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

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APR 21 2010

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

**Adopted: April 16, 2010**

**Released: April 16, 2010**

By the Commission: Commissioner McDowell approving in part, concurring in part and issuing a statement.

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## I. INTRODUCTION

1. In 2005, the United States Court of Appeals for the Tenth Circuit remanded the Commission's rules regarding high-cost universal service support to non-rural carriers.<sup>1</sup> The scope of this Order on Remand and Memorandum Opinion and Order is narrow; it responds to the Tenth Circuit's remand. While a number of parties asked us to use this proceeding to consider comprehensive universal service reform,<sup>2</sup> we intend to consider such reform in separate proceedings.<sup>3</sup>

2. The Tenth Circuit directed the Commission to address three issues. First, the court held that, in order to demonstrate that the Commission has met its statutory obligation to provide "sufficient" universal service support, the Commission "must articulate a definition of 'sufficient' that appropriately considers the range of principles" that Congress established in section 254(b).<sup>4</sup> Second, to ensure that the existing support mechanism produces "reasonably comparable" rural and urban rates (as the Communications Act<sup>5</sup> requires), the Commission "must define the term 'reasonably comparable' in a manner that comports with its concurrent duties to preserve and advance universal service."<sup>6</sup> Third, the Commission must "craft a support mechanism taking into account all the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service."<sup>7</sup>

<sup>1</sup> *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) (*Qwest II*).

<sup>2</sup> See, e.g., Mid-Sized LEC FNPRM Comments; ITTA FNPRM Comments.

<sup>3</sup> The Commission has stated that the universal service program should be comprehensively reformed to, among other things, emphasize the importance of broadband to the future of the program. See *Joint Statement on Broadband*, GN Docket No. 10-66, *Joint Statement on Broadband*, FCC 10-42, para 3 (rel. Mar. 16, 2010) (*Joint Statement on Broadband*). The National Broadband Plan recommends that the Commission phase out the existing high-cost universal service support program, including the current non-rural high-cost universal service support mechanism, as part of a comprehensive plan to modernize and reform universal service. See Federal Communications Commission, *Connecting America: The National Broadband Plan*, Ch. 8 (rel. March 16, 2010) (*National Broadband Plan*). See also *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1467 (2008) (*Identical Support Rule Notice*); *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1495 (2008) (*Reverse Auctions Notice*); *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Notice of Proposed Rulemaking, 23 FCC Rcd 1531 (2008) (*Joint Board Comprehensive Reform Notice*); *High-Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Inter-carrier Compensation Regime; Inter-carrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC 6475 (2008) (*Comprehensive Reform FNPRM*).

<sup>4</sup> *Qwest II*, 398 F.3d at 1234.

<sup>5</sup> 47 U.S.C. § 151, *et seq.* Section 254, the provision concerning universal service, was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

<sup>6</sup> *Qwest II*, 398 F.3d at 1237.

<sup>7</sup> *Id.*

3. This Order on Remand responds to the court's directive. First, we define "sufficient" under section 254(e) of the Communications Act<sup>8</sup> as an affordable and sustainable amount of support that is adequate, but no greater than necessary, to achieve the goals of the universal service program. We conclude that the current non-rural high-cost support mechanism, in conjunction with the Commission's other universal service programs, provides sufficient support to achieve the universal service principles set forth in section 254(b).<sup>9</sup> Second, we find that rural rates are "reasonably comparable" to urban rates if they fall within a reasonable range of the national average urban rate. We conclude that the current non-rural support mechanism produces rates that preserve and advance universal service. Third, we conclude, on the basis of undisputed empirical evidence in the record, that the current non-rural high-cost support mechanism comports with the requirements of section 254.

4. We further find that it would not serve the public interest to undertake broad reform of the non-rural high-cost support mechanism in this proceeding. The proposals for reform, described below, would substantially increase the size of the universal service fund, and, consequently, the contribution burden shouldered by consumers. Because the current non-rural support mechanism satisfies section 254 of the Act, and because the Commission will soon consider the National Broadband Plan's recommendation to phase out the existing high-cost universal service support program, including the current non-rural high-cost universal service support mechanism, as part of comprehensive universal service reform, we decline to make changes to the non-rural high-cost support mechanism in this proceeding.

5. In a separate Memorandum Opinion and Order, we grant, with modifications, the joint petition filed by the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for supplemental high-cost universal service support for rural residential customers of Qwest, Wyoming's non-rural incumbent local exchange carrier.<sup>10</sup> Consistent with Commission requirements for requests for additional support under the current non-rural mechanism, the Wyoming petitioners have established that Wyoming's rural rates are not reasonably comparable to urban rates nationwide and that Wyoming has taken all practicable steps to achieve reasonable comparability through state action and existing federal support. Thus, we find that the Wyoming petitioners have demonstrated that supplemental high-cost support is required under the current non-rural high-cost support mechanism to achieve reasonably comparable rates.

## II. ORDER ON REMAND

### A. Background

6. A major objective of high-cost universal service support always has been to help ensure that consumers have access to telecommunications services in areas where the cost of providing such services would otherwise be prohibitively high.<sup>11</sup> In section 254 of the Act, Congress directed the

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<sup>8</sup> 47 U.S.C. § 254(e).

<sup>9</sup> 47 U.S.C. § 254(b).

<sup>10</sup> 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) (Wyoming Petition).

<sup>11</sup> See, e.g., *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Fifth Report and Order, 13 FCC Rcd 21323, 21325-26, para. 5 (1998) (*Fifth Report and Order*) ("Universal service support has increased subscribership levels by ensuring that residents in rural and high cost areas are not prevented from receiving phone service because of prohibitively high

(continued....)

Commission to preserve and advance universal service by ensuring, among other things, that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are “reasonably comparable to rates charged for similar services in urban areas.”<sup>12</sup> In addition, section 254(e) provides that federal universal service support “should be explicit and sufficient to achieve the purposes of this section.”<sup>13</sup>

7. Currently, the Commission’s rules provide federal high-cost support to non-rural and rural carriers under different support mechanisms.<sup>14</sup> While rural carriers receive support based on their embedded costs, support to non-rural carriers is based on the forward-looking economic cost of constructing and operating the network, as determined by the Commission’s cost model.<sup>15</sup> Non-rural carriers receive support based on the model’s cost estimates only in states where the statewide average forward-looking cost per line for non-rural carriers exceeds a national cost benchmark, which is set at two standard deviations above the national average cost per line.<sup>16</sup>

(Continued from previous page)

local telephone rates. As of today, approximately 94 percent of the households in the United States subscribe to telephone service, a subscribership rate that is among the best in the world.”)

<sup>12</sup> 47 U.S.C. § 254(b)(3).

<sup>13</sup> 47 U.S.C. § 254(e). Similarly, section 254(b)(5) states that there “should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.” 47 U.S.C. § 254(b)(5).

<sup>14</sup> The term “non-rural carriers” refers to incumbent local exchange carriers that do not meet the statutory definition of a rural telephone company. See 47 U.S.C. § 153(37). Under section 153(37), rural telephone companies are defined as incumbent carriers that either serve study areas with fewer than 100,000 access lines or meet one of three alternative criteria. *Id.* Thus, “non-rural carriers” are principally defined by study area size. Non-rural carriers serve the majority of access lines nationwide, including lines in rural, insular, and high-cost areas.

<sup>15</sup> The Commission determined that high-cost universal service support should be based on forward-looking economic cost, but that rural carriers’ high-cost support would not be based on forward-looking economic cost until further review. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8888-89 paras. 199, 203 (1997) (*Universal Service First Report and Order*) (subsequent history omitted). The Commission finalized the computer model platform and adopted model inputs used to estimate the forward-looking costs of a non-rural carrier’s operations in the *Tenth Report and Order*. *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Tenth Report and Order, 14 FCC Rcd 20156 (1999) (*Tenth Report and Order*), affirmed, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) (*Qwest I*). The model platform refers to the assumptions about the design of the network and network engineering, and fixed characteristics such as soil and terrain used in the computer model. See *Fifth Report and Order*, 13 FCC Rcd at 21324, para. 2.

<sup>16</sup> See 47 C.F.R. § 54.309(a)(3). The Commission originally set the cost benchmark at 135% above the national average forward-looking cost per line. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20463-64, para. 55 (1999) (*Ninth Report and Order*), remanded, *Qwest I*, 258 F.3d 1191. In *Qwest I*, the court found that the Commission “failed to explain how its 135% benchmark will help achieve the goal of reasonable comparability or sufficiency,” and directed the Commission to “address the relevant data and provide adequate record support and reasoning for whatever level of support it ultimately selects upon remand.” *Qwest I*, 258 F.2d at 1202-03. In the *Order on Remand*, the Commission adopted a two standard deviation benchmark: “Consistent with the court’s directive, standard deviation analysis provides an empirical method, based on relevant data, of identifying states with significantly higher costs than the national average that are likely to have difficulty maintaining comparable rates without federal support.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 18 FCC Rcd 22559, 22597, para. 62 (2003) (*Order on Remand*), remanded, *Qwest II*, 398 F.3d 1222. As discussed below, there are numerous reasons why the Commission bases high-cost support on costs, rather than rates. See *infra* paras. 61-64.

8. To induce states to achieve the reasonably comparable rates that are required by the statute, the Commission requires states to review annually their residential local rates in rural areas served by non-rural carriers and certify that those rural rates are reasonably comparable to urban rates nationwide, or explain why they are not.<sup>17</sup> The Commission defined the statutory term “reasonably comparable” in terms of a national *rate* benchmark, which serves as a “safe harbor” in the rate review and certification process.<sup>18</sup> States with rural rates below the benchmark may presume that their rural rates are reasonably comparable to urban rates nationwide without providing additional information; if the rural rates are above the benchmark, states can rebut the presumption that rates are not reasonably comparable by demonstrating that factors other than basic service rates affect the comparability of rates.<sup>19</sup> The national rate benchmark currently is set at two standard deviations above the average urban rate as reported in the most recent annual rate survey published by the Wireline Competition Bureau.<sup>20</sup>

9. In *Qwest II*, the court held that the Commission relied on an erroneous, or incomplete, construction of section 254 in defining statutory terms and crafting the funding mechanism for non-rural high-cost support.<sup>21</sup> The court directed the Commission on remand to articulate a definition of “sufficient” that appropriately considers the range of principles set forth in section 254(b) and to define “reasonably comparable” in a manner that comports with the Commission’s statutory obligation to preserve and advance universal service.<sup>22</sup> The court found that, “[b]y designating a comparability benchmark at the national urban average plus two standard deviations, the FCC has ensured that significant variance between rural and urban rates will continue unabated.”<sup>23</sup> The court also found that the Commission ignored its obligation to “advance” universal service, “a concept that certainly could include a narrowing of the existing gap between urban and rural rates.”<sup>24</sup> Because the non-rural high-cost support mechanism rested on the application of the definition of “reasonably comparable” rates invalidated by the court, the court also deemed the support mechanism invalid.<sup>25</sup> The court further noted that the Commission based the two standard deviations *cost* benchmark on a finding that *rates* were reasonably comparable, without empirically demonstrating a relationship between costs and rates.<sup>26</sup>

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<sup>17</sup> See 47 C.F.R. §54.316. In *Qwest I*, the court required the Commission on remand to develop some mechanism (a “carrot” or a “stick”) to induce adequate state action to preserve and advance universal service. See *Qwest I*, 258 F.3d at 1204. In response to this directive, the Commission in the *Order on Remand* adopted the rule requiring states to certify annually that their rural rates are reasonably comparable to urban rates nationwide. See *Order on Remand*, 18 FCC Rcd at 22601-14, paras. 70-92. In *Qwest II*, the court held that this rate certification process provided an adequate inducement to states to assist in implementing the goals of universal service. See *Qwest II*, 398 F.3d at 1226, 1238.

