Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
High-Cost Universal Service Support	)	WC Docket No. 05-337

To: Wireline Competition Bureau

COMMENTS OF THE USA COALITION

Todd D. Daubert
Lisa A. Gilbreath
SONNENSCHEIN NATH & ROSENTHAL LLP
1301 K Street, N.W., Suite 600 East Tower
Washington, DC 20005
(202) 408-6400
(202) 408-6399 (facsimile)
tdaubert@sonnenschein.com

Counsel for the USA Coalition

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SUMMARY

The American public will be harmed if the FCC's efforts to reform universal service are overturned by courts in the litigation that will inevitably follow any major change to the program. Unfortunately, the American public will suffer even greater harm if the FCC is successful in adopting the universal service reform recommendations of the National Broadband Plan ("NBP"). Rather than rushing to push through questionable regulations with an uncertain legal foundation, the FCC should step back, focus on what consumers want and need, and base its reform efforts on the universal service provisions in its enabling statute -- the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). The public interest is better served by universal service programs that deliver what the public wants and needs than by superficially appealing programs that seemingly cost less over the short term but are far more costly over time both in terms of necessary support and harm to competition.

Ensuring that affordable broadband services are available throughout the United States is a crucial goal for the country that the USA Coalition wholeheartedly supports. However, seeking to achieve this goal by ending all universal service support apart from subsidizing a single carrier in the relatively limited areas that currently lack access to broadband services with speeds of 4 Mbps download and 1 Mbps upload will harm not only those who do not live and work in the area served by the single subsidized carrier but also those who do. This well-intentioned but misguided strategy could slow the deployment of new services and the implementation of new technologies, as well as cause rate increases for both traditional and broadband services. The subsidization of a single carrier in some areas would also inhibit the development of competition, not only within the subsidized area but also in the surrounding areas that are, or could be, served by the same carrier, which is why the proposal is fundamentally inconsistent with the requirements of the Act.

SUMMARY

Despite cries from many that the Act is outdated, the universal service provisions of the Act actually focus on consumers and provide the FCC, working in cooperation with the Joint Board, with the necessary tools to ensure that people throughout the United States have access to reasonably comparable services and reasonably comparable rates, including broadband services. Unfortunately, the FCC has never fully implemented the Act, choosing instead to blame the very carriers who are providing the American public with the services they most want and need: wireless competitive eligible telecommunications carriers ("CETCs"). Specifically, the FCC has never adopted workable definitions for key terms of the Act or specific and measurable goals for the program. Until the FCC defines goals for the universal service program that reflect the consumer focus mandated by the Act, the agency's efforts to implement meaningful universal service reform will continue to fail.

The FCC has yet to resolve the scope of its authority to implement the recommendations of the NBP, which does not reflect the requirements of the Act, or adopt a new distribution mechanism to replace the current mechanism. Moreover, the reclassification of broadband services would not cure the fundamental inconsistencies between many of the NBP's universal service recommendations and the requirements of the Act. As such, the discriminatory and arbitrary proposal to begin immediately phasing-out all support for all CETCs across the entire country is unlawful and would undermine the FCC's efforts to adopt long-term universal service reform.

The American public would be best served by the FCC focusing on maximizing the benefits gained from each dollar of universal service funding rather than focusing myopically on minimizing overall fund size or even on broadband alone. Indeed, maximizing the effectiveness of funding is the best means for reducing overall expenditures over the long term even though other reform proposals would result in lower expenditures over the short term. The worst

possible outcome would be the adoption of reform measures that result in a mild reduction of expenditures but that slow the deployment of new technology and inhibit the development of competition.

Single winner reverse auctions represent the prime example of a measure that focuses on reducing fund size at the expense of the American public. Although the use of single-winner reverse auctions would result in savings over the short term, the harms that would result from subsidizing a single carrier ultimately would prove to be far more costly over the long term, with the American public ultimately paying the price. As such, the FCC should focus on alternative reform measures that would not undermine the foundation of competition upon which the Act is built.

The FCC has a long history of considering the appropriateness of using a cost model as part of the high cost fund distribution mechanism for rural carriers, ultimately deciding to rely instead upon the identical support rule due to significant issues with cost models that could not be satisfactorily resolved. Before the FCC determines whether advances in technology have led to cost models that can accurately model costs in rural, insular, and high-cost areas, the FCC must consider whether the use of a cost model is necessary and appropriate in light of the new distribution methodology to be implemented, and whether there are any simpler ways of accomplishing the same goals. Accordingly, it is premature at this time for commenting parties to create the type of record the FCC needs before adopting a new cost model, because the potential feasibility of a cost model is meaningless when divorced from consideration as part of a specific distribution methodology.

The best way to achieve universal service and to foster the deployment of the fastest and most efficient services is to focus on removing the obstacles that service providers face in unserved and underserved areas in a predictable and technologically neutral manner. The USA

SUMMARY

Coalition proposes a new approach to universal service reform that would bring USF support into compliance with both the letter and spirit of section 254 of the Act. If the Commission elects to eliminate the identical support rule rather than implementing true portability of support, the Commission should adopt the new distribution mechanism the USA Coalition proposes here. This new approach is a technologically neutral method of distributing USF support that offers consumers in rural, insular, and high-cost areas access to a competitive and robust market for communications services including both broadband and narrowband services.

The key to the USA Coalition's proposal is that the distribution mechanism is designed to address directly the two primary cost-related obstacles that make some rural, high cost, and insular areas more difficult to serve than urban areas ***without***:

- changing the competitive position of any carrier vis-à-vis its competitors, regardless of whether those competitors are using the same or different technologies; or
- eliminating the need for potential new entrants first to determine carefully whether a particular rural, insular, or high-cost market will support their entry to that market just as they must do before they enter an urban market.

The distribution mechanism seeks to level the playing field between urban markets and markets in rural, insular, and high-cost areas by making a particular carrier's service cost per potential subscriber reasonably comparable to the same carrier's service cost per potential subscriber in an average urban market. Support would be sufficient to create the same incentives and disincentives for carriers serving rural, insular and high cost areas that they would face in urban areas, which is the best means for encouraging deployment without distorting the market by insulating any ETC from competition (because every ETC would face competition, or at least the threat of competitive entry) or creating incentives for too many carriers to enter the market (because ETCs would be reimbursed for only a portion of their actual expenditures).

Under the USA Coalition's proposal, incumbents and competitors would compete for subscribers on a level playing field and would succeed or fail based upon consumer demand for

their products and services, in turn, facilitating consumer choice. Support would be distributed based upon the costs that the incumbent and competitive LECs actually incur, with every ETC serving a particular supported area being eligible for reimbursement of an identical percentage of the eligible costs it incurs.

Eligible costs would be clearly defined and easily auditable, and the increased transparency at the beginning of the process would improve the ability of carriers to predict their support levels before distribution and could reduce the need for complex and burdensome audits after distribution. Indeed, both incumbent LECs and competitive ETCs would know exactly how much support they would receive before they make a decision regarding network or service expansion, which would facilitate the type of economically rational decision-making that improves the efficiency of USF support. In addition, the new approach would provide support for all types of service and service providers, regardless of technology, speed, or provider type.

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The Universal Service for America Coalition ("USA Coalition" or "Coalition"), by its attorneys, hereby submits these comments in the above-captioned proceeding to address key issues raised by the Notice of Inquiry and Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC") on April 21, 2010 ("*Notice*").[1] The USA Coalition is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The Coalition seeks to ensure that our nation's universal service programs are technologically and competitively neutral, which ultimately will facilitate competition that benefits consumers.

Under the Communications Act of 1934, as amended (the "Act"), universal service support must be used in a technologically and competitively neutral manner solely to achieve universal availability of affordable services for all consumers. The National Broadband Plan ("NBP"), by contrast, was not based upon the Act, and Congress did want the FCC to limit its recommendations solely to measures that could be adopted under the current Act. For this reason, the FCC recommended various legislative reforms as necessary to achieve some of the

[1] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 10-58 (rel. Apr. 21, 2010) ("*USF NOI & NPRM*").

recommendations of the NBP. Nonetheless, the FCC apparently has decided to implement the recommendations of the NBP without fully considering whether the proposals are consistent with the Act, which the FCC cannot do until it has adopted definitions for key terms in Section 254 of the Act.

Rather than rushing to push through questionable regulations with an uncertain legal foundation, the FCC should step back, focus on what consumers want and need, and base its reform efforts on the universal service provisions in its enabling statute, the Act. The public interest is better served by universal service programs that deliver what the public wants and needs rather than by superficially appealing programs that seemingly cost less over the short term but are far more costly over time both in terms of necessary support and harm to competition.

I. USF REFORM WILL BE EFFECTIVE AND SUSTAINABLE ONLY IF IT IS GROUNDED UPON A SOLID LEGAL FOUNDATION

Despite a change in administration and the development of the NBP, the reform measures being considered in 2010 look remarkably similar to the measures that were considered in 2008. Unfortunately, as in 2008, the measures being considering in 2010 would not serve the public interest, and they do not reflect the requirements of the Act. The FCC now faces the very real risk of undermining its reform efforts by getting ahead of itself in an attempt to meet the non-binding deadlines it set for itself in the NBP. Specifically, the FCC has proposed to begin immediately phasing out ***all*** support for Title II services under the current system before the agency has:

- resolved the scope of its authority for implementing long-term reform (*e.g.*, reaching a final decision regarding reclassification of broadband services in light of the *Comcast* decision);
- adopted workable definitions for key terms in the universal service provisions of the Act;

- established specific and measurable goals for the universal service program that reflect the requirements of the Act;
- decided upon an appropriate replacement distribution mechanism that reflects the requirements of the Act; and
- determined, based upon data, where the current level of support must be decreased or increased in order meet the statutory mandate that support be sufficient.[2]

However, until the FCC has adopted workable definitions for key terms in the universal service provisions of the Act and fully addressed the scope of this authority to implement long-term reform, it cannot establish specific and measurable goals for the universal service program that reflect the requirements of the Act. Without specific and measurable goals, the FCC cannot evaluate various reform proposals to determine which would best accomplish those goals. Moreover, until the FCC adopts long-term reform and determines where the current level of support must be increased or decreased to reflect the reformed distribution mechanism, the agency cannot determine the appropriate transition mechanism, or even the appropriate timeframe for the transition.[3]

In the *Notice*, the FCC invites parties to comment on any aspect of the NBP model that may be relevant to its consideration of how to reform the existing universal service support mechanisms.[4] The FCC also seeks comment on the NBP's recommendation that the

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2 *See, e.g., USF NOI & NPRM*, ¶¶ 50, 53, 60, 62.

3 In other words, without knowing to what it is transitioning, and the basis upon which it is transitioning, the FCC cannot have a rational transition plan that is consistent with the Act. Moreover, because "the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision," *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985), the FCC must ensure that it does not put the cart before the horse as the agency moves forward with universal service reform, or the courts will force the FCC to start over even if the decision would have withstood substantive review had it been the result of rational decisionmaking. In any event, the goal of the FCC should be complying with both the spirit and the letter of the law (*e.g.*, the Administrative Procedures Act and the Act) rather than taking the minimum steps it believes are necessary to withstand appeal.

4 *USF NOI & NPRM*, ¶ 16.

