services in unserved and underserved rural and high-cost areas throughout America. As part of these reforms, the Broadband Plan calls for the Commission to "shift up to $15 billion over the next decade from the current high-cost program to broadband through commonsense reforms."[6]

The ARC Proposal represents one such commonsense reform. Indeed, both the Broadband Plan and yesterday's *NPRM* specifically mentioned the ARC Proposal as an effective way to curb inefficient spending on legacy voice networks.[7] The ARC Proposal is designed to em-

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Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337, GN Docket Nos. 09-47, 09-51, 09-137 (filed Mar. 10, 2010) ("ILEC Associations Letter").

[4] *Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, *Notice of Inquiry and Notice of Proposed Rulemaking*, FCC 10-58 (rel. April 21, 2010)("*NPRM*") at ¶ 50.

[5] Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) ("Broadband Plan"). *See* Joint Statement on Broadband, GN Docket No. 10-66, FCC 10-42 (rel. Mar. 16, 2010) at para. 3 (finding that "[e]very American should have a meaningful opportunity to benefit from the broadband communications era—regardless of geography, race, economic status, disability, residence on tribal land, or degree of digital literacy").

[6] Broadband Plan at 147 (Recommendation 8.6).

[7] *See id.* at 161 n.97 and accompanying text at 147; *NPRM* at ¶ 52.

brace and advance the objectives of the Broadband Plan by enabling the immediate repurposing of high-cost funds for broadband programs, and by rationalizing high-cost support received by incumbent LECs by tying the level of support to incumbent LECs' success in the marketplace.[8]

II. The Idea of Capping Incumbent LEC Support Has Not Been "Soundly Rejected" by the Commission.

There is a fundamental infirmity in the underlying premise expressed in the ILEC Associations Letter. The Associations suggest that the ARC Proposal should be "summarily dismiss[ed]"[9] because the Commission "already considered and soundly rejected placing an additional, interim cap on ILEC high-cost support when it adopted the interim cap on support received by competitive eligible telecommunications carriers . . . ."[10]

The source of this infirmity is that, apart from the sea change brought about by the Commission's landmark Broadband Plan, the universal service landscape is worse than it was two years ago. Capping competitive ETCs did not resolve the crisis perceived by the Commission in the *Interim Cap Order*, and various indicators suggest that the crisis currently faced by the high-cost fund is severe. The Commission concluded in the *Interim Cap Order* that "the continued growth of the [high-cost] fund . . . is not sustainable and would require excessive (and ever growing) contributions from consumers to pay for this fund growth."[11] At that time the quarterly contribution factor (used to calculate telecommunications service providers' contributions to the federal Universal Service Fund ("USF")) was 11.3 percent.[12] Today, the quarterly contribution factor has reached the record-setting level of 15.3 percent, despite the fact that wireless competitive ETCs have been capped.[13] Meanwhile, the average per-line high-cost support received by incumbent LECs ***has increased by 25.9 percent*** in the last two years.[14]

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[8] ARC Letter at 3.

[9] ILEC Associations Letter at 2.

[10] *Id*. at 1 (citing *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009)).

[11] *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6) (footnote omitted). ARC disagrees with the Commission's formulation two years ago that the high-cost fund was in such dire jeopardy that a unilateral cap of wireless competitive ETCs' funding was necessary to preserve the sustainability of the fund. ARC agrees with those who have argued that the Commission failed to prove its case. *See* Rural Cellular Association, *Cut the Cap: The Commission Should Repeal the Interim Cap on High-Cost Universal Service Support Received by Wireless Carriers* (May 1, 2009) at 5-12 (submitted via ECFS in CC Docket No. 96-45 and WC Docket No. 05-337). Nonetheless, as ARC explains in the text, the wireless cap has not stemmed dramatic increases in the contribution factor, which are driven in part by the size of the high-cost fund. The Commission's solution has not worked, confirming ARC's conclusion that the Commission should now take the additional step of imposing a cap on incumbent LECs' high-cost funding.

[12] *Interim Cap Order*, 23 FCC Rcd at 8838 (para. 6 n.27) (contribution factor for the second quarter of 2008).