<sup>18</sup> See 47 C.F.R. §54.316(b); *Order on Remand*, 18 FCC Rcd at 22582-89, 22607-10, paras. 38-48, 80-82.

<sup>19</sup> See *Order on Remand*, 18 FCC Rcd at 22609-10, para. 82.

<sup>20</sup> See 47 C.F.R. §54.316(b); Industry Analysis and Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service* (August 2008) (*Reference Book*).

<sup>21</sup> *Qwest II*, 398 F.3d at 1226.

<sup>22</sup> *Id.* at 1237.

<sup>23</sup> *Id.* at 1236.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1237.

<sup>26</sup> *Id.*

10. In December 2005, the Commission issued a notice of proposed rulemaking seeking comment on issues raised by the Tenth Circuit in *Qwest II*.<sup>27</sup> Since the Commission issued the *Remand NPRM*, it has sought comment on various proposals for comprehensive reform of the high-cost support mechanisms for both rural and non-rural carriers.<sup>28</sup> In addition, the Commission issued a further notice of proposed rulemaking seeking comment on comprehensive universal service and intercarrier compensation reform on November 5, 2008.<sup>29</sup>

11. On January 14, 2009, Qwest Corporation, the Maine Public Utilities Commission, the Vermont Public Service Board, and the Wyoming Public Service Commission filed with the Tenth Circuit a petition for a writ of mandamus, asserting that the Commission had unreasonably delayed responding to the *Qwest II* remand.<sup>30</sup> Shortly after that petition was filed, the Commission and the petitioners negotiated an agreement under which the Commission would release a notice of inquiry no later than April 8, 2009; issue a further notice of proposed rulemaking no later than December 15, 2009; and release a final order that responds to the court's remand no later than April 16, 2010.<sup>31</sup> On April 8, 2009, the Commission issued a notice of inquiry to refresh the record regarding the issues raised by the court in this remand proceeding.<sup>32</sup> The Commission requested comment on several specific proposals, and sought comment generally on how any changes to the Commission's non-rural high-cost support mechanism should relate to more comprehensive high-cost universal service reform and the Commission's initiatives regarding broadband deployment.<sup>33</sup> Subsequently, on December 15, 2009, the Commission released a further notice of proposed rulemaking that tentatively concluded that the current non-rural high-cost mechanism is an appropriate transitional mechanism for determining high-cost support to non-rural carriers while the Commission considers comprehensive universal service reform consistent with both the Communications Act and the Recovery Act.<sup>34</sup>

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<sup>27</sup> *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Proposed Rulemaking, 20 FCC Rcd 19731 (2005) (*Remand NPRM*).

<sup>28</sup> See *Identical Support Rule Notice*, 23 FCC Rcd 1467; *Reverse Auctions Notice*, 23 FCC Rcd 1495; *Joint Board Comprehensive Reform Notice*, 23 FCC Rcd 1531.

<sup>29</sup> *Comprehensive Reform FNPRM*, 24 FCC Rcd 6475.

<sup>30</sup> Petition for a Writ of Mandamus, *In re Qwest Corp.*, No. 09-9502 (10th Cir. filed Jan. 14, 2009).

<sup>31</sup> See Response of Federal Communications Commission to Petition for a Writ of Mandamus, *In re Qwest Corp.*, No. 09-9502 (10th Cir. filed Mar. 6, 2009). In light of the parties' agreement on a timetable for Commission action, the Tenth Circuit denied the mandamus petition as moot. Order, *In re Qwest Corp.*, No. 09-9502 (10th Cir. issued Mar. 20, 2009).

<sup>32</sup> *Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, CC Docket No. 96-45, WC Docket No. 05-337, Notice of Inquiry, 24 FCC Rcd 4281 (2009) (*Remand NOI*).

<sup>33</sup> *Id.*

<sup>34</sup> See Recovery Act § 6001(k)(2); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, WC Docket No. 05-337, Further Notice of Proposed Rulemaking, FCC 09-112 (rel. Dec. 15, 2009). A list of parties that filed comments in response to the further notice of proposed rulemaking is included in Appendix A.

## B. The Evolution of Universal Service

### 1. Marketplace Developments

12. The communications marketplace has undergone significant changes since the Commission originally adopted the non-rural high-cost support mechanism in 1999.<sup>35</sup> At that point in time, none of the Bell Operating Companies (BOCs), which provided local telephone service to the majority of customers served by non-rural carriers, were permitted to offer combined local and interstate long distance services.<sup>36</sup> As a result, most customers of non-rural carriers took local service from the incumbent LEC and subscribed to a separate interexchange carrier for long distance service. In the *Order on Remand*, the Commission explicitly defined “reasonable comparability” in terms of the national average urban rate for local telephone service provided by incumbent LECs.<sup>37</sup>

13. When the Commission issued the *Remand NPRM* in 2005, however, it noted that most consumers no longer purchase stand-alone local telephone service, but instead purchase local and long distance service from the same provider.<sup>38</sup> In the *Remand NOI*, the Commission further noted that consumers increasingly purchase packages of services that include not only unlimited nationwide calling, but also broadband Internet access and video services.<sup>39</sup>

14. The record in this proceeding shows that consumers are migrating away from traditional wireline telephone service. Today, for example, the vast majority of subscribers have a wireless phone in addition to a wireline phone – a substantial increase from 1997, when there were only 55 million wireless subscribers.<sup>40</sup> Between December 2000 and December 2008, the number of wireless subscribers more

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<sup>35</sup> See, e.g., USTelecom NOI Comments at 5 (“Since the Tenth Circuit case began, the market has changed dramatically. Customers now have new options, such as cable and wireless for obtaining voice services at reasonably comparable rates. These services are generally sold at rates that are set on a nationwide basis. Prepaid wireless plans provide affordable options that were not available a few years ago. Distance is now irrelevant as the vast majority of consumers subscribe to bundled all distance plans.”).

<sup>36</sup> Specifically, the BOCs were prohibited from providing in-region interLATA service prior to the Commission’s authorization pursuant to section 271 of the Act. See BOC Authorization to Provide In-region, InterLATA Services Under Sections 271 and 272 at [http://www.fcc.gov/Bureaus/Common\\_Carrier/in-region\\_applications/](http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/) (last updated Jan. 14, 2010).

<sup>37</sup> See *Order on Remand*, 18 FCC Rcd at 22582, para. 38 & n.130.

<sup>38</sup> *Remand NPRM*, 20 FCC Rcd at 19741, para. 21 & n.74 (citing J.D. Power and Associates Reports: Three Quarters of Households Now Bundle Local and Long Distance Telephone Service with One Provider, July 14, 2005). The Commission’s most recent local telephone competition report indicates that for 69 percent of residential lines the local carrier is also the presubscribed interstate long distance provider. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Competition: Status as of June 30, 2008*, Table 6 (July 2009). The Commission’s data likely understate the percentage of consumers who currently subscribe to bundled local and long distance service because the data do not include all telephone lines provided via voice over Internet protocol (VoIP).

<sup>39</sup> *Remand NOI*, 24 FCC Rcd at 4289-90, para. 19.

<sup>40</sup> See CTIA FNPRM Comments (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, 13 FCC Rcd 19,746, app. B, at B-2 (1998)).

than doubled, growing from 109.5 million to 270.3 million, and the wireless penetration rate jumped from 38 percent to 87 percent of the total population.<sup>41</sup>

15. Wireless penetration rates have been driven, in part, by wireless deployment. Most of the population – including the rural population – now has access to wireless service offered by one or more different providers in the census block in which they live.<sup>42</sup> In addition, more than 95 percent of the total population lives in areas with at least three mobile service providers offering competing service, and more than half the total population lives in areas with at least five competing providers offering mobile service.<sup>43</sup> Even in rural areas, approximately 98.5 percent of the population has access to mobile services offered by one or more providers.<sup>44</sup> Furthermore, many mobile wireless service providers now provide services supported by universal service funds and draw a substantial amount of interstate high-cost support – including support from the non-rural mechanism – as eligible telecommunications carriers (ETCs) designated by either a state commission or the Commission. Universal service high-cost support for these competitive ETCs grew from \$17 million in 2001 to \$1.27 billion in 2009.<sup>45</sup>

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<sup>41</sup> See Verizon NOI Comments at 18 (citing *Wireless Quick Facts, Year-End Figures*, CTIA – The Wireless Association (December 2008) (comparing December 2000 to December 2008 figures)); see also CTIA FNPRM Comments at 3-4 (estimating that the number of wireless subscribers had grown to 276.6 million as of June 2009).

<sup>42</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, Thirteenth Report, 24 FCC Rcd 6185, 6189, para. 2 (2009) (*Thirteenth CMRS Competition Report*). A census block is the smallest geographic entity for which the Census Bureau tabulates decennial census data. U.S. Census Bureau, *Glossary Of Basic Geographic And Related Terms - Census 2000*, available at <http://www.census.gov/geo/www/tiger/glossary.html#glossary> (last modified Sept. 9, 2005). Many blocks correspond to individual city blocks bounded by streets, but blocks – especially in rural areas – may include many square miles and may have some boundaries that are not streets. The Census Bureau established blocks covering the entire nation for the first time in 1990. Previous censuses back to 1940 had blocks established only for part of the nation. Over 8 million blocks are identified for Census 2000. U.S. Census Bureau, *Introduction to Census 2000 Data Products* (June 2001), at <http://www.census.gov/prod/2001pubs/mso-01icdp.pdf>. The mean size of a census block is .0460 square miles, and its median size is 0.016 square miles with a range of 0.0000001 to 8,081 square miles; its mean population is 34.3 people, while its median population is 8.0 people, with a range of 0 to 23,373 people. FCC analysis based on Census 2000 “Summary File 1 (SF 1),” U.S. Census Bureau, *United States Census 2000*, available at <http://www.census.gov/Press-Release/www/2001/sumfile1.html> (last modified Aug. 8, 2009).