Commission phase out remaining competitive ETC funding under the existing funding mechanisms over a five-year period and target the savings toward the deployment of broadband capable networks and other reforms in the plan.[5] However, because the FCC has yet to (1) address the scope of its authority, (2) adopt workable definitions for key statutory terms, (3) establish specific and measurable goals for the universal service program, or (4) decide upon an appropriate replacement distribution mechanism, the FCC's proposal to begin immediately phasing out all support for Title II services provided by competitive ETCs puts the cart before the horse in a manner that would, if adopted, provide a textbook example of arbitrary and capricious rulemaking. In addition to the procedural defects in the manner in which the FCC apparently plans to proceed, many of the proposals being discussed are fundamentally inconsistent with the requirements of the Act, which continues to govern the FCC's actions even if the agency believes that the statute should be updated.

A) The FCC Must Base All Universal Service Reform Efforts Squarely Upon the Universal Service Requirements of the Act

Reform will be effective and sustainable only if the FCC's actions are grounded upon a solid statutory and regulatory foundation. The FCC, like all administrative agencies, is a "creature of statute" and draws its authority from Congress.[6] The authorizing statute for the FCC is the Act.[7] The FCC must comply with all provisions of the Act, including those the FCC believes are flawed, because the FCC has no authority whatsoever to correct flaws in the Act. As the Supreme Court has explained, when a statute fails to confer authority necessary for an agency to provide "safeguards desirable or necessary to protect the public interest, that is a

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5 *USF NOI & NPRM*, ¶ 62.

6 The Constitution vests "[a]ll legislative Powers" in the Congress. U.S. CONST. art. I § 1. The FCC literally has no power to act -- unless and until Congress confers power upon it. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

7 47 U.S.C. §§ 151 *et seq.*

problem for Congress, and not the [FCC] or the courts, to address."[8] Accordingly, the FCC's reform efforts must start and end with the specific requirements of the Act, even if the agency believes that the Act is flawed with respect to broadband services.

B) The NBP Does Not Reflect the Universal Service Requirements of the Act

The FCC wrote the NBP as a result of a Congressional mandate in the American Recovery and Reinvestment Act of 2009 ("ARRA").[9] The mandate was not based upon the Act, and thus the NBP that the FCC developed in response to the ARRA does not reflect the requirements of the Act generally or the universal service provision of the Act in particular.[10] Specifically, the ARRA's mandate provides in relevant part as follows:

> The national broadband plan required by this section shall seek to ensure that ***all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal***. The plan shall also include—
>
> (A) an analysis of the ***most effective and efficient mechanisms for ensuring broadband access by all people of the United States***;
>
> (B) ***a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;***
>
> (C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and
>
> (D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.[11]

In short, the ARRA required the FCC to write a report for Congress regarding broadband services, all of which were classified as information services under the Act when Congress

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8 *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

9 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(1)-(2) (2009). *See also In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry (rel. Apr. 8, 2009).

10 *Id.*

11 *Id.* § 6001(k)(2) (emphasis added).

adopted the ARRA. However, the ARRA did not amend the Act or authorize the FCC to implement any of the recommendations set forth in the report. As such, the FCC's actions remain governed solely by the Act.

The USF provisions of the Act establish a very different mandate for the Commission than the goal of the NBP. In the Act, Congress directed the Commission and states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers. Specifically, Congress directed the Commission and the states to devise methods to ensure that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas . . . have access to telecommunications and information services ... at rates that are reasonably comparable to rates charged for similar services in urban areas." Under the Act, "[u]niversal service is an evolving level of ***telecommunications services*** that the Commission shall establish periodically under this section, taking account advances in telecommunications and information services."[12] The Act further provides that

> The [Federal-State Joint Board on Universal Service ("Joint Board")] in recommending, and the Commission in establishing, the definition of services that are supported by Federal universal service support mechanisms shall consider the extent to which such ***telecommunications services*** --
>
> (A) are essential to education, public health, or public safety;
>
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
>
> (C) are being deployed in public ***telecommunications networks*** by ***telecommunications carriers***; and
>
> (D) are consistent with the public interest, convenience and necessity.[13]

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12 47 U.S.C. §254(c) (emphasis added).

13 *Id.* (emphasis added).

As such, unlike the NBP, which focuses solely on broadband information services, the Act mandates that universal service be used to support "an evolving level of ***telecommunications services***" which enable ***advanced telecommunications and information services that have been subscribed to by a substantial majority of residential customers***.[14] Regardless of the need to support access to broadband and other advanced information services, Congress does not intend for the FCC to ignore the concurrent need to support access to telecommunications services, and thus the Act does not permit the FCC to do so.[15] Similarly, the Act requires the FCC to support all telecommunications services that meet the criteria set forth in the Act to the extent necessary to achieve the goals of the Act. Consequently, the FCC cannot focus solely on broadband services to the exclusion of every other service even if the agency ultimately reclassifies broadband services as telecommunications services.

Unlike the ARRA, the Act also envisions -- and requires -- the FCC to work with the Joint Board not only to create, but also to maintain, the list of services supported by universal service. Although the Commission recommended a radical change to the scope of supported services in the NBP, the Act requires the issue of supported services to be referred to the Joint Board for consideration and recommendation, which the FCC must consider before adopting any changes to the list of supported services.[16] As such, the FCC cannot adopt radical changes to the

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14 *Id.* (emphasis added).

15 The Act specifically prohibits focusing on information services to the exclusion of telecommunications services: "Access to advanced telecommunications ***and*** information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2) (emphasis added). By focusing universal service support solely on information services such as broadband, the FCC is ignoring its mandate to promote access to telecommunications services. Indeed, by definition, "universal service is an evolving level of ***telecommunications services***." 47 U.S.C. § 254(c)(1) (emphasis added).

16 *See* 47 U.S.C. §§ 254(a) ("The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996. . . . The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board . . . . Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after

scope of supported services without consulting the Joint Board merely because the changes were recommended in the NBP.[17]

With respect to universal service rules and policies, the Act further requires the FCC to base its policies on a series of principles, including:

> (1) QUALITY AND RATES. -- Quality services should be available at just, reasonable and affordable rates.
>
> (2) ACCESS TO ADVANCED SERVICES. -- Access to advanced ***telecommunications and information services*** should be provided in all regions of the Nation.
>
> (3) ACCESS IN RURAL AND HIGH COST AREAS. -- 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.
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> * * *
>
> (5) SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS. -- There should be ***specific, predictable and sufficient*** Federal and State mechanisms ***to preserve and advance*** universal service.[18]

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receiving such recommendations."). Indeed, nearly every provision in Section 254 envisions, and requires, that universal service policies be created jointly by the Commission and the Joint Board. 47 U.S.C. §§ 254(b), 254(b)(7), 254(c)(1), 254(c)(2).

17 On November 20, 2007, the Joint Board issued its *Comprehensive Reform Recommended Decision* regarding comprehensive reform of high-cost universal service. *Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd 20477 (rel. Nov. 20, 2007) ("*Comprehensive Reform Recommended Decision*"). On January 29, 2008, the Commission released a Notice of Proposed Rulemaking that sought comment on the Joint Board's Comprehensive Reform Recommended Decision. In compliance with its statutory mandate to complete any proceeding to implement a Joint Board's recommendations on universal service within one year after receiving such recommendations, Section 254(a)(2), the Commission, on November 8, 2008, chose not to implement the Joint Board's recommendations contained in the Comprehensive Reform Recommended Decision. *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (rel. Nov. 5, 2008). Since the Joint Board issued the *Comprehensive Reform Recommended Decision* in 2007, it is outdated and cannot serve as the basis for the radical changes to the list of supported services that the FCC is now contemplating.

18 47 U.S.C. § 254(b) (emphasis added); *see also* 47 C.F.R. § 54.101(a)(7) ("Access to interexchange service. 'Access to interexchange service' is defined as the use of the loop,

"Alongside the universal service mandate is the directive that local telephone markets be opened to competition. The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed to the other."[19] Accordingly, the universal service program

> must treat all market participants equally -- for example, subsidies must be portable -- so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, ***this principle is made necessary*** not only by the economic realities of competitive markets but also ***by statute***.[20]

The FCC, therefore, adopted competitive neutrality as a core universal service principle that is necessary for promoting the twin goals of universal service and competition under the Act.[21] As such, the FCC's USF mandate extends far beyond the NBP's goal of ensuring that all people in

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as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network.").

19 *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000) ("*Alenco*") (citations omitted), *citing* 47 U.S.C. §§ 251–253; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L. Ed. 2d 834 (1999); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406, 412 (5th Cir. 1999)("*TOPUC*"); *see also id.* at 614 (noting the "twin Congressional mandates articulated in the Telecommunications Act of 1996 (the "Act") of providing universal telecommunications service in the United States and injecting competition into the market for local telephone service.").

20 *Alenco*, 201 F.3d at 616 (emphasis added).

21 *See* Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, 8790 (1997) ("*Universal Service First Report and Order*") ("We adopt this principle [of competitive neutrality] and the principles enumerated by Congress in section 254(b) to preserve and advance universal service while promoting the pro-competitive goals of the 1996 Act."); *id.* at 8801-02 ("[A]n explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and ***necessary*** to promote 'a pro-competitive, de-regulatory national policy framework.'" (footnote omitted) (emphasis added)); *id.* at 8801 (ruling that the universal service mechanisms and rules should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology or another."); *id.* at 8787 ("Over time, it will be necessary to adjust the universal service support system to respond to competitive pressures and state decisions so that the support mechanisms are sustainable, efficient, explicit, ***and promote competitive entry***.") (emphasis added); *id.* at 8802 (concluding that, under a competitively neutral regime, "[regulatory] disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers").

the United States have access to affordable broadband services (*i.e.,* advanced information services).

Under the Act, the FCC must, among other things, implement ***specific, predictable and sufficient*** universal service mechanisms that preserve and advance universal service such that consumers in all regions of the Nation 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. Accordingly, rather than merely adopting a definition for broadband and ensuring that all people have access to such broadband services, the Act requires the FCC to engage in a comparative exercise to ensure that all people have access to reasonably comparable telecommunications and information services at reasonably comparable rates.

The implementation of recommendations based on the tightly focused goals of the NBP without consideration of the broad-ranging requirements of the Act would, in addition to being unlawful, harm consumers. For example, the NBP focuses solely on broadband deployment, and would limit support solely to one provider in each geographic area that currently lacks access to broadband speeds that equal or exceed 4 Mbps download and 1 Mbps upload while simultaneously withdrawing all support for any other providers serving the area with slower download and upload speeds.[22] The double whammy of withdrawing support while subsidizing a single competitor that offers faster speeds could very well result in higher prices and fewer choices for consumers living in the area even though the services they currently enjoy serve their needs and may not be appreciably slower than those offered by the subsidized broadband provider. Even if the subsidized provider offers much greater speeds, consumers in the area may

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22 Federal Communications Commission, *Connecting America: The National Broadband Plan*, Chap. 8 "Availability" (rel. Mar. 16, 2010) ("*National Broadband Plan*").

not want or need the faster services enough to justify the higher prices they must pay for such services. These problems would only become exacerbated over time to the extent unsubsidized providers begin to withdraw from the market and the subsidized provider faces fewer competitive forces. The chances for this type of outcome are exactly why the more comprehensive approach mandated by the Act protects consumers far better than the narrow focus of the NBP.

In short, although the ARRA required the FCC to identify mechanisms and set forth strategies for ensuring broadband access by all people of the United States, the ARRA did not authorize the FCC to adopt any of the mechanisms or implement any strategies set forth in the NBP. As such, the FCC's efforts to ensure affordable broadband access, including through USF reform, remain governed solely by the Act. In light of the significant differences between the requirements for the NBP and the universal service requirements of the Act, the FCC can implement the universal service reform recommendations of the NBP only to the extent they are fully consistent with the Act.