[13] *Proposed Second Quarter 2010 Universal Service Contribution Factor*, FCC Public Notice, DA 10-427 (rel. Mar. 12, 2010).

[14] *See* ARC Letter at 1. Further, although statistical data are not available for the period from 2008 to 2010, there is no evidence to suggest any reversal of the trend showing a precipitous and ongoing loss of access lines served by incumbent LECs. *See id*.

The primary reason for such increases in the contribution factor is not support to CETCs, which have been capped since August 2008, but rather it is rapidly shrinking interstate and international revenues. In the fourth quarter of 2008, the revenue base totaled $19.01 billion,[15] while in the fourth quarter of 2009 it was $17.16 billion, a nearly 10% decrease.[16] In the second quarter of 2010, it is projected to fall to $16.64 billion, a drop of another 3%. Given that wireless telecommunications revenues continue to rise, the decline in wireline revenues is fueling the increased contribution factor.

In these circumstances, it is myopic and hardly credible for the ILEC Associations to suggest that there is no basis for revisiting the Commission's decision to forgo any imposition of a cap on high-cost support received by rural incumbent LECs. This is especially true since wireless is today providing a significant subsidy to wireline networks via the universal service funding mechanism.

The ARC Proposal is timely and relevant because it provides a means to begin shifting high-cost support to broadband services, it stems the tide of high-cost funding to incumbent LECs whose base of customers continues to shrink, and it provides a measure of fairness by applying the high-cost cap in a competitively neutral manner to all fund recipients.[17] ARC discusses these issues in greater detail in the following sections.

III. The ILEC Associations Concede That At Least Some Excess Funds Received by Incumbent LECs Are Already Being Devoted to Broadband-Capable Infrastructure.

The ILEC Associations assert that "many" incumbent LECs have used their increased per-line support to invest in "multi-use, broadband capable infrastructure."[18] This highlights perhaps the best argument in favor of the ARC Proposal: Much of what the incumbent LECs receive today is no longer needed to support traditional wireline service.

While the Associations insist that ILECs have found perfectly legal ways to take support that is intended for voice networks and use it for broadband, this is no longer a viable approach. In last week's *NPRM*, the Commission stated its intent to "eliminate the indirect funding of broadband-capable networks today through our legacy high-cost programs, which is occurring without transparency or accountability for the use of funds to extend broadband service."[19]

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[15] *Proposed Third Quarter 2009 Universal Service Contribution Factor, FCC Public Notice,* DA 08-2091 (rel. Sept. 12, 2008).

[16] *Proposed Fourth Quarter 2009 Universal Service Contribution Factor, FCC Public Notice,* DA 09-2042 (rel. Sept. 14, 2009).

[17] ARC has proposed that incumbent LECs serving tribal areas would qualify for uncapped per-line support. ARC Proposal at 3.

[18] ILEC Associations Letter at 2-3 (footnote omitted).

[19] *NPRM* at ¶ 53.

Given that some of the incumbent LECs' excess support is being directed toward broadband deployment anyway, the logical approach is to finance such deployment through a transparent and comprehensive mechanism developed via the Commission's broadband initiatives instead of through carrier self-help. The ILEC Associations should have no objection to those funds being redirected to a program that is explicitly dedicated to broadband deployment.

IV. Rationalization of Rural Incumbent LEC Support Is Long Overdue.

By citing the Commission's *Rural Task Force Order*, the ILEC Associations draw attention to another strong argument in favor of the ARC Proposal: Rural incumbent LECs have continued to receive inefficient levels of support far longer than the Commission ever intended. The ILEC Associations fail to note that in the same *Rural Task Force Order*, the Commission noted that it had not anticipated that "the embedded cost mechanism for rural carriers would be in place for this long."[20] The Commission further declared that by 2006, rural incumbent LECs would be weaned off the embedded cost methodology and moved toward a forward-looking cost model that would include removal of all support from carrier rates as mandated by the Telecommunications Act of 1996. To ease the transition to a leaner, more efficient cost model, the Commission bestowed additional largess on rural incumbents—$1.2 billion in increased high-cost support, according to the *Rural Task Force Order*.[21]

Yet, when 2006 arrived, rural incumbent LECs were not moved to a forward-looking model as promised; instead, the Commission extended the Rural Task Force plan indefinitely while comprehensive reform was being considered.[22] As a result, rural incumbent LECs continued to receive "make-whole" support even as their line counts dropped and their revenues declined precipitously, even while the Commission refrained from taking any steps to move the incumbent LECs from a rate-of-return regime to price cap regulation.[23]

The Broadband Plan emphasized that "permitting carriers to be made whole through USF support lessens their incentives to become more efficient and offer innovative new services to

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[20] *Federal-State Joint Board on Universal Service,* Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, 11258, para. 28 (2001) ("*Rural Task Force Order*").