<sup>43</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6189, para. 2

<sup>44</sup> *Id.*, 24 FCC Rcd at 6189, 6239, paras. 2, 104.

<sup>45</sup> Universal Service Administrative Company, Annual Report 2009 at 42, available at [http://www.usac.org/\\_res/documents/about/pdf/usac-annual-report-2009.pdf](http://www.usac.org/_res/documents/about/pdf/usac-annual-report-2009.pdf) (USAC Annual Report 2009). See also *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; ALLTEL Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers; RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, para. 6 (2008) (*Interim Cap Order*), affirmed, *Rural Cellular Assn. v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009) (*Rural Cellular Assn.*). The majority of competitive ETCs are mobile wireless service providers, and the vast majority of competitive ETC support goes to wireless competitive ETCs. *Id.*, n.61. In May 2008, the Commission adopted an order that imposed an interim, emergency cap on competitive ETC high-cost support disbursements “to halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund.” *Id.*, para. 5. In addition, the Commission conditioned certain merger decisions on voluntary commitments by Sprint Nextel and Verizon Wireless to phase out their high-cost universal service support in equal 20 percent increments over a period of five years. *Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section* (continued....)

16. Consumers in urban and rural areas have flocked to wireless phone service due to improved wireless coverage and better pricing.<sup>46</sup> Nationwide mobile wireless service providers offer unlimited national flat-rate calling plans, and even many smaller operators offer some version of a national rate pricing plan.<sup>47</sup> By the first half of 2009, the percentage of all households that had “cut the cord,” and subscribe exclusively to wireless service, rose to an all-time high of more than 22.7 percent – i.e., more than one in five households.<sup>48</sup>

17. In addition to wireless service, more and more customers have the option to purchase voice service from competing broadband-based VoIP providers. Such services are offered by facilities-based providers, such as cable operators, as well as providers of “over-the-top” VoIP services that utilize a broadband connection provided by a separate, facilities-based provider.<sup>49</sup> Like mobile wireless service providers, many VoIP providers offer competitive monthly rates under nationwide pricing plans.<sup>50</sup> While these services are not yet as pervasive as traditional wireline or wireless services, the Commission has recognized that “[i]nterconnected VoIP service subscribers represent an important and rapidly growing part of the U.S. voice service market, and interconnected VoIP services are becoming increasingly competitive with other forms of local telephone service.”<sup>51</sup>

## 2. Telephone Subscribership Rates and Consumer Expenditure Data

18. Since the Commission established the universal service program in 1996, subscribership penetration rates have remained at consistently high levels. In 1996, 93.9 percent of households had phone service.<sup>52</sup> Fourteen years later, the Commission’s most recent report on telephone subscribership, (Continued from previous page)

*310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17529-32, paras. 192-97 (2008); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570, 17611-12, paras. 106-08 (2008).

<sup>46</sup> *Thirteenth CMRS Competition Report*, 24 FCC Rcd at 6294, para. 230 (“It appears that customers are switching to wireless from wireline because of wireless’s relatively low cost and widespread availability. As discussed in past Reports, a number of analysts have argued that wireless service is competitive or cheaper than wireline, particularly if one is making a long-distance call or when traveling.”).

<sup>47</sup> *Id.*, 24 FCC Rcd at 6199, 6243-44, 6246, paras. 14, 111-12, 118. The four service providers that are considered “nationwide”, Verizon Wireless, AT&T, T-Mobile and Sprint Nextel, offer facilities-based service in at least some portion of the western, mid-western, and eastern United States. *Id.*, 24 FCC Rcd at 6199, para 14. These four nationwide mobile wireless service providers offer nationwide calling plans for an average effective rate of \$0.05 to \$0.10 per minute, in addition to unlimited nationwide calling plans. See Verizon NOI Comments at 17.

<sup>48</sup> CTIA FNPRM Comments at 4 (citing United States Centers for Disease Control and Prevention, “Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2009” (rel. Dec. 16, 2009)).

<sup>49</sup> NCTA NOI Comments at 6 (explaining that cable operators now provide voice service to more than 20 million households, typically at rates that are lower than the rates offered by the incumbent LEC).

<sup>50</sup> *Id.* (explaining that Vonage offers “unlimited local and long distance calling plans starting at \$9.95 per month for three months, and \$24.99 per month thereafter”).

<sup>51</sup> *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9705, para. 26 (2008).

<sup>52</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, *Telephone Subscribership in the United States*, Table 1 (February 2010) (Telephone Subscribership Report).

released in February 2010, found that the telephone subscribership penetration rate in the United States in 2009 had increased to 95.7 percent – the highest reported penetration rate since the Census Bureau began collecting such data in November 1983.<sup>53</sup> This represents a statistically significant increase of 0.5 percent from the 95.2 percent penetration rate reported for 2008.<sup>54</sup> An alternative measure of telephone penetration shows that the telephone penetration rate has risen from 96.9 percent in 2001 to 98.2 percent in 2008.<sup>55</sup> Thus, even as consumers have dropped traditional wireline telephone service, overall subscribership to telephone service continues to increase.

19. Furthermore, average consumer expenditures on telephone service as a percentage of total household expenditures have remained relatively stable over time – at approximately two percent – even though consumers purchase more different types of telephone services than they did decades ago.<sup>56</sup> Data from the Bureau of Labor Statistics (BLS) indicate that consumers spent 1.94 percent of their household expenditures on telephone service in 1980 and 2.23 percent in 2008.<sup>57</sup> Moreover, consumers are buying more telephone services than they did in 1980. An alternative measure of consumer expenditures shows that telephone service as a percentage of all goods and services accounted for 1.6 percent of consumer expenditures in both 1980 and 2005.<sup>58</sup> Further, consumers now pay only slightly more for both wireline and wireless services than they paid for wireline service alone in 1980. In 1980, there was no wireless service, and in 1984 there were only 92,000 wireless subscribers.<sup>59</sup> Today, by contrast, an estimated 270 million Americans are wireless subscribers.<sup>60</sup> Indeed, by 2008, 49 percent of consumer expenditures on telephone service were allocated to wireline (local and long distance) service while 51 percent were allocated to wireless service.<sup>61</sup> In addition, while consumer expenditure percentages have remained stable, the Consumer Price Index (CPI) for all items has consistently been higher than the CPI for

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<sup>53</sup> *Id.* at 23. The Commission’s subscribership statistics are based on the Current Population Survey (CPS) conducted by the Census Bureau. The survey is intended to be neutral as to whether the household has wireline or wireless phones. *See id.* at 2, n.4.

<sup>54</sup> *See id.* at 3 (concerning the statistical significance of changes in annual averages) and 22-23 (showing the annual averages for the United States for 2008 and 2009).

<sup>55</sup> 2009 Universal Service Monitoring Report (data through July 2009), Federal-State Staff for the Federal-State Joint Board on Universal Service, Table 6.4 (Dec. 31, 2008) (2009 Monitoring Report), [http://www.fcc.gov/wcb/tapd/universal\\_service/USFmonitor.html](http://www.fcc.gov/wcb/tapd/universal_service/USFmonitor.html). This figure is based on occupied households with telephone service, regardless of technology.

<sup>56</sup> *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, 3-1; 3-3, Table 3-1 (August 2008) (2008 Trends) (“About 2% of all consumer expenditures are devoted to telephone service. This percentage has remained virtually unchanged over the past twenty years, despite major changes in the telephone industry and in telephone usage.”).

<sup>57</sup> BLS publishes data from its Consumer Expenditure Survey showing how much consumers spend on telephone service and other household expenditures. *See* <http://www.bls.gov/cex>. BLS data for telephone service currently includes: residential/payphone service (which includes local service, features, payphone expenditures, and long distance); wireless service; pager service; and phone cards. In 1980, there was no wireless service, so the earlier data reflects primarily local and long distance service.

<sup>58</sup> *See* 2008 Trends, 3-5, Table 3.3. These percentages are based on data from the Bureau of Economic Analysis (BEA), National Economic Accounts. Telephone service as a percentage of all goods and services was at its highest, 1.9 percent of consumer expenditures, from 1997 through 2000. *See id.*

<sup>59</sup> *See* 2008 Trends, 11-1, 11-4, Chart 11.1.

<sup>60</sup> *See supra* para. 14.

<sup>61</sup> *See* 2008 Trends, 3-5, Table 3.3.

telephone service for the past two decades.<sup>62</sup> In fact, while the CPI for all items increased 2.5 percent between 1996 and 2006, the CPI for telephone service decreased by 0.3 percent.<sup>63</sup>

### 3. Growth in the Universal Service Fund

20. The universal service fund provides federal support for several universal service programs, subsidizing telecommunications services purchased by consumers in high-cost areas, low-income consumers, rural health care providers, and schools and libraries.<sup>64</sup> The amount of universal service support disbursed has grown dramatically in recent years in response to programmatic and marketplace changes. In 2001, universal service disbursements totaled \$5.35 billion.<sup>65</sup> By 2009, universal service disbursements totaled \$7.26 billion annually.<sup>66</sup> High-cost support disbursements represent the majority of universal service expenditures, and are the primary driver of growth in overall universal service disbursements.<sup>67</sup> From 2001 to 2009, high-cost support disbursements grew substantially, from about \$2.6 billion to about \$4.3 billion, an increase of \$1.7 billion, or about 65 percent.<sup>68</sup> Much of this growth in high-cost support was attributable to the removal of implicit subsidies from interstate access charges, which traditionally helped reduce rates for basic local telephone service, and the inclusion of these amounts in two new explicit universal service mechanisms: Interstate Access Support (IAS) and Interstate Common Line Support (ICLS).<sup>69</sup> Until recently, high-cost support was one of only two types of universal service support that was not subject to an annual cap.<sup>70</sup> In May 2008, the Commission found it

<sup>62</sup> See *2008 Trends*, 12-1, 12-3, Chart 12.1.

<sup>63</sup> *Id.* at 12-3, Table 12.1.

<sup>64</sup> The rural health care and schools and libraries mechanisms support certain non-telecommunications services. See 47 CFR § 54.503 (schools and libraries), 47 CFR §§ 54.601(c), and 54.621 (rural health care).

<sup>65</sup> Universal Service Administrative Company, Annual Report 2001 at 32, available at <http://www.usac.org/about/governance/annual%2Dreports/2001/default.html> (USAC Annual Report 2001).

<sup>66</sup> USAC Annual Report 2009 at 39.