C) The FCC Should Base USF Reform on its Current Authority Under the Act or Finish Reclassifying Services Before Evaluating Reform Proposals that Require Reclassification

In the *Notice*, the FCC seeks comment on its plan to eliminate all support for Title II telecommunications services (*i.e.*, currently supported voice services) in order to support only Title I information services (*i.e.*, broadband services).[23] Since the Act provides that "[u]niversal

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[23] *USF NOI & NPRM*, ¶ 53; *see, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14855 ¶¶ 14–15 (2005) ("*Wireline Broadband Order*")(reclassifying wireline broadband Internet access offerings as information services); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4824 ¶¶ 38–39 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*") (concluding that cable modem service "does not include an offering of telecommunications service to subscribers"). The Commission also extended the

service is an evolving level of ***telecommunications services***," the FCC would, absent reclassification of broadband services as telecommunications services, have to rely upon its Title I ancillary jurisdiction in order to support broadband services with universal service funding.[24]

As the United States Court of Appeals for the District of Columbia Circuit recently emphasized in *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir. Apr. 6, 2010) ("*Comcast*"), the FCC can exercise its Title I ancillary authority only ***as necessary*** to achieve a specific statutorily mandated responsibility. However, if no universal service support whatsoever is necessary for any Title II telecommunications services, then the FCC cannot claim that support for information services is necessary to achieve any statutorily mandated responsibility.[25] Accordingly, if the FCC eliminates all support for telecommunications services, the FCC cannot rely on Title I ancillary jurisdiction to support only information services. For this reason, the FCC has proposed to reclassify broadband services as telecommunications services.

The FCC's proposal to reclassify broadband services as telecommunications services is controversial, and it is far from clear whether the agency ultimately will reclassify certain broadband services and, if so, which services will be reclassified and when reclassification will be complete. Until reclassification is complete, the FCC cannot rationally assume a scope of

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information service classification to broadband Internet services offered over wireless facilities. *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5909–110, ¶¶ 19–26, 5912–14, ¶¶ 29–33 (2007) ("*Wireless Broadband Order*")(concluding that wireless Internet access offerings are information services).

24 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1962) (explaining that "Ancillary authority" refers to the Commission's discretion under Title I of the Act to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities ...").

25 If universal service funding were unnecessary for telecommunications services, which the FCC would have to conclude in order to eliminate funding for such service in light of the Act's requirement that universal service funding be sufficient, the agency could not credibly maintain that funding of broadband services is necessary to further the universal availability of telecommunications services at affordable rates. *See* 47 U.S.C. 254(c).

authority that is contingent upon further regulatory action in other proceedings.[26] To do so would be arbitrary and capricious because the parties participating in the proceeding would be unable to provide meaningful input regarding various reform proposals since they would have no idea whether any or all of the proposals ultimately would be feasible pending the outcome of the unrelated proceedings. Like asking for comment on rules to implement a bill that may or may not ever get enacted by Congress, asking for comment on rules that could be adopted only if Congress amends the Act – or the FCC reclassifies certain services – would be an exercise in futility that fails to provide commenting parties with enough specificity to permit them to submit the type of meaningful comments that the Administrative Procedure Act ("APA") is designed to ensure would form the basis of agency rulemaking.[27] Accordingly, the FCC must either move forward with universal service reform based upon its current authority, which is not sufficient to adopt the recommendations of the NBP, or proceed with notice and comment only after the agency has completed the reclassification proceeding.

Rather than reclassifying broadband services, the FCC instead could achieve its goal of supporting broadband under its existing authority by supporting Title I broadband information services ***in addition to*** Title II telecommunications services, as the USA Coalition has proposed on numerous occasions.[28] The FCC has already ruled that an Internet service provider may

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26 *See In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010).

27 Unmoored from the reality of the current statutory and regulatory framework, the standard of "reasonable foreseeability" under the APA would be unlimited and thus meaningless.

28 *See, e.g.,* Comments of the USA Coalition, *In the Matter of High-Cost Universal Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (Jan. 28, 2010); Comments of the USA Coalition, *In the Matter of High-Cost Universal Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (May 8, 2010); Comments of the USA Coalition, *In the Matter of Impact of Middle and Second Mile Access on Broadband Availability and Deployment; A National Broadband Plan for our Future; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans*, GN Docket Nos. 09-47, 09-51, 09-137 (Dec. 7, 2009).

voluntarily choose to offer the transmission component of a broadband service as a telecommunications service.[29] Moreover, to the extent the FCC continues to support telecommunications services, the agency would retain Title I authority also to support broadband services.[30] The USA Coalition respectfully suggests that the Commission adopt this alternative approach that makes support for both telecommunications and information services explicit, while minimizing distinctions based on technology platform, competitive status, or speed of service. Such an approach is consistent with the Act's mandate that universal service be used to support telecommunications services which enable advanced ***telecommunications and information services*** that have been subscribed to by a substantial majority of residential customers.

In any event, reclassification of services alone would not provide the FCC with sufficient authority to adopt the USF recommendations of the NBP. Because the NBP was not based upon the Act, and because the FCC is limited in its recommendations solely to measures that could be adopted under the current Act, legislative reform would be necessary to achieve some of the recommendations of the NBP, which are fundamentally inconsistent with the requirements of the current Act for the reasons explained above. Accordingly, even if the FCC ultimately reclassifies broadband services as telecommunications services, any universal service reform must be fully consistent with the requirements of the Act as it stands when the agency adopts the reform measures.

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29 *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5914–15 (2007).

30 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1962) (explaining that "Ancillary authority" refers to the Commission's discretion under Title I of the Act to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities ..."); *see also* Comments of the USA Coalition, *In the Matter of High-Cost Universal Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (Jan. 28, 2010).

D) The FCC Must Adopt Key Definitions in the Act, and Establish Clear Goals Based on These Key Definitions, Before Evaluating Specific Reform Proposals

The FCC cannot adequately consider any reform proposals until it has adopted objective and measurable goals for universal service support that are consistent with the Act and the FCC's universal service principles. Moreover, the FCC can adopt appropriate goals only after it has adopted workable definitions for several key terms in the Act's universal service provisions as mandated by the Tenth Circuit in *Qwest II*.[31] The FCC would have to address its failure to articulate clear and measurable goals for the universal service program, which has long plagued FCC reform efforts, before it could even consider transitioning universal service funds to support broadband services as proposed.[32] Importantly, the definitions must be practical expansions of the Act's requirements that facilitate the establishment of real and measurable forward-looking goals rather than the truisms adopted by the FCC in its latest response to the Tenth Circuit's mandate in *Qwest II*.[33] Although these truisms purportedly support the FCC's post hoc rationalizations, they cannot be relied upon to distinguish among various reform proposals based upon their relative merits.[34] Accordingly, the FCC must now adopt workable definitions before it can move forward with effective and sustainable universal service reform.

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31 *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005) ("*Qwest II*"); *see* 47 U.S.C. §§ 254(b)(1), (3), (5).

32 *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Notice of Inquiry, 24 FCC Rcd 4281 (rel. Apr. 8, 2009).

33 For example, the FCC's dual findings that "sufficient' universal service support means support that is neither insufficient nor excessive and that past support must have been sufficient in light of penetration rates may or may not satisfy the remanding court in *Qwest II*, but they look backwards only and thus do not provide a workable definition that the agency can apply going forward to rationally distinguish among potential reform proposals.

34 *See In the Matter of High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carriers*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072 (rel. Apr. 16, 2010).

(i) <u>The FCC Must Adopt Definitions for Key Terms in the Act.</u>

The Tenth Circuit has chastised the FCC for failing to define terms such as "reasonably comparable," "affordable," and "sufficient," yet the FCC has failed to adopt workable definitions in response to the Tenth Circuit's remand.[35] The *Qwest II* decision makes clear that the FCC must establish clear goals based on precise definitions of key statutory terms that are specific enough to permit the agency to measure -- in a transparent and objective manner -- whether progress is being made towards meeting the goals. The Act envisions -- and requires -- that these definitions be adopted through cooperative action by the Joint Board and the Commission.[36]

The FCC cannot adopt universal service policies that either fail to balance the principles enumerated in section 254 or that have no basis in the principles of section 254.[37] "The plain text of the statute mandates that the FCC 'shall' base its universal policies on the principles listed in section 254(b) of the Act. This language indicates a mandatory duty on the FCC."[38] Without a solid and well-defined statutory foundation, universal service reform will collapse upon judicial review and fail to achieve the goals of the Act. It is for this reason that the FCC must clearly define success for the universal service program in concrete terms that can be objectively measured before it may engage in meaningful reform by rationally choosing among competing reform proposals.

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35 *See Qwest II*; *see also High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking, 24 FCC Rcd 14858 (rel. Dec. 15, 2009) ("*Qwest II FNPRM*").

36 47 U.S.C. §§ 254(b), 254(b)(7), 254(c)(1), 254(c)(2).

37 *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) ("*Qwest I*").

38 *Id.* These principles include the principle of competitive neutrality that the FCC subsequently adopted pursuant to section 254(b)(7).

(a) "Reasonably Comparable" and "Affordable."

Pursuant to the Act, "[c]onsumers 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*** ... 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."[39] The structure of this provision, which lists services and rates separately, demonstrates that rates alone are not the only relevant factor. Indeed, the Act requires that support be sufficient not only to make rates reasonably comparable, but also to make services reasonably comparable. The structure of the provisions setting forth the principles and procedures for establishing and maintaining the list of supported services likewise demonstrate that ***all*** services available to consumers in urban areas must be considered.[40] Similarly, section 254 in conjunction with the Act's other twin goal of promoting competition makes clear that the universal service program should facilitate the freedom to choose among service providers in rural, insular and high-cost areas that is reasonably comparable to the choices that consumers in urban areas enjoy.[41]

In order best to serve the needs of consumers living in rural, insular, and high-cost areas and to advance the goals of universal service as required by the *Qwest II* decision, the USA Coalition respectfully submits that the Commission should define "reasonable comparability" to require that the choices available to consumers in rural, insular, and high-cost regions of the United States be "reasonably comparable" to those available in urban areas with respect to service types and providers, as well as service rates.

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39 47 U.S.C. § 254(b)(3) (emphasis added).

40 47 U.S.C. § 254(c); 47 U.S.C. § 214(e).

41 *See Alenco*, *supra* note 19 at 614.

The USA Coalition respectfully submits that, with respect to telecommunications and information ***services***, reasonably comparable services are those competing within the same market segment from the perspective of the consumer (*i.e.*, the average consumer would consider the services in the respective markets to be comparable replacements). The FCC should conduct surveys to determine the types of services available to consumers in urban areas (*e.g.*, voice, mobility, broadband, text messaging, bundled long distance, and unlimited long distance), and work to ensure that rural consumers have reasonably comparable access to equivalent services. Specifically, to the extent a rural area lacks access to services that are reasonably comparable to those found in urban areas, the area should be considered underserved.

The FCC should also ensure that rural consumers have the ability to choose among service providers in a competitive marketplace. The Commission must guarantee that the benchmark it establishes for competition in rural areas is "reasonably comparable" to the competition existing in urban areas in order to ensure that rural consumers can benefit from competition in the same manner as urban consumers.

The USA Coalition respectfully submits that, with respect to ***rates***, reasonably comparable rates are those that are within two standard deviations. This further satisfies the requirement that quality services "be available at just, reasonable, and ***affordable*** rates."[42] This is because, as the USA Coalition proposes, rural, insular, and high-cost rates that are "reasonably comparable" to urban rates are generally affordable.

