

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

In the Matter of )  
 )  
 Connect America Fund ) WC Docket No. 10-96  
 )  
 A National Broadband Plan for Our Future ) GN Docket No. 09-59  
 )  
 Establishing Just and Reasonable Rates for Local ) WC Docket No. 07-135  
 Exchange Carriers )  
 )  
 High-Cost Universal Service Support ) WC Docket No. 05-337  
 )  
 Developing an Unified Intercarrier Compensation ) CC Docket No. 01-92  
 Regime )  
 )  
 Federal-State Joint Board on Universal Service ) CC Docket No. 96-45  
 )  
 Lifeline and Link-Up ) WC Docket No. 03-109

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**NOTICE OF PROPOSED RULEMAKING AND FURTHER NOTICE OF PROPOSED  
RULEMAKING**

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**Comment Date on Section XV: [30 days after date of publication in the Federal Register]**  
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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker  
issuing separate statements.

**TABLE OF CONTENTS**

Heading	Paragraph #
I. INTRODUCTION .....	1
II. EXECUTIVE SUMMARY .....	14
A. Universal Service Fund .....	18
1. Immediate Reforms.....	19
2. Long-Term Vision .....	30
B. Intercarrier Compensation .....	34
1. Immediate Reforms.....	35
2. Comprehensive Reform .....	40
III. ROLE OF INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE PROGRAMS.....	45
IV. LEGAL AUTHORITY TO SUPPORT BROADBAND.....	55

A.	Additional Section 254(b) Principle.....	58
B.	Commission Authority to Support Broadband.....	60
1.	Section 254.....	61
2.	Section 706.....	66
3.	Title I Ancillary Authority.....	68
4.	Conditional Support.....	70
5.	Other Approaches.....	72
V.	SETTING AMERICA ON A PATH OF REFORM.....	75
A.	National Goals and Priorities for Universal Service.....	76
B.	Encouraging State Action To Advance Universal Service.....	84
C.	Eligible Telecommunications Carrier Requirements.....	88
D.	Public Interest Obligations of Fund Recipients.....	90
1.	Characteristics of Voice Service.....	95
2.	Voice Obligations.....	98
3.	Characteristics of Broadband Service.....	103
4.	Broadband Obligations.....	121
a.	Service, Coverage, and Deployment.....	124
b.	Affordable and Reasonably Comparable Rates.....	137
c.	Additional Considerations.....	148
VI.	NEAR-TERM REFORMS.....	157
A.	Rationalizing Loop Support, Local Switching Support, and Interstate Common Line Support.....	162
1.	Background.....	164
2.	Modification of High-Cost Loop Support.....	175
3.	Local Switching Support.....	186
4.	Corporate Operations Expenses.....	194
5.	Limits on Reimbursable Operating and Capital Costs.....	201
6.	Limits on Total per Line High-cost Support.....	208
B.	Reducing Barriers to Operating Efficiencies.....	216
1.	Study Area Waiver Process.....	218
2.	Revising the “Parent Trap” Rule, Section 54.305.....	225
C.	Transitioning IAS to CAF.....	228
1.	Background.....	229
2.	Discussion.....	233
D.	Rationalizing Competitive ETC Support Through Elimination of the Identical Support Rule.....	241
1.	Background.....	243
2.	Discussion.....	246
E.	The First Phase of the Connect America Fund.....	261
1.	Legal Authority to Establish a Competitive Process for CAF.....	262
2.	Overall Design of Phase I CAF.....	266
3.	Size of Phase I CAF.....	274
4.	One CAF Provider Per Unserved Area.....	281
5.	Auction to Determine Awards of Support.....	284
6.	Identifying Unserved Areas Eligible for Support.....	289
7.	Pre-existing Deployment Plans.....	308
8.	Public Interest Obligations for Phase I CAF.....	309
9.	Support Eligibility Requirements.....	316
a.	ETC Designation and Service Areas.....	318
b.	Authorization to Provide Required Services and Other Certifications.....	320
10.	Competitive Award Process.....	324
a.	Short-Form Application.....	326
b.	Basic Auction Design.....	331