<sup>67</sup> Disbursements were allocated among the various universal service programs in the following proportions in 2009: 59.2 percent for high-cost support; 25.9 percent for schools and libraries support; 14.1 percent for low-income support; and 0.8 percent for rural health care support. *Id.*

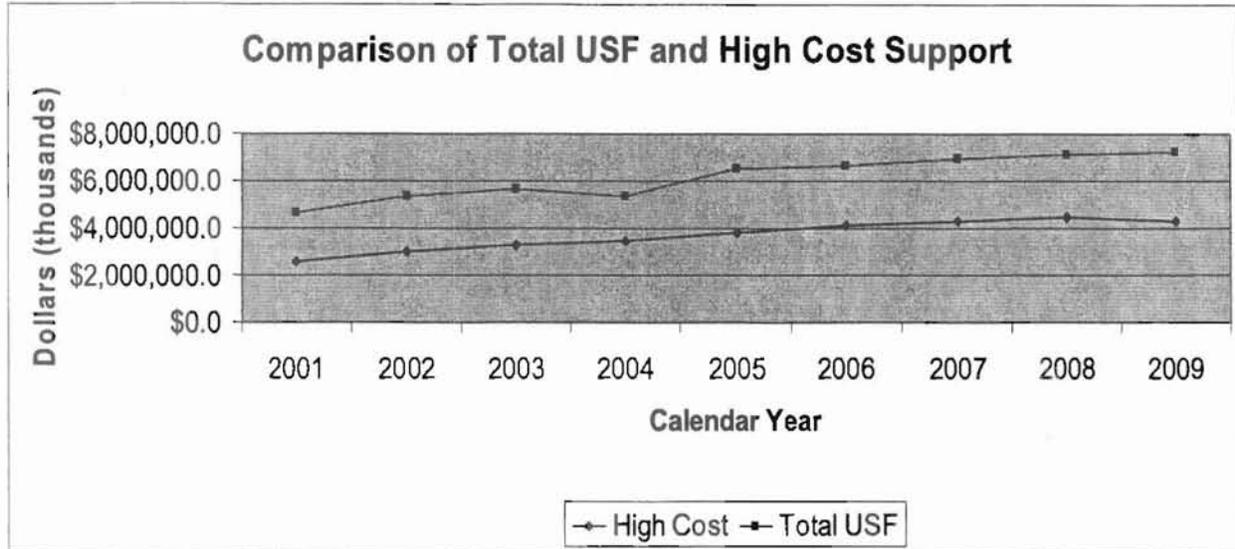
<sup>68</sup> USAC Annual Report 2001 at 33; USAC Annual Report 2009 at 40. See also *Interim Cap Order*, 23 FCC Rcd 8834.

<sup>69</sup> See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166 16 FCC Rcd 19613 (2001) (*MAG Plan Order*), recon. pending. In 2008, incumbent LEC ETCs and competitive ETCs received \$585 million of IAS and \$1.62 billion of ICLS. 2009 Universal Service Monitoring Report, Table 3.1.

<sup>70</sup> The schools and libraries universal service funding mechanism (the E-rate program) is capped at \$2.25 billion per funding year, and the rural health care support mechanism is capped at \$400 million per funding year. See 47 C.F.R. §§ 54.507(a), 54.623. The low-income support mechanism is not capped, and continues to grow, but grew by less than \$240 million between 2001 and 2008. See 2009 Monitoring Report, Table 2.2. Although high-cost support is not subject to an overall cap, portions of the high-cost support mechanism, are subject to a cap or target. 47 C.F.R. §

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necessary to impose an interim, emergency cap on competitive ETC high-cost support disbursements, “to halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund.”<sup>71</sup>



21. As the amount of universal service support disbursed has increased, so has the quarterly universal service contribution factor, which results in higher universal service contribution assessments and higher phone bills for end-user customers.<sup>72</sup> The contribution factor has more than doubled in the past 10 years. In the second quarter of 2001, the contribution factor was approximately 6.9 percent of interstate and international, end-user telecommunications revenues.<sup>73</sup> Now, in the second quarter of 2010, the current contribution factor has climbed to 15.3 percent – an all-time high – due to the increased demand for universal service support and a declining pool of interstate telecommunications revenues against which to assess contributions.<sup>74</sup> As a result, many consumers of interstate telecommunications

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54.305(e) (capping safety valve support for individual rural carriers, as well as the total amount of safety valve support for all rural carriers); 47 C.F.R. § 36.621(a)(4)(ii)(D) (capping rural high-cost loop support on an indexed basis); *Access Charge Reform, Price Cap Performance Review for LECs, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service, Order on Remand*, 18 FCC Rcd 14976, para. 14 (2003) (targeting IAS to \$650 million per year).

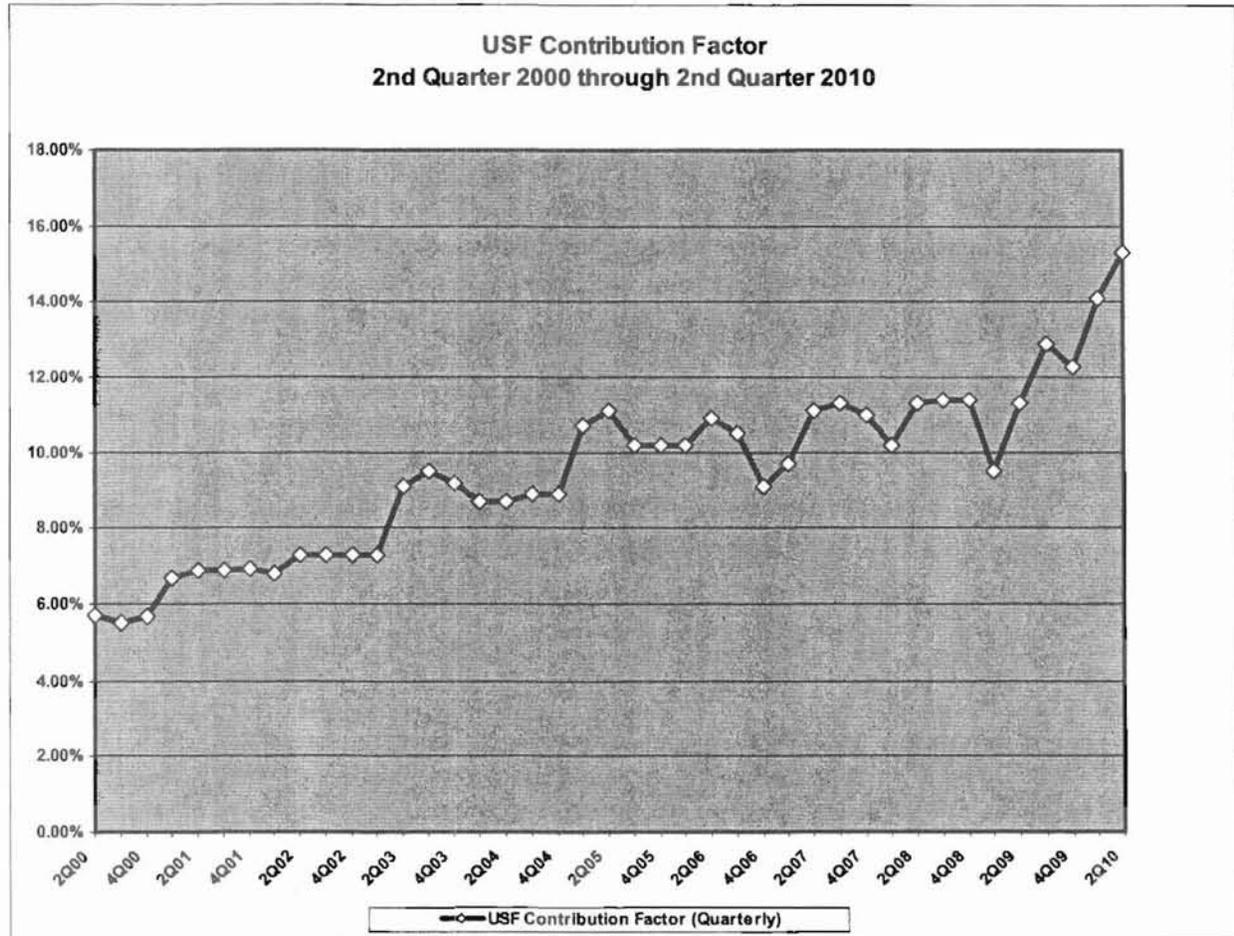
<sup>71</sup> *Interim Cap Order*, 23 FCC Rcd at 8837, para. 5.

<sup>72</sup> Support for the universal service fund derives from assessments paid by providers of interstate telecommunications services and certain other providers of interstate telecommunications. See 47 C.F.R. § 54.706. Fund contributors are permitted to, and almost always do, pass those contribution assessments through to their end-user customers. See 47 C.F.R. § 54.712. Fund assessments paid by contributors are determined by applying the quarterly contribution factor to the contributors' contribution base revenues.

<sup>73</sup> See *Proposed Second Quarter 2001 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, 16 FCC Rcd 5358 (Comm. Carr. Bur. 2001).

<sup>74</sup> *Proposed Second Quarter 2010 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 10-427 (OMD rel. Mar. 12, 2010). Because the Commission took no action regarding the projections of demand and administrative expenses and the proposed contribution factor within the 14-day period following release of the Public Notice, they were deemed approved by the Commission. See 47 C.F.R. § 54.709(a)(3).

services are paying a surcharge of over 15 percent on the interstate portion of their monthly bill. This figure likely underestimates the total universal service burden imposed on consumers, however, because more than 20 states have established their own universal service funds, in addition to the federal universal service fund.<sup>75</sup> For example, to support the Texas universal service fund, which includes a high-cost program and a low-income program, Texas currently imposes a 3.4 percent surcharge on intrastate telecommunication services receipts.<sup>76</sup> Similarly, Colorado currently imposes a 2.2 percent fee to support the Colorado high-cost support mechanism.<sup>77</sup>



<sup>75</sup> See Peter Bluhm, Phyllis Bernt, PhD, and Jing Liu, *State High-Cost Funds: Purposes, Design and Evaluation*, National Regulatory Research Institute (Jan. 15, 2010) (finding that 21 states have established high-cost universal service funds).

<sup>76</sup> Texas Universal Service Fund (TUSF) at <http://www.puc.state.tx.us/ocp/telephone/telefacts/USF.PDF> (last visited Mar. 1, 2010).

<sup>77</sup> About the Colorado Public Utilities Commission Telecommunications Universal Service Fund – High-Cost Support Mechanism at <http://www.dora.state.co.us/PUC/telecom/hcsm/AboutHCSM.htm> (last visited Mar. 1, 2010); 4 CCR 723-2-2846(c) (“The HCSM rate element shall be applied to the retail revenues of each provider’s end user and shall appear as a line item on the monthly bill of each such end user except that providers falling within the de minimis exemption of subparagraph (b)(I)(B) shall not apply the HCSM rate element nor collect such contribution from their end users.”).

22. All of the developments discussed above – the growth of a vibrantly competitive telecommunications marketplace; the unprecedented levels of telephone subscribership; the stability of consumer expenditures on telephone service over the last three decades; and the dramatic increase in federal universal service funding – inform our analysis of whether the non-rural mechanism, as currently structured, comports with section 254 of the Act. Taking all of these factors into account, we conclude, for the reasons set forth below, that it does.