In sum, the goal for any universal service distribution mechanism should be that the choices available to consumers in rural, insular, and high-cost regions of the United States are "reasonably comparable" to those available in urban areas with respect to service types, service providers, and service rates. As a result, support would be available in any area where ***any one***

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[42] 47 U.S.C. § 254(b)(1) (emphasis added).

of the three standards has not been met. Three examples illustrate this conclusion: (1) even if an area has reasonably comparable service types and a reasonably comparable number of providers, support would be available if the ***service rates*** are not reasonably comparable; (2) even if an area has a reasonably comparable number of service providers and rates for the services that exist, support would be available if ***service types*** are not reasonable comparable; and (3) even if the service types and rates are reasonably comparable, support would be available if consumers in the area lack sufficient choice among ***service providers***.

(b) "Sufficient."

Only after defining both "reasonable comparability" and "affordability" will it be possible for the Commission to determine whether support is "sufficient" to achieve universal service purposes.[43] The USA Coalition respectfully submits that support which ensures that a reasonably comparable amount of service providers can offer reasonably comparable services at reasonably comparable rates to consumers in rural, insular, and high-cost areas is sufficient to achieve universal service purposes. In order to determine whether support is "sufficient" to comply with the terms of section 254, the Commission must examine, from the consumer's perspective, the characteristics of the services, including rates, and service providers available to consumers both in urban and in rural, insular, and high-cost areas.

As explained in more detail below, the USA Coalition proposes that in areas where consumers do not have access to reasonably comparable services at reasonably comparable rates, the Commission define "sufficient" as the amount of support necessary to ensure that the average cost per potential subscriber in the supported area falls within two standard deviations or a specified percentage of the average cost per potential subscriber in the average urban area. Specifically, the FCC would (1) calculate the average cost per potential subscriber in an average

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43 *See* 47 U.S.C. § 254(b)(5).

urban area, (2) calculate the average cost per potential subscriber in the support area, and then (3) define sufficient as the amount of support necessary to ensure that the difference between the two amounts is less than two standard deviations or a specified percentage. Only where there is enough USF support available to ensure the reasonable comparability of service type, service providers, and service rates is support "sufficient."

(ii) The FCC Must Adopt Workable Goals for the Universal Service Program.

Congress created the universal service fund program to support the provision of services where they otherwise would not be available or affordable and to ensure the strength of the communications network in those areas. In many rural, insular, and high-cost areas, telecommunications service is affordable only with support from the USF. Evolution of the current universal service support mechanism is necessary, and indeed mandated by the Act. However, beneficial evolution that continues to improve the services to which consumers in all parts of the Nation have access will not be possible if the FCC focuses myopically on the mechanisms themselves rather than on the ultimate goals of the Act that the mechanisms are meant to achieve.

Ensuring that support is both available where needed and used properly to achieve the goals of universal service is far more important than the precise manner by which funds are distributed. Moreover, ensuring that the funds operate efficiently is a far better means for managing fund size while achieving universal service; this is only possible if the FCC adjusts distribution mechanisms as necessary to achieve the ultimate goals rather than compromising goals in order to fit specific distribution mechanisms or hit arbitrary fund size targets. Specifically, the goal should be to ensure that the availability and affordability of a variety of service types and service providers for consumers living in rural, insular, and high-cost areas is reasonably comparable to the variety and affordability of service types and service providers

available to consumers living in urban areas as required by section 254(b)(3) of the Act.[44] The Commission has found that "section 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates."[45] This principle of "reasonably comparability" should remain the primary goal of the universal service program. By contrast, the Commission should not narrow its focus solely to ensuring that one provider in each area offers broadband service, which would be inconsistent with the Act and the wants and needs of many of the people in the United States.

The Commission should make this goal practicable and useful by relying on data first to determine the choices available to consumers in the average urban areas with respect to service types, service providers, and service rates in terms of specific and measurable criteria (*i.e.*, specific numbers and service descriptions), and then to set the goal as ensuring that the choices available to consumers in rural, insular and high-cost areas fall within the criteria for reasonable comparability -- whether that be in terms of percentages or standard deviations -- to those available to consumers in the average urban area (*i.e.*, specific numbers and service descriptions). It is crucial that the goal be defined in terms of specific and measurable criteria so that the Commission can determine, in each area, whether the goal has been met, and if not, specifically why the goal is not being met (*e.g.,* rates are too high, no mobile service, or no broadband service) and how far below the goal the particular area falls. Only in this manner can the Commission "advance" universal service consistent with the principles set forth in, or established pursuant to, section 254(b) of the Act.[46] Moreover, the Commission must first know

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44 47 U.S.C. § 254(b)(3).

45 *Federal State Joint Board on Universal Service*; *High-Cost Universal Service Support*, Notice Of Proposed Rulemaking, 20 FCC Rcd 19731, 19736–37, ¶ 10 (2005).

46 *See Qwest II*, 398 F.3d at 1234–36 (finding the FCC failed to consider all principles enumerated in section 254(b) and failed to establish that its policies would "advance" universal service goals).

with specificity what "advancement" of universal service means before the agency can analyze any reform proposal, including the recommendations of the NBP.

To the extent the Commission seeks to reduce or eliminate support for telecommunications services in rural, insular, and high-cost areas, the agency must ensure that funding for such services in those areas remains "sufficient" by demonstrating both that the amount of remaining support is consistent with the FCC's definition and that the reduction or elimination will not harm consumer access to such services or cause the rates for such services to increase beyond the point of reasonably comparability. As such, the FCC must address its unsupported assumption that the reasonably comparable services at reasonably comparable rates will remain available in certain rural, insular, and high cost areas after the FCC has reduced or eliminated funding for Title II services in such areas.[47] In many rural, insular, and high-cost areas, the penetration rate for reasonably comparable services at reasonably comparable rates may be high only because universal service support is available to ETCs serving the area.[48] Moreover, by eliminating support for Title II services, the Commission will also cause services to be withdrawn or rates to rise to a level that is no longer reasonably comparable in areas where support is insufficient to achieve the workable universal service goals.

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47 *USF NOI & NPRM*, ¶¶ 10, 60–62.

48 Furthermore, the NBP, by its own admission, "does not estimate the amount of support that may be necessary to sustain broadband services in those areas where it already is available." *National Broadband Plan* at page 151. The same is true with respect to narrowband services. Moreover, capital expenditures may be less significant than operational expenditures, particularly in "unserved" or "underserved" areas, and particularly with regard to transport. The FCC is thus in danger of significantly underestimating the level of broadband and narrowband coverage in the absence of ongoing support and therefore underestimating the level of support needed for sustainable universal broadband and narrowband deployment.

E) The FCC Cannot Adopt a Rational Transition Plan Until It Has Adopted Long-Term Universal Service Reform

In the *Notice*, the FCC seeks comment on the timing of implementing the reforms proposed in the NBP.[49] The timing and form of the "transition" measures proposed by the FCC are inconsistent with the both the APA and the Act. The APA, for example, requires the FCC to articulate a rational relationship between the facts found and the choice made.[50] Unless the FCC gathers and analyzes the facts relevant to a particular decision, the agency cannot articulate a rational relationship between those facts and the decision it makes. Indeed, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'"[51] In short, the agency must articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[52]

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49 *USF NOI & NPRM*, ¶ 53.

50 5 U.S.C. § 706(2)(A) (1994).

51 *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947)). A court conducting an arbitrary and capricious review of an agency's decision looks at "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In other words, the reviewing court considers "whether there is a rational basis for the conclusions approved by the administrative body." *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937, 64 L. Ed. 2d 790, 100 S. Ct. 2156 (1980) (quoting *Texaco, Inc. v. Federal Energy Admin.*, 531 F.2d 1071, 1076–77 (Temp. Emer. Ct. App. 1976)).

52 *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962).

A key factor in determining whether the proposed transition measures are consistent with the Act is the Act's explicit mandate that universal service support be sufficient.[53] In recent years, the FCC has justified many of its decisions on its determination that this mandate means that support should not be excessive.[54] However, the mandate also means that universal service support cannot be insufficient.[55] The FCC cannot eliminate support in a given area without first determining that no support is necessary in that specific area. Likewise, the FCC cannot reduce support in a given area without first determining that the reduced support is sufficient.

The FCC can only determine whether support is insufficient or excessive by referring to the means for identifying areas where support is necessary and calculating the necessary amount of support to be distributed in those areas. The FCC could conduct a detailed study of whether support is insufficient or excessive in particular geographic areas by referring to the current means for identifying where support is necessary and then calculating the amount of necessary support. In this proceeding, however, the FCC has announced its intention to implement radical reforms to both the means for identifying areas where support is necessary and calculating the necessary amount of support to be distributed in those areas. However, the FCC has yet to adopt any particular reform measures. As such, without any means in place for identifying areas where support is necessary and for calculating the necessary amount of support to be distributed in those areas, the FCC cannot consider the relevant factors and facts necessary to determine, as required by the Act, whether support in any given area is "sufficient." Indeed, there are no factors in place for consideration and, thus, no context in which the Commission can identify and

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53 47 U.S.C. § 254(b)(5), (e).

54 *See In the Matter of High Cost Universal Service Support; Federal-State Joint Board on Universal Service; Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carriers*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072 ¶¶ 28–29 (rel. Apr. 16, 2010).

55 *See Qwest II*, 398 F.3d at 1227, 1233–34.

compile the relevant facts. This truth also serves to highlight the fact that the Commission has not performed any factual analysis of any study area anywhere in the Nation to determine the impact of the withdrawal of support on the consumers living and working in those areas, not to mention making a factual determination as to whether the Act permits support to be withdrawn in each individual area because withdrawal would (1) not result in insufficient support to the area as defined by section 254 of the Act, and (2) serve the public interest.

For these reasons, the FCC can determine which transition measures, if any, are appropriate and within the authority of the FCC to adopt only after the FCC has adopted permanent reform. Specifically, addressing transition measures before the replacement mechanism is adopted would be arbitrary and capricious because the FCC would have no basis upon which to conclude that the transition measures would not lead to insufficient, or even excessive, funding. Moreover, until the FCC has adopted permanent reform, the agency cannot predict with any accuracy that permanent reform will actually be adopted and, if so, how the exact details of the reform will be resolved (unless, of course, the FCC plans to ignore the record developed in the proceeding to consider permanent reform) and the timing of the implementation of such reform. As such, adopting a transition measure before the replacement mechanism is adopted would likely lead to protracted litigation and uncertainty, which would harm the economy generally and consumers of telecommunications and information services specifically. Therefore, the USA Coalition respectfully urges the Commission not to depart down the road to nowhere by adopting a transition measure before adopting effective and sustainable long-term reform.

Once the FCC has adopted permanent reform, the FCC will also have to ensure that the transition measures are consistent with the rest of the Act. In the NBP, the FCC has proposed to phase-out support to CETCs over five years, but incumbent local exchange carriers ("ILECs")

would be phased-out over ten years. The FCC seeks comment on this proposal in the *Notice*.[56] If a ten-year transition period for ILECs were appropriate, it is difficult to imagine any scenario in which a five-year transition period for CETCs would be appropriate, particularly in light of the Act's technological and competitive neutrality mandates.[57] Again, though, until the FCC has adopted long-term reform, it is impossible to evaluate either transition proposal for consistency with the requirements of the Act, and thus the adoption of a transition period before the FCC has adopted permanent reform would also violate the APA.