[21] *See id.* ("we estimate that the modified embedded cost mechanism will result in an increase in rural carrier support of approximately $1.26 billion over the five-year period.").

[22] *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support,* 12 FCC Rcd 5514 (2006).

[23] The Broadband Plan recommends that this move to price caps finally should be implemented:

> [T]he FCC should require rate-of-return carriers to move to incentive regulation. As USF migrates from supporting voice telephone service to supporting broadband platforms that can support voice as well as other applications, and as recipients of support increasingly face competition in some portion of their service areas, how USF compensates carriers needs to change as well.

Broadband Plan at 147 (footnote omitted).

retain and attract consumers."[24] In identifying inefficiencies of the current High-Cost Program, the Broadband Plan pointed to Interstate Common Line Support ("ICLS") received by rate-of-return incumbent LECs as the "only significant part" of the high-cost fund that remains un-capped.[25] The Broadband Plan therefore recommended a freeze of ICLS to incumbent LECs as an interim measure while the Commission develops a methodology for providing support for broadband purposes.

By recommending that an incumbent LEC's support be reduced along with its customer counts, the ARC Proposal would free up more support than simply freezing ICLS. Thus, the ARC Proposal provides an even more effective means of stemming the inefficiencies that were singled out in the Broadband Plan for elimination. It is a reasonable approach to placing an effective limit on rural incumbent LEC support—which the Commission has repeatedly promised to do—while allowing the Commission to pursue comprehensive universal service reforms. The proposal has the added benefit of repurposing funds for use in broadband initiatives, which is central to the recommendations in the Broadband Plan.

In light of the pressing need to repurpose high-cost support for broadband deployment, there can no justification for allowing incumbent LECs to continue to receive the same levels of support while customers increasingly opt out of traditional wireline service.

V. The ILEC Associations' Invocation of the "COLR" Myth Does Not Justify Continued Increases in Per-Line Incumbent LEC Support.

The ILEC Associations argue that incumbent LECs should be permitted to continue to receive the same levels of support, even as customers leave their networks, because they need to recover the "costs incurred to support a network capable of supporting carrier-of-last-resort ('COLR') obligations throughout an entire study area."[26] COLR is a term defined variously throughout the states, and is undefined at the federal level. ARC has never seen a peer-reviewed academic study or legitimate economic justification for ensuring that there is a COLR when competitors are ready, willing, and able to serve requesting customers. Put another way, when there are multiple ETCs in an area, all are COLRs. All can be called upon by regulators to serve requesting customers.

It is increasingly clear that there is no merit to the frequent incumbent LEC contention that COLR "obligations" serve as a rationale for make-whole universal service payments to incumbent LECs or other "revenue neutral" rent-seeking schemes.[27] This unsupported perspective

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[24] *Id*.

[25] *Id*. at 150 (Recommendation 8.12).

[26] ILEC Associations Letter at 3.

[27] *See e.g.*, Michael D. Pelcovits, Ph.D., Microeconomic Consulting & Research Associates, Inc., *Debunking the Make-Whole Myth: A Common Sense Approach to Reducing Irrational Telecommunications Subsidies, White Paper #3* (Nov. 17, 2008), at 25, 29 ("[T]he potential cost of [the COLR] obligation is much less than the current sources of explicit and implicit subsidies now received by the ILECs. . . . The make-whole model does not apply anymore

about COLR "obligations" must change as the Commission explores competitively-neutral policy options to further its "goal of making broadband universally available to all people of the United States."[28]

All ETCs, *including wireless ETCs*, have an obligation to respond to reasonable requests for service. This is the federal COLR obligation and it is analogous to rules adopted by many states.[29] In addition, Section 214(e)(3) of the Communications Act of 1934 ("Act"),[30] which gives the Commission (with respect to interstate services) or a state public utility commission (with respect to intrastate services) authority to order a common carrier to provide service to an unserved community, is equally applicable to both wireline and wireless carriers.