### C. The Current Non-Rural Mechanism Comports With Section 254

23. On remand, the Tenth Circuit directed the Commission to address three issues. First, the court held that the Commission “must articulate a definition of ‘sufficient’ that appropriately considers the range of principles in the text of the statute.”<sup>78</sup> Second, the Commission “must define the term ‘reasonably comparable’ in a manner that comports with its concurrent duties to preserve and advance universal service.”<sup>79</sup> And finally, the court directed the Commission “to utilize its unique expertise to craft a support mechanism taking into account all of the factors that Congress identified in drafting the Act and its statutory obligation to preserve *and* advance universal service.”<sup>80</sup> With respect to this last mandate, the court stated that “the FCC must fully support its final decision on the basis of the record before it.”<sup>81</sup> We address each of these issues in turn. After careful analysis and review of the record, we conclude that the non-rural support mechanism, as currently structured, comports with the requirements of section 254 of the Act.

#### 1. “Sufficient”

##### a. An Assessment of Whether Support Is “Sufficient” Must Take Into Account the Entire Universal Service Fund

24. Section 254(e) of the Act provides that federal universal service support “should be explicit and *sufficient* to achieve the purposes of [section 254].”<sup>82</sup> In the context of determining high-cost support for non-rural carriers, the Commission previously defined “sufficient” as “enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers.”<sup>83</sup> In *Qwest II*, the Tenth Circuit held that the Commission did not adequately demonstrate how its non-rural universal service support mechanism was “sufficient” within the meaning of section 254(e).<sup>84</sup> The court noted that “reasonable comparability” was just one of several principles that Congress directed the Commission to consider when crafting policies to preserve and advance universal service.<sup>85</sup> The court was “troubled by the Commission’s seeming suggestion that other principles, including affordability, do not underlie federal non-rural support mechanisms.”<sup>86</sup> “On

<sup>78</sup> *Qwest II*, 398 F.3d at 1234.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1237.

<sup>81</sup> *Id.*

<sup>82</sup> 47 U.S.C. § 254(e) (emphasis added).

<sup>83</sup> *Order on Remand*, 18 FCC Rcd at 22578, para. 30.

<sup>84</sup> *Qwest II*, 398 F.3d at 1237.

<sup>85</sup> *Id.* at 1234 (citing 47 U.S.C. § 254(b)).

<sup>86</sup> *Id.*

remand,” the court concluded, “the FCC must articulate a definition of ‘sufficient’ that appropriately considers the range of principles identified in the text of the statute.”<sup>87</sup>

25. Congress, in section 254(b) of the Act, set forth a number of principles for the Commission to consider when implementing the universal service policy. These principles include: (1) “[q]uality service should be available at just, reasonable, and affordable rates”; (2) “access to advanced telecommunications and information services should be provided in all regions of the Nation”; (3) “low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications services and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged . . . in urban areas”; (4) “[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service”; (5) “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service”; and (6) “[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services.”<sup>88</sup> In addition, section 254(b) permits the Joint Board and the Commission to adopt “[s]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.”<sup>89</sup>

26. The Commission developed four universal service support programs to implement all of the statutory requirements set forth in section 254 of the Act. While the principles in section 254(b), collectively informed and guided the Commission’s decisions, each support program necessarily addresses some of the principles more directly than others. For example, the Commission implemented an E-rate program and a rural health care mechanism to provide support for schools, libraries, and rural health care providers, as set forth in section 254(b)(6).<sup>90</sup> The Commission expanded the Lifeline and Link-up programs to assist low-income consumers and help ensure affordable rates, as set forth in section 254(b)(3).<sup>91</sup> While the Commission kept the larger statutory goals in mind as it developed the four support programs, it did not attempt to fully address each universal service principle in section 254(b) through each support mechanism. Nor is there any indication that Congress intended each principle to be fully addressed by each separate support mechanism. The Commission believes that any determination about whether the Commission has adequately implemented section 254 must look at the cumulative effect of the four support programs, acting together.

27. The non-rural high-cost support mechanism thus is just one segment of the Commission’s comprehensive scheme to preserve and advance universal service.<sup>92</sup> The “sufficiency” of the non-rural

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<sup>87</sup> *Id.*

<sup>88</sup> 47 U.S.C. § 254(b).

<sup>89</sup> 47 U.S.C. § 254(b)(7). Based on the Joint Board’s recommendation, the Commission established “competitive neutrality” as an additional principle upon which to base policies for the preservation and advancement of universal service. See *Universal Service First Report and Order*, 12 FCC Rcd at 8801-03, paras. 46-53.

<sup>90</sup> 47 U.S.C. § 254(b)(6). The Fifth Circuit rejected a challenge to the Commission’s schools and libraries program and parts of the rural health care program. See *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-46 (5th Cir. 1999) (*TOPUC*).

<sup>91</sup> See *Universal Service First Report and Order*, 12 FCC Rcd at 8952-9133, paras. 326-685.

<sup>92</sup> Moreover, even in the context of high-cost universal service support, the non-rural fund is but one of several mechanisms that provide universal service support to rural, insular, and other high-cost areas. See *Verizon NOI Comments* at 5 (describing other high-cost universal service support mechanisms, which include federal high-cost

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high-cost mechanism to achieve its purpose cannot fairly be judged in isolation.<sup>93</sup> The four universal service programs work in tandem to accomplish the principles set forth in section 254(b). For instance, while the basic purpose of high-cost support is to ensure that telephone service is not prohibitively expensive for consumers in rural, insular, and high-cost areas, some consumers in those areas will still need additional assistance due to their low household income. Low-income support, provided through the Lifeline and Link-up programs, supplements high-cost support in those circumstances to remove the additional affordability barriers faced by economically disadvantaged individuals living in rural and other high-cost areas. A fair assessment of whether the Commission has reasonably implemented the section 254 principles, and whether support is “sufficient” for purposes of section 254(e), must therefore encompass the entirety of universal service support programs.<sup>94</sup> This approach to assessing “sufficiency” is consistent with the Tenth Circuit’s analysis in *Qwest I*. The court there recognized that it could not satisfactorily perform the “task of reviewing the sufficiency of the FCC’s actions” without knowing “the full extent of federal support for universal service.”<sup>95</sup>

28. Moreover, whether the Commission has satisfied the goal of “sufficiency,” as required by section 254(e), must be evaluated in the larger context of section 254. The various objectives of section 254 impose practical limits on the fund as a whole. If the universal service fund grows too large, it will jeopardize other statutory mandates, such as ensuring affordable rates in all parts of the country, and ensuring that contributions from carriers are fair and equitable.<sup>96</sup> This issue is not theoretical. With the contribution factor above 15 percent, the Commission has to balance the principles of section 254(b) to ensure that support is sufficient but does not impose an excessive burden on *all* ratepayers. For the reasons discussed herein, we conclude that in designing its non-rural high-cost mechanism, the Commission must balance the statutory principles of reasonable comparability and affordability, taking into account both affordability of rates in high-cost areas served by non-rural carriers and affordability of rates in other areas where customers are net contributors to universal service funding.

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support for rural carriers; federal access charge replacement support (IAS for price-cap carriers and ICLS for rate-of-return carriers); and supplemental state universal service programs).

<sup>93</sup> Verizon NOI Comments at 1 (“The non-rural fund is not designed to achieve all of Congress’ universal service objectives in the Act. There are many different universal service programs that, by design, work together.”); *see also id.* at 5-8 (describing how the full panoply of federal and state universal service support programs achieve the Act’s universal service objectives).

<sup>94</sup> Verizon NOI Comments at 1 (explaining that “the non-rural fund rules are but one part of the [Commission’s] much larger program that, overall, must be ‘sufficient’ to contribute to the ‘preservation and advancement’ of universal service, and must promote service at rates that are ‘reasonably comparable’ between urban and rural areas.”); *see also* Verizon FNPRM Comments at 4-5; NASUCA NOI Comments at 34-43; NASUCA FNPRM Comments at 6-8; CTIA FNPRM Comments at 7; NJ Rate Counsel FNPRM Comments at 9, 11; USA Coalition FNPRM Reply Comments at 3; Vermont/Maine NOI Comments at 19-20 (stating that the Commission does not need to satisfy all the section 254(b) principles through the high-cost program).

<sup>95</sup> *Qwest I*, 258 F.3d at 1205.

<sup>96</sup> Verizon NOI Reply Comments at 2 (“Unrestrained growth in the high cost fund imperils both the affordability and sustainability of all universal service programs – programs that consumers pay for through charges on their bills.”); NCTA FNPRM Comments at 4 (“[U]nchecked growth in the size of the fund, and the corresponding burden on consumers, is directly contrary to the goal of making affordable services available to all consumers.”); AT&T FNPRM Comments at 7 (“[A]t 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.”); NASUCA NOI Comments at 43; Comcast FNPRM Comments at 2, 3.

29. Several courts, including the Tenth Circuit, have recognized that over-subsidizing universal service programs can actually undermine the statutory principles set forth in section 254(b). The Tenth Circuit acknowledged that “excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1).”<sup>97</sup> The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently found, when it upheld the Commission’s interim cap on high-cost support disbursements to competitive ETCs’ support, that the concept of “sufficiency” can reasonably encompass “not just affordability for those benefited, but fairness for those burdened.”<sup>98</sup> The D.C. Circuit explained that, in assessing whether universal service subsidies are excessive, 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.”<sup>99</sup> Further, in *Alenco Communications, Inc. v. FCC*, the Fifth Circuit found that “[t]he agency’s broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.”<sup>100</sup> We thus conclude that a proper balancing inquiry must take into account our generally applicable responsibility to be a prudent guardian of the public’s resources.<sup>101</sup>

30. In light of all these considerations, we respond to the Tenth Circuit’s remand by defining “sufficient” as an affordable and sustainable amount of support that is adequate, but no greater than necessary, to achieve the goals of the universal service program. Unlike the Commission’s prior definition, which the court stated “ignore[d] all but one principle in [section] 254(b),”<sup>102</sup> this definition is “tied explicitly to all the principles underlying the universal service program.”<sup>103</sup> It also “expressly incorporates the principle of ‘affordability’ by ensuring that universal service [support] levels are ‘sufficient’ without growing so large as to be unsustainable and without rendering the rates for supported services ‘unaffordable.’”<sup>104</sup> Having considered the principles set forth in section 254(b) and the Commission’s interpretation and application of those principles, we now turn to applying those principles to the non-rural high-cost support mechanism.

<sup>97</sup> *Qwest II*, 398 F.3d at 1234 (citing *Qwest I*, 258 F.3d at 1200).