In adopting a new approach to the distribution of universal service, it is essential that the new policies not harm the very consumers the program is intended to serve. In order to minimize market disruptions caused by the implementation of a new distribution mechanism, the new mechanism must be transitioned in slowly over a time-frame that recognizes financing and business planning cycles (*e.g.*, 10 years). Although the FCC cannot determine the appropriate length of the transition period until it has adopted a new distribution mechanism, a lengthy phase-in for major changes will likely be necessary to permit ETCs to comply with commitments made to state regulators as part of their state ETC certifications, as well as to prevent the disruptions of financing due to the withdrawal of funding that is an integral part of business and financing plans.

The Commission should also ensure that the transition mechanism does not reduce the current level of services available in rural and underserved markets today. Rural consumers are already at risk of losing access to competitive services – ***and wireless services in particular*** – because of the imposition of the March 2008 interim cap on wireless support. Additional

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56 *USF NOI & NPRM*, ¶ 60.

57 *Universal Service First Report and Order*, 12 FCC Rcd at 8801, ¶¶ 46–49; Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the Act is "to promote and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications customers and encourage rapid deployment of new telecommunications technologies.").

reductions in support could result in further pullbacks by competitive carriers – a result in direct opposition to the purported goal of expanding network access in rural and insular areas.

To avoid these potential harms, the Commission should include safety-valve mechanisms in any transition plan that it ultimately adopts in order to ensure that universal service reform measures do not harm consumers in rural, insular, and high-cost areas. The safety valve mechanisms should function to maintain the status quo in the event that the reform measure or transition plan being implemented has unintended consequences in any particular area that may be unique in a way that makes the area particularly vulnerable to further reductions. In particular, the Commission should develop mechanisms to protect consumers from the risk of service loss or rate increases due to reductions in support within the most rural, insular, and high-cost areas. The Commission should also carefully consider the need for special provisions for at risk consumers living in Native American lands, native Alaskan lands, and the Hawaiian homelands. USF reform should not have a negative impact on the limited options currently available to at risk consumers living in these areas.

II. A COST MODEL IS A TOOL WHOSE POTENTIAL EFFECTIVENESS DEPENDS ENTIRELY UPON HOW AND WHY IT WOULD BE USED

In the *Notice*, the FCC asks a series of questions about cost models, including questions about whether use of a cost model would be appropriate to set the reserve price for a reverse auction.[58] As an initial matter, a cost model is not a distribution methodology, but rather a tool for determining costs that could be used as part of a universal service support mechanism. As such, the potential feasibility of a cost model is meaningless when divorced from consideration of the cost model as part of a specific distribution methodology.

The FCC has a long history of considering the appropriateness of using a cost model as part of the high cost fund distribution mechanism for rural carriers, ultimately deciding not to

58 *USF NOI & NPRM*, ¶¶ 14, 17, 20, 31–40.

implement a model.[59] Through this process, the FCC has documented the many challenges associated with developing, implementing, and maintaining an appropriate cost model.[60] Some parties now claim that the FCC should reconsider the appropriateness of using a cost model in light of improvements in modeling technology since the FCC last declined to implement a model for non-rural carriers.[61] However, before the FCC determines whether advances in technology have led to cost models that can accurately model costs in rural, insular, and high-cost areas, the FCC must consider whether the use of a cost model is necessary and appropriate in light of the new distribution methodology to be implemented, and whether there are any simpler ways of accomplishing the same goals.

A) The FCC Cannot Determine the Appropriateness of Using a Cost Model Before the Agency Determines How and Why the Model Might Be Used

As a means for calculating theoretical costs, a model may or may not be an appropriate tool for use with a particular support distribution methodology. Assuming the challenges traditionally associated with cost models can successfully be addressed, the appropriateness of a cost model depends upon how the calculated theoretical cost would be used within the distribution methodology and whether there are easier means for achieving the same results.

With respect to setting reserve prices for reverse auctions, for example, cost models make little sense. As an initial matter, a forward-looking cost model designed to replicate an ideal network likely would set the reserve price so low that few, if any, potential ETCs would submit bids. If no ETC submits a bid, the auction would have to be repeated with a higher reserve price,

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59 *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶ 2 (May 8, 1997) ("*1997 Universal Service Order*").

60 *See id.; see also High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order on Remand and Report and Order and Further NPRM (Nov. 5, 2008); Recommended Decision (Federal-State Joint Board 2007); NPRM (2008).

61 *See* James Stegeman, Dr. Steve Parsons, and Mike Wilson, The Advanced Services Model: Proposal for a Competitive and Efficient Universal Service High-Cost Approach for a Broadband World at 22–26 ("CostQuest Proposal").

in which case all of the time and resources spent to develop, implement, and maintain the cost model will have been wasted. Likewise, the reserve price set by the cost model would be irrelevant as soon as the first eligible ETC submits a bid. Accordingly, the FCC should consider setting the reserve price at the level of support that is currently distributed in that area or in a similar area. If no ETC submits a bid, the FCC could raise the reserve price and reopen the auction for bids, which would be cheaper and simpler than developing a cost model that would face the same potential problems. If the reserve price is too high, then additional ETCs are likely to submit bids that bring the price down to the appropriate amount. In this manner, the FCC could achieve similar results to using a cost model without wasting the time and resources spent to develop, implement, and maintain a cost model.

Cost models can also be used to identify areas where support is necessary. For example, a cost model can be used to calculate the service costs of a theoretically efficient provider in order to establish a benchmark to which actual carrier costs can be compared. This use of a cost model, though, is focused solely on the carrier, which can, under certain circumstances, create incentives for inefficiency (*e.g.,* less efficient carriers are more likely to appear to need support when their costs are compared to the cost model). More importantly, focusing solely on carrier costs may fail to reflect the experience of consumers in the area and thus may result in excessive support in some areas and insufficient support in others. For this reason, a better approach for identifying areas in need of support would be to analyze data regarding the services and rates actually available to consumers in the area.

Cost models may be most effective in identifying differences in costs between areas since one theoretical cost would be compared to another theoretical cost rather than to actual costs. The use of a cost model in this way (*e.g.*, comparing costs calculated in two different areas using the same model) could help the FCC identify the percentage by which the average cost to serve a

particular rural, insular, or high cost area exceeds the average cost to serve a typical urban area, which the FCC could use to calculate the amount of support necessary to ensure that consumers in an area have access to reasonably comparable services at reasonably comparable rates. However, there may be less expensive and burdensome means for achieving similar results (*e.g.*, comparing specific proxy costs) and the FCC would still have to address whether differences in technology could skew results even if the theoretical costs calculated using a particular model in one area are compared to the costs calculated by the same model in a different area.

B) To the Extent the FCC Determines that Using a Cost Model May Be Appropriate, the Agency Must Address The Inherent Limitations of All Models

Assuming that the FCC moves forward with a model, it is essential that the FCC effectively address major assumptions and potential limitations that are inherent in all cost models. Adoption of a flawed cost model would be counterproductive, and even damaging, to competition and the market for telecommunications and information services, which could slow the deployment of all services, including broadband, and harm consumers.

(i) The FCC Must Weigh the Potential Advantages of a Cost Model Against the Significant Time and Resources Necessary to Develop and Maintain the Model.

Inherent in cost modeling is the fundamental limitation of empirical modeling itself -- an empirical finding based on a model today might reasonably change tomorrow. Quite simply, while models can and do inform our understanding of the functioning of existing and past markets, models mimic or approximate current or past markets but never exactly replicate them. In other words, models are useful tools to expand our economic understanding, but they cannot predict the future. Instead, they are merely a reflection of what is known today, and become obsolete as technology and markets change. This limitation is a property of models themselves,

and cannot be overcome with ever better models. It is because of this uncertainty and instability that economic models can never be as efficient as actual market outcomes.

Assuming that the FCC nonetheless moves forward with a model, it is essential that the FCC sustain that model, because the harms that can arise from the inherent limitations of modeling can be minimized if the model is kept up to date. The FCC's *Ninth Report and Order*, adopted on October 21, 1999, established a federal high-cost universal service support mechanism for non-rural carriers based on forward-looking economic costs.[62] Since that time, the FCC has failed to maintain the model adequately, and thus there is nearly universal agreement that the model no longer calculates accurate costs.[63] The FCC's inability to sustain the non-rural cost model raises serious doubt as to whether the FCC would be able to develop and maintain a much more complex model or set of models for the distribution of support throughout rural areas. Therefore, the FCC must consider whether it is committed to spending significant time and resources on the development and maintenance of a model.

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62 *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20439 ¶ 2 (1999) ("*Ninth Report and Order*") *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). With the *Ninth Report and Order*, the Commission sought to "adopt a new specific and predictable forward-looking mechanism that will provide sufficient support to enable affordable, reasonably comparable intrastate rates for customers served by non-rural carriers." *Id.* at 20451 ¶ 34. The forward-looking mechanism implemented in the *Ninth Report and Order* determines the amount of federal support to be provided to non-rural carriers in each state by comparing the statewide average cost per line for non-rural carriers, as estimated by the Commission's cost model, to a nationwide cost benchmark. The cost model estimates the forward-looking costs of providing supported services for non-rural carriers. The Commission selected input values for the model in the *Tenth Report and Order*, and found the model provides reasonably accurate cost estimates. *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Tenth Report and Order, 14 FCC Rcd 20156 (1999), *affirmed*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). The non-rural mechanism provides support for the percentage of the costs per line allocated to the intrastate jurisdiction that exceed a national average cost benchmark of 135%. *Ninth Report and Order*, 14 FCC Rcd at 20441, ¶ 63. The Commission concluded in the *Ninth Report and Order* that a benchmark of 135% of the national average cost balanced various goals under the statute, including sufficiency and the need to achieve rate comparability. *Id.* at 20464, ¶ 55.

63 *See, e.g., USF NOI & NPRM* at ¶ 7; *Qwest Corp. v. FCC*, 258 F.3d 1191, 1205–06 (10th Cir. 2001).

(ii) The FCC Would Have To Ensure That the Cost Model Is Sufficiently Precise.

The FCC has previously recognized that the type of cost models that would be used to determine high cost support for all ETCs have been incapable of precisely modeling the costs of small, rural carriers.[64] Traditionally, cost models inadequately approximate the costs of service for Americans living in unusual, low-density, geographic areas – precisely the unusual circumstances that would most likely require universal service support. Furthermore, cost models have typically worked least well where the information about where people live is most scant, such as rural areas – again, precisely the area that would require universal service support.

The Commission noted in its *1997 Universal Service Order* that this imprecision could significantly change the support that such carriers receive, providing carriers with funds at levels insufficient to continue operations or, at the other extreme, a financial windfall.[65] Compared to the large ILECs, small, rural carriers generally serve fewer subscribers, serve more sparsely populated areas, and do not generally benefit from economies of scale and scope as much as non-rural carriers.[66] Thus, the Commission concluded that rural carriers should not use a cost model or other means of determining forward-looking economic cost immediately to calculate their support for serving rural high cost areas, and that requiring the CETCs to submit cost studies could place either the ILEC or the CETC at a competitive disadvantage.[67]

Many parties now claim that cost-modeling technology has improved significantly since 1997, and that current models would be able to calculate costs in rural, insular and high cost areas with sufficient accuracy and precision.[68] Once the Commission has adopted a reformed

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64 *1997 Universal Service Order* at ¶ 291.

65 *Id.*

66 *Id.*

67 *Id.* at ¶¶ 291, 313.

68 *See, e.g.,* CostQuest Proposal at 22–26.

distribution mechanism, it will be able to determine whether the advances in technology have overcome known limitations in past models. While determining whether technology has, in fact, advanced to the point that past infirmities are no longer a concern, the FCC would have to determine whether a single model can be used to model the costs of vastly different technologies, as set forth below.