Similarly, Section 214(e)(4) of the Act[31] gives state public utility commissions authority to apply COLR obligations to wireless carriers in situations where a wireless ETC becomes the only ETC in an area. In addition, several states require a wireless ETC, as a condition of designation, to be a COLR in the event that it is the last ETC serving a particular area.[32]

Incumbent LECs have historically argued that the Commission and state public utility commissions should not reduce their high-cost support because doing so would undermine the incumbent LECs' ability to comply with their COLR obligations. In ARC's view, this argument has never been backed up with supporting data or even anecdotal instances illustrating such a problem. COLR obligations are rarely the reason why a carrier builds out its network to reach new customers. For example, an incumbent LEC—and, in a competitive market, a competitive LEC—will build facilities to a new residential development because the revenue opportunity from serving the new units justifies the investment. In a market with facilities-based, last-mile competition, the incumbent LEC has a market-based incentive to extend its network so that it can have the opportunity to serve these customers, rather than ceding that opportunity to a competi-

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and there is no evidence that failure to apply this model will sacrifice consumer welfare or limit the ability of the ILECs to invest in new infrastructure. It is time for reform—and a reform without apology.").

[28] *Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, FCC Public Notice, DA 09-2419 (Nov. 13, 2009) at 1 (citing American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)).

[29] *See* 47 U.S.C. § 214(e)(1) (requiring all ETCs to "offer the services that are supported by Federal universal service mechanisms . . . throughout the service area for which the designation is received"); *see also* 47 C.F.R. § 54.202(a) (requiring any common carrier in its application to be designated as an ETC to "commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service."); 47 C.F.R. § 54.202(a)(1)(i).

[30] 47 U.S.C. § 214(e)(3).

[31] 47 U.S.C. § 214(e)(4).

[32] *See, e.g.*, RCC Minnesota, Inc., Docket No. UM-1083 at p. 10 (Or. PUC, June 24, 2004); PSC 160.13(1)(a) (Wisconsin Administrative Code) ("[An ETC] is eligible to receive universal service funding under both applicable federal and state universal service programs for an area, if it," among other things, "holds itself ready to offer service to all customers in the area.").

tor. Build-out by the incumbent LEC in these cases is clearly not attributable to its COLR obligations.

Even in cases in which the incumbent LEC must extend its network pursuant to its COLR obligations, this requirement is, in most states, limited by the terms and conditions of the carrier's line extension tariff, which mitigate substantially any burden—economic or otherwise—on the incumbent LEC.[33] In fact, COLR obligations are generally a source of profit for incumbent LECs, because wireline carriers are not required to forgo a fair return on investment when fulfilling COLR obligations. State commissions often ensure that a return will be earned on such investments, and federal mechanisms continue providing support even when consumers discontinue service. By contrast, competitive ETCs have the equivalent of COLR obligations with no such guaranteed return on investment, and no continuing support when consumers discontinue service. Thus, rather than imposing a substantial net burden on rural incumbent LECs, COLR requirements actually provide the incumbents with a significant competitive advantage over wireless ETCs.

Every new wireless entrant that seeks ETC status must accept the statutory requirement that it might be asked to serve a customer within its service territory at some future date. Therefore, because wireless ETCs face effectively the same service obligations as incumbent LECs, there is absolutely no reason to provide incumbent LECs with a preferential level of high-cost support to compensate for COLR obligations.