<sup>98</sup> *Rural Cellular Assn*, 588 F.3d 1095; see also CTIA FNPRM Comments at 8 (agreeing with the Commission that “it is also necessary to find a balance between ‘reasonable comparability’ and ‘affordability’ by taking into account the affordability of rates in areas where customers are net contributors.”); MDTC FNPRM Comments at 16 (explaining that “universal service policy should be designed to maintain or increase subscribership – not to transfer wealth from low-cost to high-cost regions”).

<sup>99</sup> *Rural Cellular Assn*, 588 F.3d at 1102.

<sup>100</sup> 201 F.3d 608, 620-21 (5th Cir. 2000) (affirming transitional rules that capped support for rural incumbent LEC high-cost loops and corporate operation expenses). See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, Report and Order, 13 FCC Rcd 5318 (1997); *Errata*, 13 FCC Rcd 2372 (1998)

<sup>101</sup> Verizon NOI Comments at 9-10 (“The principle of ‘sufficient’ support also includes a concurrent prohibition against excessive funding in order to protect consumers, who pay for universal service through charges on their bills.”).

<sup>102</sup> *Qwest II*, 398 F.3d at 1234.

<sup>103</sup> Verizon NOI Comments at 10.

<sup>104</sup> *Id.* at 10-11; see also CTIA FNPRM Comments at 11-12 (“The high-cost support mechanism should be measured as ‘sufficient’ if it is adequate, but no larger than necessary, to satisfy the goals of the Act. A sufficient mechanism would permit customers in rural and high-cost areas to receive comparable services at comparable rates, without overburdening the customers who ultimately support universal service.”).

**b. The Commission's Universal Service Programs Provide "Sufficient" Support**

31. We find that the non-rural high-cost support mechanism, acting in conjunction with the Commission's other universal service programs, provides sufficient support to achieve the universal service principles set forth in section 254(b) of the Act. These programs have produced almost ubiquitous access to telecommunications services and very high telephone subscribership rates.<sup>105</sup> The Commission's most recent report on telephone subscribership, released in February 2010, found that, as of November 2009, the telephone subscribership penetration rate in the United States was 95.7 percent – the highest reported penetration rate since the Census Bureau began collecting such data in November 1983.<sup>106</sup> The fact that subscribership has increased indicates that the Commission is preserving and *advancing* universal service.

32. In particular, the current telephone subscribership penetration rate is strong evidence that our universal service programs provide support that is sufficient to ensure that rates are affordable, as required by section 254(b)(1).<sup>107</sup> This finding is buttressed by data showing that average consumer expenditures on telephone service as a percentage of household expenditures have been relatively stable over time – approximately 2 percent – even while the amount of telephone service consumers are purchasing has increased.<sup>108</sup> Moreover, rural consumers and urban consumers spent a comparable percentage of their household expenditures on telephone service.<sup>109</sup> We agree with Qwest that “the current level of telephone subscribership suggests that universal service subsidies *as a whole* are enabling *affordable* rates . . . .” We disagree, however, that the Commission is required to “present[] data . . . to demonstrate that non-rural high-cost support” by itself “is actually contributing to affordable rates” in order to satisfy the court.<sup>110</sup> As we explained above, the Commission cannot – and is not required to – evaluate the non-rural high-cost fund in isolation. Sufficient support that satisfies the universal service principles of section 254(b) – including affordable rates – can only reasonably be achieved through the

<sup>105</sup> See Verizon NOI Comments at 8 (explaining that high telephone subscribership rates demonstrate that the Commission's universal service programs, working together, have achieved the universal service objectives in the Act).

<sup>106</sup> Telephone Subscribership Report, Table 2.

<sup>107</sup> A number of commenters agree that high telephone subscribership rates provide evidence that rates are affordable. See, e.g., AT&T NOI Reply Comments at 23; NCTA NOI Comments at 6; CTIA NOI Comments at 7. Qwest believes that “sufficient high-cost support should include enough support to enable rates in high-cost areas to remain affordable for most customers.” Qwest FNPRM Comments at 8. We agree. As set forth herein, record evidence demonstrates that the current system produces affordable rates that pass Qwest's proposed “affordability” test. Qwest, by contrast, has provided no empirical data supporting its unsubstantiated assertion that rural rates charged by non-rural carriers are not affordable for most customers. To the contrary, in its comments responding to the *Remand NOI*, Qwest stated: “High penetration rates throughout the country suggest that current rates are affordable so further efforts to ensure affordability of rural rates within the framework of the high-cost program seem unnecessary at this time.” Qwest NOI Comments at 15.

<sup>108</sup> See *supra* para. 19.

<sup>109</sup> *Id.* Urban consumers spent approximately 2.2 percent of their household income on telephone service, and rural consumers spent approximately 2.5 percent. See Bureau of Labor Statistics, Consumer Expenditure Survey, Table 51, Housing tenure and type of area: Shares of average annual expenditures and sources of income (2008), <http://www.bls.gov/cex/2008/share/tenure.pdf>. (BLS, CES Table 51). At least some (if not all) of this differential is explained by the fact that consumers with higher incomes spend a smaller percentage of total household expenditures on telephone service, and average income is higher in urban areas than in rural areas. *Id.*

<sup>110</sup> Qwest Comments at 16; see also AT&T Comments at 17.

totality of the Commission's universal service programs, not by the non-rural high-cost mechanism standing alone.<sup>111</sup> Indeed, we believe that the public interest would not be well-served if we attempted to determine sufficiency by considering a single support mechanism in a vacuum, while ignoring the support provided by the other support mechanisms.

33. Significantly, the court in *Qwest II* did not find that non-rural high-cost support was insufficient to achieve the statutory principles in section 254(b). Rather, it held that the Commission failed to consider all of those principles in its analysis of whether support is, in fact, sufficient. We have now considered those principles and adopted a definition of "sufficient" that is tied explicitly to all of those principles.<sup>112</sup> We further find, based on record evidence, that the Commission's universal service programs, including the non-rural high-cost support mechanism, provide "sufficient" support. Given the unprecedented level of telephone subscribership, the increased utilization of service, and the steady share of consumer expenditures, we conclude that current subsidy levels are at least sufficient to ensure reasonably comparable and affordable rates that have resulted in widespread access to telephone service. Contrary to the assertion of some parties, we did not "start[] with a premise that in fixing the non-rural high-cost support fund [the Commission] must not increase the size of the [universal service fund]."<sup>113</sup> Instead, after reviewing the data, we have concluded that it is not necessary to expand funding for the non-rural mechanism to ensure that support is "sufficient."<sup>114</sup>

34. While some commenters assert that the non-rural high-cost support mechanism, as currently structured, provides insufficient support, none has made any effort to demonstrate that its current support is actually insufficient.<sup>115</sup> In particular, we are not persuaded that incumbent LEC line

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<sup>111</sup> For the same reason, we reject the argument made by some commenters that statewide telephone subscribership penetration rates cannot demonstrate whether the non-rural mechanism produces support that is sufficient to ensure affordable rates in rural areas. See *Qwest Comments* at 16-17; *RCA Comments* at 15, 16; *USA Coalition Comments* at 6, 7. Like *Qwest*, these commenters myopically focus on whether the non-rural mechanism, standing alone, produces affordable rural rates, when the proper scope of inquiry is whether the Commission's universal service programs, in the aggregate, produce affordable rural rates. Other universal service programs (e.g., Lifeline and Link-up) also lower barriers to affordability for consumers in rural areas, so a rural telephone subscribership penetration rate could not be attributed solely to the sufficiency (or insufficiency) of non-rural high-cost support. See para. 27. Likewise, rural rates would be influenced significantly by rural high-cost support mechanisms and access charge replacement mechanisms, such as IAS and ICLS. It is therefore reasonable for the Commission to measure the sufficiency of support by examining whether its universal service programs, as a whole, have increased telephone subscribership penetration rates both nationally and by state.

<sup>112</sup> See *supra* paras. 25-30. As noted above, we define "sufficient" as an affordable and sustainable amount of support that is adequate, but no greater than necessary, to achieve the goals of the universal service program. See *supra* para 30.

<sup>113</sup> *Qwest Comments* at 6; see also *Rural State Comments* at 23, 25; *AT&T Comments* at 11.

<sup>114</sup> We further reject *Qwest's* contention that we have improperly "elevat[ed] the size of the fund above the statutory universal service principles, ... destroy[ing] [our] ability to appropriately define sufficient support." *Qwest Comments* at 7. According to *Qwest*, the Commission should give the size of the universal service fund little or no consideration when balancing the principles in section 254(b), "because none of those principles ... addresses the size of the fund in any manner." *Id.* Like the D.C. Circuit, however, we find it "hard to imagine how the Commission could achieve the overall goal of § 254 – the 'preservation and advancement of universal service' 47 U.S.C. § 254(b) – if the USF is 'sufficient' for purposes of § 254(b)(5) yet so large it actually makes telecommunications services less 'affordable,' in contravention of § 254(b)(1)." *Rural Cellular Assn*, 588 F.3d at 1103.

<sup>115</sup> *Rural State FNPRM Comments* at 5-6; *Qwest FNPRM Comments* at 1; *AT&T FNPRM Comments* at 6, 12; *ITTA FNPRM Comments* at 1-2.

losses due to competitive entry in urban areas have resulted in diminished service for consumers in rural areas.<sup>116</sup> No commenter has presented evidence that customers will be left without service absent an increase in federal high-cost support for non-rural carriers.<sup>117</sup> A similar lack of evidence caused the D.C. Circuit to reject a challenge to the interim cap the Commission imposed on high-cost support disbursements to competitive ETCs.<sup>118</sup> The court in that case found that petitioners produced “no cost data showing they would, in fact, have to leave customers without service as a result of the cap” and therefore gave the court “no valid reason to believe the principle of ‘sufficiency’” would be “violated by the cap.”<sup>119</sup> Likewise, in *Alenco*, the Fifth Circuit held that a single provider’s reduced rate of return “does not establish that the cap [on certain incumbent LEC high-cost support mechanisms] fails to provide sufficient service” to customers.<sup>120</sup> We therefore reject the argument that competition has rendered non-rural high-cost support insufficient.

35. Qwest and AT&T complain that they receive less high-cost support than other providers, including rural incumbent LECs.<sup>121</sup> But it does not follow that Qwest and AT&T receive insufficient support simply because they receive less support than other providers.<sup>122</sup> Compared to non-rural carriers, rural carriers generally serve fewer subscribers, serve more sparsely populated areas, and generally do not benefit from economies of scale and scope to the same extent as non-rural carriers.<sup>123</sup>

36. Commenters alleging that non-rural high-cost support is insufficient also ignore the millions of dollars of growth in disbursements under this mechanism. For example, when the Tenth Circuit issued *Qwest II* in 2005, carriers received \$292 million annually in federal universal service support from the non-rural mechanism.<sup>124</sup> In 2009, carriers received \$331 million in federal universal

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<sup>116</sup> Qwest FNPRM Comments at 19; Rural State FNPRM Comments at 19; Mid-Sized LEC FNPRM Comments at 3; ITTA FNPRM Comments at 6; USTelecom FNPRM Comments at 3-4.