(iii) The FCC Must Address Which Technologies Will Be Modeled and Whether Different Cost Structures Will Be Taken into Account.

In the *Notice*, the FCC asks a series of questions about whether the NBP's proposals ensure competitive neutrality.[69] In adopting any reform, the Commission should adhere to the principle of competitive neutrality that requires universal service mechanisms to "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology or another."[70] However, the FCC assumes that it can achieve the goals of a competitively neutral and efficient universal support system when, in reality, "competitively neutral and efficient," as envisioned by the NBP, may be contradictory goals. Broadband can be supplied by wireline, wireless, WiMAX, satellite, cable, and other providers – each with radically different cost structures. Because each technology platform has a different cost structure, it is unlikely that a single technology will be the "least cost" solution. Moreover, in light of the consumer-focused requirements of the Act, the "least cost" solution is not the only relevant factor, just as it is not the only relevant factor to consumers. As such, pegging support to the "least cost" technology would effectively limit support to only some technologies, including those that may not be the best solution for that particular geographic area or for a particular consumer. On the other hand, if a model is set that compensates different technologies

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69 *USF NOI & NPRM*, ¶¶24–25.

70 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report & Order, 12 FCC Rcd 8776, 8801 ¶47 (1997).

at different levels due to their differing cost structures, that model would be inherently less efficient and more difficult to administer. Additionally, cost models that explicitly or implicitly favor one technology over others would create incentives for carriers that utilize multiple technological platforms to engage in gamesmanship in order to maximize the subsidies they are eligible to receive.

Regardless of which distribution methodology is chosen, a consistent subsidy model should be employed so that all competitors will start on a level playing field. Otherwise, the subsidy mechanism will result in harm to the public by favoring one type of technology or class of competitors over all others. Failure to ensure that the playing field is competitively neutral places a heavy thumb on the scale in favor of a single technology. Indeed, we all lose when the government seeks to pick the winner, which slows the integration of technological innovation into the network, decreases efficiency, and distorts the incentives for investment in technological development.

III. THE FCC SHOULD NOT ADOPT A SINGLE-WINNER REVERSE AUCTION

In the *Notice*, the FCC asks a series of questions about whether the agency should adopt a single-winner reverse auction.[71] The overarching goal of universal service program, as set forth by the Act, is the universal availability of affordable services for the consumer. The goal of universal affordability is frustrated by mechanisms that provide support for only one carrier, which artificially insulates the supported carrier market forces that would otherwise compel them to become more efficient over time and, thus, ultimately increase the total amount of support necessary over the long-term. For this reason, the USA Coalition submits that allowing residents and businesses in rural, insular, and high-cost areas to select the services, technologies, and

[71] *USF NOI & NPRM*, ¶¶ 19–20.

service providers of their choice is the best means for ensuring the vibrancy, robustness, and redundancy of the nation's communications networks.

A) Single-Winner Reverse Auctions Harm Consumers and are Complicated and Expensive to Administer.

Single-winner reverse auctions are fundamentally inconsistent with the Act because they would lead to the reestablishment of monopoly services for both broadband and narrowband services, which would harm consumers and businesses throughout the Nation for the reasons that led Congress to adopt the Telecommunications Act of 1996 in the first place. The Commission has consistently rejected measures like reverse auctions that would have a disparate impact on carriers even though they would, on their face, apply equally to all carriers,[72] explaining that:

> [w]e do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner.[73]

Accordingly, the proper inquiry is whether the ***effect*** of the legal requirement, rather than the method, is competitively neutral.[74]

Single-winner reverse auctions unquestionably have a disparate impact even if all are permitted to bid in the auction, because only one carrier would be supported. Distribution mechanisms that have this type of disparate impact must be rejected because:

> [i]t is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. If new entrants are not provided with the same opportunity to

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72 *See Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling,* 15 FCC Rcd 15168, 15177 (2000) ("*Western Wireless Preemption Petition*").

73 *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in Freeway Rights-of-way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21724 ¶ 51 (rel. Dec. 23, 1999) ("*Minnesota Declaratory Ruling Petition*").

74 *Western Wireless Preemption Petition*, 15 FCC Rcd at 15177, citing *Minnesota Declaratory Ruling Petition* at ¶ 51 (emphasis in original).

> receive universal service support as the incumbent LEC, such carriers will be discouraged from providing service and competition in high-cost areas.[75]

It is precisely for this reason that a competitive market is "the best method of delivering the benefits of choice, innovation, and affordability to Americans."[76]

With a *de facto* ETC monopoly, members of rural communities will have few, if any, available options in terms of service providers, service plans, rate plans, technologies, and devices, and the supported carrier, in the absence of competition, will have little incentive to improve service above the minimum requirements. Not only could the single-winner ETC monopolist price aggressively, knowing that no other carrier could profitably provide service in a supported area, but the monopolist could also continue raising the prices rural consumers must pay until the price point at which *unsupported* carriers could enter the market profitably or its total profit declines because enough consumers choose not to purchase service at all. The award of support through a reverse auction thus most likely would result in higher retail prices for consumers in rural areas than they would experience if multiple ETCs were permitted to compete for "portable" support on an ongoing basis.

The pricing power enjoyed by the winner of a single-winner reverse auction is best illustrated with an example. For the purposes of this example, assume that carriers A, B, C, and D are all ETCs providing supported services in a rural high-cost service area. Within the area, there currently are 1,000 USF supported lines. Carrier D, the ILEC in the region, serves 500 lines at a total cost of $7,500, resulting in a per-line cost of $15. Under the current identical support rule, each of the three remaining ETCs receive $15 in support for each line they serve in the area. As such, the fund currently provides a total of $15,000 in support for the area ($7,500

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75 *Western Wireless Preemption Petition*, 15 FCC Rcd at 15177.

76 Federal Communications Commission, *Moving Forward: Driving Investment and Innovation While Protecting Consumers* at 1 (Jan. 15, 2009).

in ILEC costs plus 500 lines x $15 per line). For the sake of simplicity, this example assumes that competition has driven all of the ETCs to charge a monthly rate of $1. The current per-line support level of $15 suggests a reasonable "reserve price" for any reverse auction.

- **Under a single winner reverse auction, only the winning bidder -- Carrier A in this example -- is eligible for support.** Bidding begins at the reserve price of $15, and concludes at the end of all bidding rounds (using $1 bid increments) with Carrier A's final bid of $10. For this example, assume that the final bids of Carriers B, C, and D were $11, $12 and $15 per line, respectively.[77]

- **Carriers B, C, and D now must increase the prices they charge consumers to uncompetitive levels or cease providing service altogether.** Denied support, Carriers B, C, and D must pass on their full costs to consumers, and they are no longer competitive with winning Carrier A, which receives $10 support for each line served.

- **Carrier A can now charge customers up to $11, reaping almost $5 more per line than under the current system.** Carrier A can increase its price to maximize its profit potential (regardless of the consumers served)[78] up to $11, which represents the next lowest bidder's costs (*i.e.*, Carrier B, which determined that it needed $11 of support to serve the area, will enter the market and provide service at $12).[79]

Revenue Comparison			
A's Revenues Under the Identical Support Rule		**A's Revenues As the Winner of a Reverse Auction**	
Customer charge:	$ 1	Customer charge:	$ 11
USF Support	+ $ 15	USF Support:	+ $ 10
A's Total Revenue:	**$ 16**	**A's Total Revenue:**	**$ 21**

77 The final bids reflect each carrier's best estimate of the minimum amount of support necessary for them to serve the auction area.

78 Some consumers may choose to forgo service at the rates that Carrier A will charge. If enough consumers choose to forgo the $11 service rate that Carrier A's profits begin to decline, Carrier A will reduce its rate to the point that its profits are maximized.

79 Carrier B's minimum service price can be calculated by adding the $1 charged the end user with the subsidy ($11) necessary to provide service.

- **As a result, the benefits of universal service support would flow solely to Carrier A in the form of increased profits rather than to rural consumers in the form of lower rates and more choices with respect to service providers, services, and devices.** Assuming all consumers switch to the winning bidder with the cheapest available rate (*i.e.*, Carrier A), the universal service fund would distribute a total of $10,000 in support to Carrier A, which represents a savings of $5,000 per month for the USF in that area. ***However, rural consumers would see a price increase of $10 per month, from the previous $1 per month to the new rate of $11 per month.*** Carrier A would also see an increase in revenue of $5 per line (*i.e.*, $21 - $16 = $5 from Table).

The latest Wireless Competition Report emphasized the critical importance of competition for lowering prices and improving quality, innovation, and investment.[80] As Chairman Julius Genachowski reiterated in his separate statement to the Wireless Competition Report,

> Competition in the wireless voice market over the past 15 years has spurred investment, innovation, and in many cases higher quality for lower prices for American consumers. It is vital that competition continue to serve these goals as consumers and industry migrate from voice to high-speed data and 4G mobile broadband.[81]

The Wireless Competition Report also recognized the negative effects that could result if competitors leave the marketplace, including higher prices, service quality degradation, and less innovation, which highlights the importance of ensuring that FCC policies and regulations do not stifle competition.[82]

The lack of vibrant competition in a marketplace or the subsidization of a single subsidized dominant entity can harm consumers in the form of higher prices. For example, the consumer price index ("CPI") data set forth in the Wireless Competition Report indicates that the average change over time in prices paid by urban consumers for cellular and long distance services -- both characterized by vibrant competition among numerous providers -- decreased by

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80 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 09-66., ¶ 1.

81 *Id.* at 301.

82 *Id.*, ¶ 74.

35.8% and 25.2%, respectively, over the period from 1997 to 2008.[83] Indeed, the price per minute of mobile wireless services decreased by 84% between 1995 and 2008.[84] By contrast, the CPI for the local exchange segment increased 41.0% over exactly the same time period.[85] This increase in consumer prices reflects the absence of vibrant competition and the presence of single subsidized providers.

The Wireless Competition Report also expressed concern about growing concentration within the mobile wireless industry. The Report relies upon the Herfindahl-Hirschman Index ("HHI") to demonstrate that there has been substantial concentration within the mobile wireless industry,[86] which led Commissioner Michael Copps to state the following in his separate statement:

> [T]he Report confirms something I have been warning about for years – that competition has been dramatically eroded and is seriously endangered by continuing consolidation and concentration in our wireless markets.[87]

To the extent the FCC rightfully is concerned about the potential negative impacts of substantial concentration within the mobile wireless industry, it should equally be concerned about implementing universal service reform proposals like single-winner reverse auctions that would create a *de facto* monopoly for broadband services in the most fragile areas across the Nation.

Another critical flaw with single-winner reverse auctions is that only one type of technology receives support, which means that the government, rather than the consumer marketplace, will be choosing technology winners and losers. Particularly with respect to wireless services where technological innovation had led to competition among various types of

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83 *Id.*, ¶ 186, Table 18.

84 *Id.*, ¶ 255.

85 *Id.*

86 *Id.*, ¶¶ 51–52.

87 *Id.* at 303.

technology, a single-winner reverse auction system could inadvertently tip the scales towards the less efficient technology -- like killing Betamax by subsidizing VHS -- if the majority, or even a substantial portion, of the reverse auctions are won by carriers using the less efficient technology. As the 1996 Act recognized, it is competition, not regulation, that propels affordability and innovation.[88]

In sum, single-winner reverse auctions would likely produce the unintended result of reducing the availability of affordable, quality telecommunications services in rural communities. Single-winner reverse auctions are also complex and expensive, which increases service costs for consumers. In light of the harm that would result from the implementation of a single-winner reverse auction system, there simply is no justification for the added complexity and administrative expenses.