VI. The ILEC Associations' Arguments Regarding Competitive Neutrality Are Irrelevant and Unpersuasive.

The ILEC Associations claim that the Commission had a sound basis for imposing a unilateral cap on wireless ETCs two years ago, and that, in any event, the cap was upheld by the D.C. Circuit Court of Appeals because the court concluded that the cap did not treat wireless ETCs unfairly.[34]

ARC recognizes, of course, that the D.C. Circuit has ruled on the competitive neutrality of the wireless cap, as it was imposed two years ago. Although ARC disagrees with the court's determination, believing that the wireless cap has compromised the Commission's core principle of competitive neutrality,[35] the ILEC Associations' attempted defense of the unilateral wireless

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[33] *See, e.g.*, Reply Comments of General Communication, Inc., CC Docket No. 96-45 (filed Dec. 14, 2004), at 17-19 (explaining that the line extension tariffs of an incumbent LEC competitor require any customer located more than 1,000 feet away from existing facilities to pay the full cost of extending those facilities beyond 1,000 feet. The incumbent LEC customer must also agree to pay, in advance, for four years of basic local service, which is offset against construction fees. In addition, if the customer moves or otherwise drops service for any reason, the customer loses the prepaid service fees. Moreover, the cost of the first 1,000 feet of a line extension is further offset by other revenue the incumbent LEC receives from the customer during the four years of prepaid basic local service, as well as enhanced services such as vertical feature revenue or toll calling.).

[34] ILEC Associations Letter at 4.

[35] ARC Letter at 3.

cap ignores that circumstances have changed. The USF contribution factor has continued to increase, and consumer choice is causing a shift throughout the country "to wireless networks as the primary or sole means of voice communications."[36] Given the fact that pressure on the USF continues to rise, and consumers' reliance upon wireless networks has continued to increase, it is patently unfair for the Commission to continue to maintain a one-sided cap on high-cost funding that penalizes wireless ETCs.[37]

The ILEC Associations also ignore the other side of the coin. The ARC proposal for an interim cap on incumbent LECs' high-cost funding is obviously competitively neutral. Unlike the cap imposed by the *Interim Cap Order*, it would treat incumbent LECs and wireless ETCs exactly the same—which is the essence of competitive neutrality. ARC's proposed cap also would be fair, because a cap on incumbent LECs' funding is needed to relieve pressure on the high-cost fund. Enlisting incumbent LECs in the effort to curb high-cost fund growth is appropriate and reasonable, especially in light of the fact that (as of 2009) incumbent LECs receive 70.3 percent of all high-cost support.[38] Based on the most recent data available, incumbent LEC access lines made up only approximately 30 percent of total telephone lines in 2008.[39] Given their disproportionate stake in the high-cost fund, incumbent LECs should join in the effort to stabilize the fund while the Commission works to implement recommendations in the Broadband Plan to shift funding from the current high-cost program to broadband.[40]

VII. Conclusion.

In view of the Commission's sweeping proposals to transition support away from the inefficient funding of legacy networks and towards the deployment of broadband infrastructure, the ILEC Associations' arguments for more of the same incumbent protection appear almost quaint. The ARC Proposal serves the Commission's twofold objective of stemming the growth in existing funding mechanisms support and making broadband service more widely available in rural America. Accordingly, ARC urges the Commission to adopt the proposed per-line freeze on incumbent LEC support without delay.

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[36] *Id*.

[37] ARC has also pointed out that a cap imposed without regard to competitive neutrality subverts consumer choice and sovereignty. *Id*. at 4 (citing Steve G. Parsons & James Bixby, *Universal Service in the United States: A Focus on Mobile Communications*, 62 FED. COMM. L.J. 119, 150-51 (2010)).

[38] Universal Service Administrative Company 2009 Annual Report at p. 42, available online at http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2009.pdf.

[39] *Local Telephone Competition: Status as of June 30, 2008* at Tables 1, 14 (IATD, WCB July 2009).

[40] *See* Broadband Plan at 147-48 (Recommendation 8.6).

Sincerely,

David A. LaFuria
Steven M. Chernoff

Counsel for the Alliance of Rural CMRS Carriers

cc: Hon. Julius Genachowski
Hon. Michael J. Copps
Hon. Robert M. McDowell
Hon. Mignon Clyburn
Hon. Meredith Attwell Baker
Ruth Milkman, Esq.
Sharon Gillett, Esq.
Priya Aiyar, Esq.
Jennifer Schneider, Esq.
Christine K. Kurth, Esq.
Angela Kronenberg, Esq.
Christi Shewman, Esq.