<sup>117</sup> In addition, those commenters claiming that their support is inadequate due to “rapidly decreasing implicit subsidies” have failed to quantify the amount of those lost subsidies, or to describe the impact that the loss has had on rural rates for the supported telephone services. Qwest FNPRM Comments at 8; *see also* AT&T FNPRM Comments at 12. We agree with NASUCA that “if competition has eliminated the implicit support used by non-rural carriers, which causes a need for increases in the non-rural carriers’ rural rates, then that is an issue for the respective state commissions.” NASUCA NOI Comments at 48. Only “[i]f subsequent rate increases result in rural rates that are not reasonably comparable to national urban rates” would the Commission be required to increase federal high-cost support. *Id.* No commenter claiming that support under the current non-rural mechanism is insufficient due to the loss of implicit subsidies has given any indication that it has applied to any state commission to increase rural rates.

<sup>118</sup> *Rural Cellular Assn*, 588 F.3d at 1103.

<sup>119</sup> *Id.* at 1104.

<sup>120</sup> *Alenco*, 201 F.3d at 621.

<sup>121</sup> AT&T FNPRM Comments at 6 (complaining that “although it serves approximately one-quarter of rural switched access lines, AT&T receives high-cost model support in only three of its 22 ILEC states”), *id.* at 16; Qwest FNPRM Comments at 8 (complaining that “rural carriers receive more than five times the amount of high-cost support that non-rural carriers receive for providing a similar amount of comparable high-cost lines.”), *id.* at 9 (blaming the growth in the high-cost fund on support provided to competitive ETCs).

<sup>122</sup> In particular, we note that AT&T receives a significant amount of high-cost support from the non-rural mechanism: over \$100 million in 2009. 2009 Monitoring Report, Table 3.5.

<sup>123</sup> *Order on Remand*, 18 FCC Rcd. at 22573, para. 25.

<sup>124</sup> 2005 Monitoring Report.

service support from the non-rural mechanism.<sup>125</sup> While most of that increase is attributable to support paid to non-incumbent LECs, the majority of which are wireless competitive ETCs, those carriers also provide supported services within each state's boundaries and therefore advance the principles set forth in section 254(b) of the Act. As the Fifth Circuit recognized, "[t]he purpose of universal service is to benefit the customer, not the carrier," so "[s]ufficient' funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy."<sup>126</sup> Accordingly, we disagree with the Rural States' argument that the non-rural mechanism provides insufficient support in the face of record evidence showing increases in both total non-rural high-cost support and overall telephone subscribership since the Commission adopted the *Remand Order* in 2003.<sup>127</sup>

37. The Maine, Vermont, and Montana state commissions have also made allegations about problems related to service quality and service availability.<sup>128</sup> At the outset, we note that states (not the Commission) are primarily responsible for ensuring service quality and service availability through their regulation of intrastate services and administration of carrier-of-last-resort obligations.<sup>129</sup> In any event, we find these claims unpersuasive. First, the state commissions have not provided substantial empirical evidence that service quality is worse in areas where non-rural LECs receive high-cost support, relative to either areas where rural LECs receive support, or areas that do not receive any high-cost support. Second, with regard to service availability, they have failed to "systematically analyze[] the effect of" non-rural support on the availability of services, including broadband, and instead "provide[d] only anecdotal evidence of the possible effect of" non-rural high-cost support "on particular deployments."<sup>130</sup> Third, the state commissions have not demonstrated that more support would in fact improve service quality or service availability, nor have they quantified, in a verifiable manner, what level of support would ensure adequate service quality and service availability. Without such evidence, the Commission would be subject to the same criticisms raised in *Qwest II* if it were to modify the non-rural support mechanism in response to the state commission proposals.

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<sup>125</sup> 2009 Monitoring Report.

<sup>126</sup> *Alenco*, 201 F.3d at 621.

<sup>127</sup> The Commission's most recent telephone subscribership report shows that in 2009, telephone penetration was 97.6 percent in Maine and 98.1 percent in Vermont – well above the national average of 95.7 percent for the year. Telephone Subscribership Report, Table 2. Indeed, Vermont had the fifth highest telephone subscribership rate in the nation for the year. The fact that these states have some of the highest telephone subscribership rates in the United States undercuts the argument that their current level of non-rural high-cost support is insufficient.

<sup>128</sup> Rural States FNPRM Comments at 5.

<sup>129</sup> See *Remand Order*, 18 FCC Rcd at 22588, para. 47; see also NASUCA NOI Comments at 40 (explaining that "primary responsibility" for service quality "lies with the states, which have a multitude of standards by which to judge service quality," and that "there are real limitations on the Commission's authority in this area."); *TOPUC*, 183 F.3d at 418 (noting "the states' historical role in ensuring service quality standards for local service"). We find no evidence in the record that state commissions are failing to fulfill their responsibility to regulate the quality and availability of supported telecommunications services.

<sup>130</sup> See *Interim Cap Order*, 23 FCC Rcd at 8845 (rejecting a similar argument that an interim cap on competitive ETC high-cost support would result in insufficient support that would hinder broadband deployment). In fact, both Maine and Vermont concede that diminished service quality and service availability in those states were the result of investment decisions by Verizon, the former non-rural incumbent LEC in those states, and not insufficient non-rural high-cost support. See Rural State FNPRM Comments at 5 ("In Maine and Vermont, Verizon reduced its net investment, allowing its existing plant to age and become more highly depreciated, even as it made large capital investments elsewhere in wireless services and high-capacity fiber based services in more urban states."); see also *id.* at 8 ("Before Verizon sold its Maine network to FairPoint, Verizon offered several high-capacity services in southern New England that it did not offer in Maine.").

38. The D.C. Circuit held, and we agree, that the Commission has an obligation to “strike an appropriate balance between the interests of widely dispersed customers with small stakes and a concentrated interest group seeking to increase its already large stake” in the fund.<sup>131</sup> Several parties have proposed reforms to the non-rural high cost support mechanism. Our analysis of these proposals finds that each would significantly increase the size of the fund, the quarterly universal service contribution factor, and the amount that end users ultimately pay. Moreover, advocates of these proposals have failed to demonstrate how consumers living in rural areas would be harmed absent the proposed increase in funding. Qwest projects that its proposal, if adopted, would increase the size of the non-rural high-cost mechanism from \$322 million to approximately \$1.2 billion,<sup>132</sup> a four-fold increase that would cause the contribution factor to surge to 17.1 percent.<sup>133</sup> Although the Rural States assert, without support, that “[n]o option currently under consideration in this proceeding seems likely to produce a significant increase in the contribution rate,”<sup>134</sup> we estimate that the Rural States’ proposal would increase the universal service fund by \$2.725 billion (or more than nine times the total current amount of non-rural high-cost support).<sup>135</sup> If enacted today, this proposal would cause the contribution factor to leap from 15.3 percent to 21.0 percent – hardly a modest increase from a consumer’s perspective. If adopted, consumers throughout the nation would be asked to fund this massive expansion of the non-rural high-cost mechanism through an even larger universal service surcharge on their monthly telephone bill, making telecommunications services less affordable. Given our finding that the non-rural high-cost mechanism already provides sufficient support, and in the absence of any contrary empirical evidence that we need to augment that support to ensure sufficient funding, we decline to add to the already heavy universal service contribution burden placed on consumers.

39. We recognize that some commenters requesting an increase in non-rural high-cost support seek to mitigate the impact of their proposals on consumers by asking the Commission to reduce universal service funding elsewhere. Most of these recommendations involve eliminating high-cost support for certain providers<sup>136</sup> or adopting other regulatory reforms that are unrelated to the non-rural

<sup>131</sup> *Rural Cellular Assn*, 588 F.3d at 1102.

<sup>132</sup> *Remand NOI*, 24 FCC Rcd at 4284-84, para. 9. Qwest argues that the Commission could limit the increase in non-rural high-cost support by targeting increased support to medium-sized incumbent LECs, which it defines as non-rural carriers with fewer than 25 million access lines nationwide. *Id.* All non-rural carriers except AT&T and Verizon would fall under this threshold. *Id.* Qwest justifies their exclusion on the grounds that problems related to the loss of implicit subsidies and inadequate universal service support are most acute for non-rural incumbent LECs that lack the size, scale, and scope of AT&T and Verizon. *See Proposal for Implementing the Tenth Circuit’s Remand in Qwest II (Qwest Proposal)* at 4-5, 26-27 (attached to Letter from R. Steven Davis, Senior Vice President -- Federal Relations, and Shirley Bloomfield, Senior Vice President -- Public Policy, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45, WC Docket No. 05-337 (filed May 5, 2008)). We find this proposal arbitrary and capricious on its face and directly contrary to Qwest’s own position that the Commission should base non-rural high-cost support on wire center costs, not statewide average costs, because competition is eroding the incumbent LECs’ ability to cross-subsidize. *See Qwest Comments* at 19.

<sup>133</sup> Even AT&T, which also seeks an increase in non-rural high-cost support, agrees that the “Commission should not quadruple the size of the existing mechanism in this interim phase” by adopting the Qwest proposal. *See AT&T FNPRM Comments* at 12; *see also Vermont/Maine NOI Comments* at 22-23 (asserting that Qwest’s proposal is too costly).

<sup>134</sup> Rural States FNPRM Comments at 25.

<sup>135</sup> *See Appendix B.*

<sup>136</sup> *See, e.g., Qwest FNPRM Comments* at 9-10 (proposing to eliminate IAS and ICLS for competitive ETCs, as well as the identical support rule); *AT&T FNPRM Comments* at 10, 13 (proposing that the Commission eliminate implicit subsidies in intrastate access charges and reform the universal service contribution methodology); *Mid-*

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high-cost mechanism.<sup>137</sup> At the outset, we reiterate that the non-rural mechanism, as currently structured, provides sufficient support, so we are not obligated to undertake any of the reforms proposed by commenters – all of which would expand the size of the universal service fund. But even if that were not the case, we note that all of the proposed methods to offset the resulting increase fall outside the narrow scope of this proceeding, which is limited to responding to the issues raised by the Tenth Circuit in *Qwest II*. Moreover, no party has demonstrated how reducing funding for other programs or providers would advance, and not frustrate, the universal service objectives set forth in section 254 of the Act.<sup>138</sup> If anything, the parties' attempt to lessen the significant financial impact of their alternative proposals highlights the inherent tension between the principles of sufficiency and affordability. It also underscores the reasonableness of the Commission's view that the non-rural high-cost support mechanism can only be evaluated properly in the context of all the universal service programs.

40. We further conclude that the Commission's non-rural high-cost support mechanism is consistent with the statutory principle that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."<sup>139</sup> We continue to believe that the Commission's cost-based formula provides a specific and predictable methodology for determining when non-rural carriers qualify for high-cost support.