B) The FCC Should Not Rely Upon Reverse Auctions In Light of the Significant Burdens and Potential Harms Associated With Reverse Auctions

When multiple providers are supported (or at least have the potential to enter the market and secure support), the mere threat of competition mitigates many of the potential harms caused by supporting only a single provider and creates incentives for all carriers to continue improving their services and rates. Although expanding the single winner auction to a two-winner auction would not significantly alleviate the harms described above, holding multiple, simultaneous single-winner reverse auctions for USF support (with each ETC permitted to win only one auction in each area) would force multiple ETCs to compete for customers, permitting customers in rural areas to enjoy the benefits of competition. Because an ETC would receive support only for lines served by that ETC, the presence of multiple ETCs in each area would not significantly increase fund size. However, the benefits of using multiple single-winner reverse auctions to

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88 *See* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also* 47 U.S.C. §160.

distribute support could be achieved in a less expensive manner by not using reverse auctions at all.

To the extent the FCC nonetheless moves forward with a reverse auction proposal despite the inherent contradictions of supporting only a single carrier with the requirements of the Act and Commission precedent, the agency must, at a minimum, reject any auction proposal that would result in only one service provider receiving support in any given area. Before moving towards a reverse auction system, the Commission should conduct trial reverse auctions on a limited basis to determine viability of the mechanism, while maintaining the current rules in the interim.[89] Even in the trial, however, there should be no less than three separate single-winner reverse auctions conducted simultaneously in the trial area in order to mitigate the harms that arise from monopolies and duopolies. The USA Coalition respectfully submits that the number of single-winner reverse auctions conducted simultaneously within the trial area should be reasonably comparable to the number of service providers from which consumers can choose in urban areas.

IV. THE NEW DISTRIBUTION MECHANISM PROPOSED BY THE USA COALITION FOCUSES ON CONSUMERS AS REQUIRED BY THE ACT

In the *Notice*, the FCC seeks comment on the best way to target funding toward new deployment of broadband in unserved areas quickly and efficiently.[90] The best way to achieve universal service and to foster the deployment of the fastest and most efficient services is to focus on removing the obstacles that service providers face in unserved and underserved areas in a predictable and technologically neutral manner. The USA Coalition proposes a new approach to universal service reform that would bring USF support into compliance with both the letter

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89 *USF NOI & NPRM*, ¶¶ 19-20.

90 *USF NOI & NPRM*, ¶¶ 2, 43, 54.

and spirit of section 254 of the Act.[91] If the Commission elects to eliminate the identical support rule rather than implementing true portability of support, the Commission should adopt the new distribution mechanism the USA Coalition proposes here. This new approach is a technologically neutral method of distributing USF support that offers consumers in rural, insular, and high-cost areas access to a competitive and robust market for communications services including both broadband and narrowband services.

The key to the USA Coalition's proposal is that the distribution mechanism is designed to address directly the two primary cost-related obstacles that make some rural, high-cost, and insular areas more difficult to serve than urban areas ***without***:

- changing the competitive position of any carrier vis-à-vis its competitors, regardless of whether those competitors are using the same or different technologies; or
- eliminating the need for potential new entrants first to determine carefully whether a particular rural, insular, or high-cost market will support their entry to that market just as they must do before they enter an urban market.

The distribution mechanism seeks to level the playing field between urban markets and markets in rural, insular, and high-cost areas by making a particular carrier's service cost per potential subscriber reasonably comparable to the same carrier's service cost per potential subscriber in an average urban market. Support would be sufficient to create the same incentives and disincentives for carriers serving rural, insular and high cost areas that they would face in urban areas, which is the best means for encouraging deployment without distorting the market by insulating any ETC from competition (because every ETC would face competition or at least the threat of competitive entry) or creating incentives for too many carriers to enter the market (because ETCs would be reimbursed for only a portion of their actual expenditures).

Under the USA Coalition's proposal, incumbents and competitors would compete for subscribers on a level playing field and would succeed or fail based upon consumer demand for

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91 *See A New Approach to Universal Service Reform*, attached.

their products and services, in turn, facilitating consumer choice. Support would be distributed based upon the costs that the incumbent and competitive LECs actually incur, with every ETC serving a particular supported area being eligible for reimbursement of an identical percentage of the eligible costs it incurs.

Eligible costs would be clearly defined and easily auditable, and the increased transparency at the beginning of the process would improve the ability of carriers to predict their support levels before distribution and could reduce the need for complex and burdensome audits after distribution. Indeed, both incumbent LECs and competitive ETCs would know exactly how much support they would receive before they make a decision regarding network or service expansion, which would facilitate the type of economically rational decision-making that improves the efficiency of USF support. In addition, the new approach would provide support for all types of service and service providers, regardless of technology, speed, or provider type.

In order to implement the USA Coalition's proposal, the FCC would have to:

- **Determine the characteristics of the average urban market** in terms of services, rates, and service providers.
- **Identify Supported Areas**, which are areas where support is necessary from the consumer's perspective because consumers in the area lack access to reasonably comparable services at reasonably comparable rates from reasonably comparable service providers.
    - The FCC would revisit the list of Supported Areas on a regular interval (e.g., every five years) in order to determine whether support continues to be necessary.
- **Calculate, with respect to each Supported Area, a single Reimbursement Percentage**, which is the percentage by which the average service cost per potential subscriber in the Supported Area exceeds the average service cost per potential subscriber in the average urban market.
    - Each Supported Area would have a single Reimbursement Percentage that would apply to all ETCs serving that Supported Area.
    - The Reimbursement Percentage would be calculated based upon two components: a Cost Factor and a Population Factor.

    - The Cost Factor would reflect the percentage, on average, that the cost (CapEx & OpEx) to serve a particular Supported Area exceeds the cost to serve the average urban area, which the FCC could calculate using cost proxies or a cost model.

    - The Population Factor would reflect the percentage by which the Supported Area has a lower population density than the average urban area based on census data.

  - The Reimbursement Percentage would be adjusted to reflect "reasonably comparability."

    - For example, if the FCC determines that 15% is reasonably comparable, then the FCC would reduce the calculated Reimbursement Percentage by 15%.

- **Publish a list of Eligible Expenditures**, which are the types of expenditures -- both CapEx & OpEx -- that are eligible for reimbursement when incurred by an ETC to serve a Supported Area.

- **Require ETCs to file quarterly Eligible Expenditures Reports** for any eligible expenditures they have incurred during the previous quarter and for which they seek reimbursement.

- **Reimburse each ETC,** on a quarterly basis, an amount that equals the Reimbursement Percentage for a particular Supported Area multiplied by the eligible expenditures that the ETC incurred to serve that area in the relevant quarter.

By only funding eligible expenditures that ETCs have incurred to serve areas where universal service support is necessary, the new mechanism should naturally lead to decreases in fund size over time as the universal service goals are met, which stands in stark contrast to the single-winner reverse auction proposal, which will ensure that support is needed indefinitely. As explained in more detail below, the new approach avoids picking winners and losers among technologies and providers, which ultimately will benefit all consumers, while eliminating the primary obstacles that prevent consumers in rural, insular, and high-cost areas from enjoying the diversity of service and lower prices available in urban areas.

A) The Commission Should Take A Holistic Approach to Achieving the Universal Service Goals Without Unnecessarily Distorting Market Forces

The universal service fund supports the provision of services where they otherwise would not be available or affordable, and advances a vibrant, robust, and redundant communications

network that is essential to the economic strength of the United States and the public safety of its citizens. While the Act mandates that universal service evolve over time, and evolution of the current universal service distribution mechanism is necessary to accomplish the goal of universal service, beneficial evolution of the universal service support mechanisms cannot occur if the focus of policymakers' efforts is on the mechanisms themselves rather than the goals the mechanisms are meant to achieve.

Funding should not be the sole focus, because lack of funding is not the sole obstacle to universal services. Nonetheless, support must be available where needed to achieve or maintain universal service. In these areas, the support mechanisms should facilitate growth and maintenance of the network rather than create additional obstacles to distributing or accessing support. Ensuring that support is both available where needed and used properly to achieve the goals of universal service is far more important than the precise manner by which funds are distributed.

The best way to achieve universal service is to focus on removing the obstacles that service providers face. The Commission must ask why certain areas are unserved or underserved and identify the specific obstacles to serving those areas. Obstacles to universal wireless service in unserved or underserved areas can include unavailability of sufficient spectrum, lack of sufficient funding for capital expenditures and operational expenditures due to low population density and/or extraordinarily high cost of service in the area, burdensome, costly, lengthy, discriminatory, vague or arbitrary regulatory requirements (*e.g.*, the interim funding cap), unavailability of roaming, unavailability or incompatibility of handsets, and lack of sufficient access to necessary rights-of-way or slow and costly permit approval procedures. Once the obstacles to universal service have been identified, those obstacles should be eliminated to the

greatest extent possible. Under no circumstance should government rules and policies create additional obstacles to service deployment.

Universal service support distribution should be simple – carriers should know how much money they will receive based on their planned expenditures and projected costs. Furthermore, universal service support should not vary based upon meaningless distinctions; support should be made available in a technologically and competitively neutral manner so that technological innovation can be implemented into the communications network as rapidly and efficiently as possible. Favoring one type of technology or class of carriers, whether explicitly or implicitly, will only slow the integration of technological innovation into the communications network and increase inefficiencies. Allowing residents and businesses in rural, insular, and high-cost areas to select the services, technologies, and service providers of their choice in a competitive communications services marketplace is the best means for ensuring the vibrancy, robustness, and redundancy of the communications network.

The language of section 254 of the Act makes clear that the overarching purpose of the universal service program is to improve access to telecommunications and information services for consumers living in rural areas. This goal requires the Commission to focus primarily upon the consumer's options and communications experience rather than upon the service provider's regulatory status or technological platform.[92] Consumers want, and need, the ability to choose among various types of affordable services, service providers, and technologies. As such, any reform effort should seek to shift the emphasis of the USF program away from Byzantine and often meaningless distinctions designed to address deficiencies in the regulatory framework that apply to various types of carriers towards a program designed to ensure the availability and

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92 *See Alenco Commc'ns v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.").

affordability of a variety of service types and service providers for consumers living in rural, insular, and high-cost areas by directly addressing the obstacles to universal service. The support distribution methodology should neither encourage nor require any carrier to become more inefficient or to comply with unnecessarily burdensome requirements, merely to receive universal service support. At a minimum, mandated inefficiency increases the cost of providing service, which will cause the fund to grow unnecessarily. In a worst case scenario, carriers would choose to forgo support and not offer service, which would limit the options available to consumers in rural, insular, and high cost areas where support is necessary to ensure the availability of affordable services.

The Act requires the Commission to ensure that the availability and affordability of a variety of service types and service providers for consumers living in rural, insular, and high-cost areas is reasonably comparable to the variety and affordability of service types and service providers available to consumers living in urban areas as required by section 254(b)(3) of the Act.[93] As such, the universal service distribution mechanism should seek to ensure that consumers enjoy access to a competitive communications market in which consumers can select the service type, technology, and provider of their choice. In order to ensure that consumers enjoy access to a competitive communications market, universal service reform should seek to minimize the distribution mechanism's interference with market forces while creating incentives for *all* ETCs to provide advanced services (including mobility and broadband) and offer lower prices for customers in rural areas.