## 2. "Reasonably Comparable"

### a. Urban and Rural Rates Are Reasonably Comparable

41. Section 254(b)(3) provides that: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."<sup>140</sup> In 2003, the Commission determined that rural rates were "reasonably comparable" if they fell within two standard deviations of the national average urban rate contained in the Wireline Competition Bureau's annual rate survey. The record in this proceeding contains evidence that our current non-rural high-cost mechanism, which incorporates this definition of "reasonably comparable," has in fact produced rural rates that are reasonably comparable to urban rates.

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Sized LEC FNPRM Comments at 7 (proposing to eliminate IAS for competitive ETCs); ITTA FNPRM Comments at 5, 7, 9 (proposing to eliminate IAS for competitive ETCs, eliminate identical support for competitive ETCs, and limit high-cost support to a single competitive ETC in a wire center); RCA FNPRM Comments at 11-12 (proposing to make high-cost support fully portable and base all incumbent LEC high-cost support on forward-looking costs rather than embedded costs).

<sup>137</sup> Qwest FNPRM Comments at 10 (proposing that the Commission reform the contribution methodology and resolve issues related to universal service contributions for new services).

<sup>138</sup> Indeed, some commenters argue that these proposals, if implemented, would actually undermine the Commission's ability to achieve the universal service objectives set forth in section 254 of the Act. *See, e.g.*, GCI FNPRM Comments at 6, 10 (explaining that limiting support for competitive ETCs would frustrate the deployment of new infrastructure that could provide universal service in remote areas of Alaska); RCA FNPRM Comments at 9-10 (arguing that restricting support for competitive ETCs would be inconsistent with the principle of competitive neutrality); USA Coalition FNPRM Reply Comments at 8-9 (same).

<sup>139</sup> 47 U.S.C. § 254(b)(5).

<sup>140</sup> 47 U.S.C. § 254(b)(3).

42. Contrary to the assertion of some commenters, the Tenth Circuit did not find that the non-rural high-cost support mechanism failed to produce reasonably comparable rates. Rather, the court's fundamental criticism in *Qwest II* was that the Commission failed to provide empirical evidence that its non-rural high-cost support mechanism has produced reasonably comparable rates. The court indicated that it "would be inclined to affirm" the existing non-rural high-cost support mechanism if the Commission could present "empirical findings" demonstrating that the mechanism "indeed resulted in reasonably comparable rates."<sup>141</sup> We can now make that showing on the basis of unrefuted empirical evidence in the record.

43. The only comprehensive rate data in the record support the Commission's conclusion that rates for traditional wireline telephone service are reasonably comparable across rural and urban areas.<sup>142</sup> The data show that average rates are similar in urban and rural areas,<sup>143</sup> and that the standard deviation of the rates is similar between rural and urban areas.<sup>144</sup> Specifically, the data show that urban and rural rates often are the same. To the extent there are differences, however, the data show that urban rates within most states tend to be higher.<sup>145</sup> In addition, because the range of rates and standard deviation of the rates

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<sup>141</sup> *Qwest II*, 398 F.3d at 1237.

<sup>142</sup> Verizon NOI Comments at 12-22; NASUCA NOI Comments at 13-16 (presenting rate data from more than 11,000 non-rural wire centers, which showed that there was not much difference between urban and rural rates); see also USTelecom Comments at 5 (asserting that "[r]ates for voice service are already reasonably comparable" because "[s]tates have certified to that effect for several years" and "the record confirms that rural rates are comparable to urban rates."); AT&T NOI Reply Comments at 23 n.83 ("Verizon's data show that there is no systemic issue with the reasonable comparability of urban and rural rates"). Vermont and Maine attack the declaration of Patrick Garzillo, which Verizon submitted in response to the 2005 *Remand NPRM*. See Vermont/Maine NOI Reply Comments at 6-9; see also Wyoming PSC NOI Reply Comments at 6 (same). Vermont and Maine complain that Garzillo's survey focused only on rural rates charged by rural carriers, and did not include any non-rural carriers' rates. Verizon supplemented the record with the declaration of Alan Buzacott, which surveyed tariffed rural and urban rates charged by non-rural carriers in all 50 states. See Verizon NOI Comments, Exhibit 2 (Declaration of Alan Buzacott). No party seriously contests the data submitted with the Buzacott declaration, which showed that urban and rural rates were generally comparable. And no party has challenged the rate data submitted by NASUCA, which also confirms that rural and urban rates are reasonably comparable. Maine submitted a declaration asserting that the comparison of tariffed rates in the Buzacott declaration "fail[s] to prove comparability for the reasons set forth" in comments submitted by the Maine Commission and the Maine Public Advocate. Reply Declaration on Behalf of Joel Shifman, Maine Public Utilities Commission, WC Docket No. 05-337, CC Docket No. 96-45, at 5 (filed June 8, 2009) (Shifman Reply Declaration) (citing Vermont/Maine NOI Comments at 14-17, and Maine Public Advocate NOI Comments at 28-30). Those comments do not question the accuracy of the rate data on which the Buzacott declaration relies. They simply argue that the Commission should measure reasonable comparability by comparing costs rather than rates. However, the Tenth Circuit made clear that it would not uphold a cost-based funding mechanism without evidence that the mechanism "resulted in reasonably comparable rates." *Qwest II*, 398 F.3d at 1237 (emphasis added). The rate data submitted by Verizon and NASUCA show that the current non-rural high-cost support mechanism has yielded reasonably comparable rural and urban rates.

<sup>143</sup> The average is a measure of the central tendency of the data.

<sup>144</sup> The standard deviation is a measure of dispersion. The sample standard deviation is the square root of the sample variance. The sample variance is calculated as the sum of the squared deviations of the individual observations in the sample of data from the sample average divided by the total number of observations in the sample minus one. In a normal distribution, about 68% of the observations lie within one standard deviation above and below the average and about 95% of the observations lie within two standard deviations above and below the average.

<sup>145</sup> See Verizon NOI Comments, Exhibit 2 (Declaration of Alan Buzacott) at para. 6. This empirical evidence is consistent with observations in the record that rates in rural areas often are set below rates in urban areas, pursuant to  
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are similar in rural and urban areas, the difference among urban rates is similar to the difference between urban and rural rates.<sup>146</sup>

44. Data filed by NASUCA in response to the 2005 *Remand NPRM* demonstrate that rural and urban rates are reasonably comparable. NASUCA submitted data on rates (as of February 2006) in 11,252 wire centers nationwide that are served by non-rural carriers, ranging from zero percent urban to 100 percent urban.<sup>147</sup> NASUCA explains that its data set provides rates for approximately 93 percent of the U.S. population.<sup>148</sup> As illustrated in NASUCA's chart below, the average price of flat-rate residential service (plus the subscriber line charge and federal universal service charge) does not vary greatly as a function of the degree of urbanization.<sup>149</sup> For example, the average price in areas where 100 percent of the population lives in rural areas, \$21.00, is only about seven percent higher than the average price in areas where 100 percent of the population lives in urban areas, \$19.57. In fact, NASUCA found that there is no statistically significant difference in average price as a function of the percent of the population living in urban areas.<sup>150</sup>

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state regulation, under "value of service" pricing schemes. *E.g.*, AT&T NOI Comments at 32 n.58. As AT&T explained, the value of local telephone service is purportedly lower for rural subscribers because rural areas have lower population densities than urban areas, and thus subscribers in those areas can connect to fewer subscribers in the local calling area. *Id.*

<sup>146</sup> NASUCA NOI Comments at 30.

<sup>147</sup> See NASUCA Remand NPRM Comments at 2. NASUCA defined "urban" based on the following Census Bureau definition: "Urban - All territory, population and housing units in urban areas, which include urbanized areas and urban clusters. An urban area generally consists of a large central place and adjacent densely settled census blocks that together have a total population of at least 2,500 for urban clusters, or at least 50,000 for urbanized areas. Urban classification cuts across other hierarchies and can be in metropolitan or non-metropolitan areas." *Id.* at 22.

<sup>148</sup> NASUCA Remand NPRM Comments at App. CI, 1.

<sup>149</sup> NASUCA calculated weighted averages by weighting the rates in each wire center by the percentage of the population that resided in the wire center. *Id.*

<sup>150</sup> That is, the hypothesis that the averages (also referred to as the means) for the various population classifications are equal cannot be rejected at a 95 percent level of confidence. For the 80-100 percent urban classification, for example, the lower and the upper values for a 95 percent confidence interval are \$11.83 and \$26.97, respectively. The average for each population classification lies within this range. In fact, the average for each population classification lies within a 95 percent confidence interval for any of the population classifications. See Letter from Dr. David Gabel to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket No. 05-337 at 2 (filed Mar. 16, 2010) (Gabel *Ex Parte* Letter).

Percent of the population living in urban areas	Number of Wire Centers	Average price of flat-rate residential service + SLC + FUSF	Standard deviation	Minimum	Maximum	Average Population	Total Population	Percent of population <sup>151</sup>
0	1,808	21.00	3.79	11.43	31.82	2,611	4,721,471	1.8%
0-20%	3,979	20.81	3.76	11.43	31.82	3,332	13,259,982	5.1%
20-40%	545	20.47	3.56	11.91	30.86	10,295	5,610,606	2.1%
40-60%	1057	20.42	3.72	10.99	31.82	12,291	12,991,492	5.0%
60-80%	1,393	20.34	3.71	12.54	30.86	16,876	23,507,836	9.0%
80-100%	4,278	19.40	3.86	9.29	30.86	48,134	205,915,241	78.8%
100%	1092	19.57	4.20	9.29	29.64	58,861	64,275,873	24.6%
Sample avg. (0-100%)	11,252	19.63	3.85	9.29	31.82	23,221	261,285,167	

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45. NASUCA's chart also shows the range and standard deviation of rates in both rural and urban areas.<sup>153</sup> The range of prices is similar between rural and urban areas. For example, the lowest and the highest prices in areas where 100 percent of the population lives in rural areas are \$11.43, and \$31.82, respectively, while the lowest and the highest prices in areas where 100 percent of the population lives in urban areas are \$9.29 and \$29.64. In addition, the standard deviation (the square root of the variance) of the prices is similar between rural and urban areas. For example, the standard deviation of the prices in areas where 100 percent of the population lives in rural areas is \$3.79, while the standard deviation of the prices where 100 percent of the population lives in urban areas is \$4.20. The difference between these two standard deviations is only \$.41.

<sup>151</sup> The 0 and 100% urban row values are included in the 0-20% and 80-100% rows, respectively.

<sup>152</sup> NASUCA Remand NPRM Comments at App. C1.

<sup>153</sup> NASUCA's standard deviations are weighted standard deviations that reflect the population in each wire center. See Gabel *Ex Parte* Letter at 2-3.