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93 47 U.S.C. § 254(b)(3). The Commission has found that "section 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates." *Federal State Joint Board on Universal Service*; *High-Cost Universal Service Support*, 20 FCC Rcd 9731, 19736–37, ¶ 10 (2005).

Although any government intervention in the communications market invariably creates some market distortion, the intervention should be designed to ensure that the market for communications services remains functional and competitive. When support is limited to specific carriers based on artificial distinctions such as regulatory status or technological platform, market distortions are magnified, rather than minimized, and consumers have fewer service options and face higher prices. Thus, to best serve consumers, the Commission should reject policies that would deny support for any particular carrier (*e.g.*, wireless carriers or broadband service providers) based on regulatory status or technological platform.

Universal service support should be used to address directly, and in a predictable manner, the market forces that result in a lack of service options or unacceptably high prices in rural, insular, and high-cost communities. This objective can best be accomplished by crafting the USF distribution mechanism to bolster, rather than to distort, competitive market forces without artificially propping up any individual carriers. Support distribution mechanisms that foster a competitive market while mitigating the effects of high-costs and low population density in rural areas will reduce the total amount of support necessary over time. By contrast, mechanisms that provide support for only one, or even two, carriers artificially insulate those carriers from market forces that would otherwise compel them to become more efficient over time, ultimately increasing the amount of support those carriers require. For this reason, to the extent that the Commission determines that support is necessary within an area, all eligible carriers serving the area should be entitled to support, regardless of the carrier's regulatory status or technology platform, as all carriers face the same obstacles to providing service.

Providing consumers with access to competitive choices among broadband providers is also the best way to ensure that the price paid by the consumer and the need of service providers for government support will decrease over time. Although proposals to limit support to a single

carrier or even a few carriers may appear to offer cost savings, the end result would be a skewed communications marketplace where only the supported carriers could provide the service. This lack of competition promotes inefficiencies and poor service. If the universal service fund provides support to a single service provider or establishes regulations that favor a single provider serving an area, the favored provider can set its rates significantly higher than it could if it faced fair competition, and it has fewer incentives to become more efficient. In contrast, competition in the marketplace reduces rates paid by consumers and increases provider efficiency as competitors seek to gain customers by offering better voice services and faster data transfer rates at lower prices. Such efficiencies will ultimately be reflected in the decreased need for universal service subsidies over time. Specifically, to the extent government programs interfere with competition by insulating providers from competitive forces, the level of support necessary to achieve the universal service goals will be much higher over time, even if the level appears lower during the initial years of the program.

Limiting the number of recipients of universal service support to a single or select few carriers in each area could even harm carriers not currently receiving universal service. Many carriers rely upon competitive ETCs for reasonably priced special access services. If competitive ETCs providing special access services are no longer eligible for support, these carriers may no longer offer special access services, which in turn may allow incumbents to charge monopoly prices for their special access services. All competitive carriers, not just ETCs, will then have to pay higher prices for special access in those areas, with the extra costs passed on to consumers. These higher prices also may discourage the rollout of broadband services, which tend to rely heavily on the availability of reasonably priced high-capacity backhaul services.

B) The Distribution Mechanism Proposed by the USA Coalition Would Directly Address Cost-Related Obstacles That Lead to Unserved or Underserved Areas Without Unnecessarily Distorting Market Forces

The USA Coalition respectfully submits that the identical support rule is not the cause of the "harms" the Commission seeks to address with universal service reform. To the extent that the Commission nonetheless chooses to eliminate the identical support rule and forego implementing portability of support for incumbent as well as competitive ETCs, the Commission should focus USF reform on consumers as the beneficiaries of support rather than on carriers as the recipients of support. Furthermore, any new approach to USF distribution must address and mitigate the primary obstacles that impact all types of technologies and competitors – low population density (*i.e.*, fewer subscribers from whom to recover costs) and higher cost of service due to harsh terrain, population distribution issues, and other issues – while maintaining an environment where incumbents and competitors can compete for subscribers on a level playing field. The USA Coalition's reform proposal is designed to accomplish this goal in a straightforward way that is consistent with the requirements of the Act. By addressing the primary obstacles directly, the new approach eliminates artificial distinctions based on technology (*e.g.*, wireline or wireless), competitive status (*e.g.*, ILEC or CETC), or current speed of service (*e.g.*, "broadband" or "narrowband").

Under the USA Coalition's new approach, in each area where support is necessary from the perspective of the consumer, *i.e.*, "rural, insular and high-cost areas" that lack access to service options that are "reasonably comparable" to those available in "urban areas" in terms of relevant characteristics as defined by the Commission ("Supported Areas"), the FCC would calculate a "Reimbursement Percentage." This Reimbursement Percentage would reflect the percentage by which the cost to serve each potential subscriber in the Supported Area exceeds the cost to serve each potential subscriber in an Average Urban Area. ETCs would be

reimbursed for all eligible expenditures (*i.e.*, CapEx & OpEx) made to serve the Supported Area based upon the Reimbursement Percentage for the Supported Area.

(i) Identifying Areas Where Support Is Needed

To identify areas where support is needed, the FCC would divide the country into technologically neutral and publicly established "USF Areas" (*e.g.*, counties, zip codes, census blocks or islands). The FCC would:

- identify and quantify the characteristics of an average urban market from the perspective of the retail consumer;
- compare the characteristics of each USF Area with the characteristics of the Average Urban Area; and
- designate a USF Area as a "Supported Area" if the characteristics of the area are not "reasonably comparable" to any ***one*** of the identified characteristics of the Average Urban Area.

Each USF Area would be reevaluated on regular intervals (*e.g.*, every five years) to update the list of Supported Areas.

(ii) Calculating the Amount of Support Provided: The Reimbursement Percentage

The goal of the Reimbursement Percentage is to determine the amount of support necessary to make the service cost per potential subscriber in a Supported Area "reasonably comparable" to the service cost per potential subscriber in an "average urban area." The Reimbursement Percentage is designed to place each individual ETC serving a Supported Area in a position that is reasonably comparable to what it would encounter if serving the Average Urban Area. Thus, ETCs would be allowed to recover the percentage of costs incurred to serve a Supported Area equal to the percentage by which the average cost to serve the Supported Area exceeds the average cost to serve the Average Urban Area (the "Cost Factor") plus the percentage of the remaining costs equal to the percentage by which the population density of the

Average Urban Area exceeds the population density of the Supported Area (the "Population Density Factor").

(a) The Cost Factor Portion of the Reimbursement Percentage

The FCC would calculate one Cost Factor for each Supported Area that reflects the percentage, on average, that the cost (CapEx & OpEx) to serve a particular Supported Area exceeds the cost to serve the Average Urban Area. The goal of the Cost Factor is to determine the percentage by which the total cost a particular service provider would incur to serve the Supported Area exceeds the total cost that same provider would incur to serve the Average Urban Area (assuming equal population densities). Rather than attempting to determine the actual cost to serve, the FCC instead would seek only to determine the relative differences in costs to serve, by comparing specific cost proxies (*e.g.*, relative cost of backhaul) or using cost models.

(b) The Population Density Factor Portion of the Reimbursement Percentage

The FCC would also calculate one Population Density Factor for each Supported Area, reflecting the percentage by which the Supported Area has a lower population density than the Average Urban Area. As the population density decreases, the cost to serve potential subscribers increases because there are fewer potential subscribers across whom to distribute costs. The FCC would determine the population density in the Average Urban Area, and then calculate a single Population Density Factor for each Supported Area based upon publicly available census data.

(c) Combining the Cost Factor and the Population Density Factor to Determine the Reimbursement Percentage

The FCC would calculate a single Reimbursement Percentage for each Supported Area that reflects the combination of the Cost Factor with the Population Density Factor. The FCC could reduce the calculated Reimbursement Percentage to reflect the amount the agency deems to be reasonably comparable. For example, if the FCC determines that 15% is reasonably comparable, then the agency could reduce the calculated Reimbursement Percentage by 15%. The FCC would then calculate the amount of support an ETC receives by multiplying the eligible expenses incurred by the ETC to serve a Supported Area by the Reimbursement Percentage for that Supported Area. The Reimbursement Percentage would not change the competitive position of any ETC serving a Supported Area vis-à-vis any other ETC serving the same area, and is premised upon the idea that support should be sufficient to create the same incentives and disincentives for carriers serving rural, insular, and high cost areas that they would face in urban areas.

(iii) Identifying the Expenditures that Are Eligible for Reimbursement

The classes of expenditures that are eligible for reimbursement (*e.g.*, equipment costs, backhaul costs, and spectrum acquisition) would be defined by the FCC. The FCC would adopt clear rules regarding attribution of expenditures to Supported Areas, and expenditures that service multiple Supported Areas, or that service both Supported Areas and unsupported areas, would be allocated to each area based on line count. All eligible expenditures would be reimbursed based upon the Supported Area's Reimbursement Percentage.

(iv) An Example Showing How Support Would Be Calculated

By way of example, assume that the FCC determines that the average cost to serve the Supported Area is 25% higher than the average cost to serve the average urban area (**Cost Factor = 25%**), and that census data indicates that the population density in the Supported Area

is 45% of the population density in the average urban area (*i.e.*, a 55% difference between the Supported Area and the Average Urban Area) (**Population Density Factor = 55%**). With these determinations, the reimbursement an ETC would receive for each $100 of eligible expenses it incurs to serve the Supported Area would be calculated as follows:

- The FCC would apply the **Cost Factor** to the full $100 of eligible expenses, which results in a reimbursement of $25 (*i.e.*, 25% of $100 = $25);
- The FCC would apply the **Population Density Factor** to the remaining $75 of unreimbursed eligible expenses, which results in an additional reimbursement of $41.25 (*i.e.*, 55% of $75 = $41.25);
- The ETC would receive a total reimbursement of **$66.25** ($25 + $41.25) for each $100 of eligible expenses it incurs to serve the Supported Area
- The Cost Factor and Population Density Factor can be combined into a single **Reimbursement Percentage** unique to each Supported Area, which, in this example, would be 66.25%.

(v) <u>The Reporting and Reimbursement of Eligible Expenditures</u>

Under the new approach, the Commission would require ETCs to follow standard accounting rules (*e.g.,* GAAP) **or** accounting rules otherwise mandated by a regulatory authority. No ETC would be required to implement unnecessary accounting rules merely to participate in the universal service program. The Commission would further require ETCs to file simple reimbursement requests on a quarterly basis that identify, by Supported Area, total expenditures eligible for reimbursement, and the general type of and class of each expenditure. One benefit of this new approach is that carriers would be able to determine the amount of money they should receive for eligible CapEx or OpEx prior to incurring those costs. Furthermore, to provide support for broadband, the USF administrator needs only to define additional types and classes of eligible expenditures. Finally, the new approach moves carriers away from historical or projected costs and reimburses carriers based on actual, incurred costs.

CONCLUSION

For the reasons set forth above, the USA Coalition urges the FCC to adopt rational and sustainable universal service reform that operates on a fair and technologically neutral basis in order to ensure that people throughout the United States will have access to reasonably comparable telecommunications and information services at reasonably comparable rates. Such reform would ensure that all consumers benefit from broadband and technological advances, regardless of where they live and work.

Respectfully submitted,

Todd D. Daubert
Lisa A. Gilbreath
SONNENSCHEIN NATH & ROSENTHAL LLP
1301 K Street, N.W., Suite 600 East Tower
Washington, DC 20005
(202) 408-6400
(202) 408-6399 (facsimile)
tdaubert@sonnenschein.com

Counsel for the USA Coalition

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