c. Bidding Process.....	332
d. Information and Competition.....	347
e. Auction Cancellation.....	348
11. Post-auction Process and Administration of Phase I CAF .....	349
a. Post-auction Long-Form Application .....	349
b. Disbursing Support .....	361
(i) Support Payments.....	361
(ii) Support Liabilities .....	365
c. Audits and Compliance.....	368
d. Delegation of Authority .....	371
F. Targeting Support .....	372
1. Disaggregating Support .....	375
2. Redrawing Study Areas.....	384
G. Pending Proceedings and Other Issues .....	389
VII. LONG-TERM VISION FOR THE CONNECT AMERICA FUND.....	398
A. Supported Providers.....	402
B. Sizing the Federal Commitment to Universal Service .....	412
C. Alternative Approaches for Targeting and Distribution of CAF funds.....	417
1. Competitive Bidding Everywhere .....	418
2. Right of First Refusal Everywhere, Followed by Competitive Bidding Where Necessary.....	431
3. Continued Rate-of-Return Reform for Certain Areas.....	448
VIII. INCREASING ACCOUNTABILITY AND MEASURING PROGRESS TO ENSURE INVESTMENTS DELIVER INTENDED RESULTS .....	457
A. Increasing Transparency, Oversight and Accountability .....	457
1. Reporting Requirements.....	458
2. Internal Controls.....	468
3. Additional Monitoring Procedures .....	477
4. Record Retention Requirements.....	478
IX. ESTABLISHING CLEAR PERFORMANCE GOALS AND MEASURES FOR UNIVERSAL SERVICE.....	479
X. INTERCARRIER COMPENSATION FOR A BROADBAND AMERICA.....	490
A. Steps Necessary to Achieve Our Objectives.....	490
B. Why Intercarrier Compensation Must Be Reformed .....	494
XI. LEGAL AUTHORITY TO ACCOMPLISH COMPREHENSIVE REFORM .....	509
XII. CONCEPTS TO GUIDE INTERCARRIER COMPENSATION REFORM .....	523
A. Concepts to Guide Sustainable Reform .....	524
B. Intercarrier Compensation Methodologies for All-IP Networks.....	529
XIII. SELECTING THE PATH TO MODERNIZE EXISTING RULES AND ADVANCE IP NETWORKS .....	533
A. Reform Based on the Existing Jurisdictional Framework.....	537
1. Reforms Undertaken by the Commission.....	538
2. Reforms Undertaken by the States .....	543
B. Reform Based on the 1996 Act Framework.....	550
C. Other Transition Issues .....	556
XIV. DEVELOPING A RECOVERY MECHANISM.....	559
A. Threshold Considerations.....	560
B. Determining the Type and Amount of Recovery .....	564
C. Evaluating Reasonable Recovery from End-Users .....	573
1. Residential Benchmark.....	573
2. Interstate Subscriber Line Charges.....	579
D. Criteria for Recovery from the Connect America Fund.....	585
E. Specific Recovery Considerations for Rate-of-Return Carriers.....	595

<b>XV. REDUCING INEFFICIENCIES AND WASTE BY CURBING ARBITRAGE OPPORTUNITIES</b> .....	603
<b>A. Intercarrier Compensation Obligations for VoIP Traffic</b> .....	608
1. Background.....	610
2. Discussion.....	612
<b>B. Rules To Address Phantom Traffic</b> .....	620
1. Background.....	621
2. Discussion.....	625
<b>C. Rules to Reduce Access Stimulation</b> .....	635
1. Background.....	639
a. Access Rate Regulation .....	640
b. Interstate Access Tariffs and Interexchange Carriers .....	652
c. Prior Commission Action.....	655
2. Discussion.....	658
a. Proposed Access Stimulation Rules.....	658
b. Other Proposals .....	667
<b>XVI. INTERCONNECTION AND RELATED ISSUES</b> .....	678
<b>XVII. PROCEDURAL MATTERS</b> .....	690
A. Filing Requirements .....	690
B. Initial Regulatory Flexibility Analysis.....	699
C. Paperwork Reduction Act Analysis .....	700
<b>XVIII. ORDERING CLAUSES</b> .....	701
Appendix A: Proposed Universal Service Rules	
Appendix B: Proposed Call Signaling Rules	
Appendix C: Proposed Access Stimulation Rules	
Appendix D: Incentive Regulation: A Framework for Calculating Intercarrier Compensation Replacement Payments for Rate-of-Return Carriers	
Appendix E: Initial Regulatory Flexibility Analysis	

## **I. INTRODUCTION**

1. Bringing robust, affordable broadband to all Americans is the great infrastructure challenge of our time. The private sector is taking the lead in meeting this challenge, but in areas of the country where it is not economically viable to deploy and/or operate broadband networks, including many rural areas, public support is needed to spur private investment. Today, as the National Broadband Plan recommends, we propose to fundamentally modernize the Commission's Universal Service Fund (USF or Fund) and intercarrier compensation (ICC) system. We propose to do so by eliminating waste and inefficiency and reorienting USF and ICC to meet the nation's broadband availability challenge, transforming a 20th century program into an integrated program tailored for 21st century needs and opportunities.

2. The principle that all Americans should have access to communications services, a concept referred to as universal service, has been at the core of the Commission's mandate since its founding. Congress created this Commission in 1934 for the purpose of making "available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>1</sup> In the decades since, federal and state policymakers developed a complex system of public-private partnerships that supports deployment and adoption of telephone service in costly-to-serve areas. A combination of payments from long distance to local phone companies (ICC) and explicit support from USF has helped local phone

<sup>1</sup> 47 U.S.C. § 151.

companies serve nearly all Americans. But networks that provide only voice service are no longer adequate for the country's communication needs.

3. Ubiquitous broadband infrastructure has become crucial to our nation's economic development and civic life.<sup>2</sup> Businesses need broadband to start and grow; adults need broadband to find jobs; children need broadband to learn. Broadband enables people with disabilities to participate more fully in society and provides opportunity to Americans of all income levels. Broadband also helps lower the costs and improve the quality of health care. As important as these benefits are in America's cities—where more than two-thirds of residents have come to rely on broadband<sup>3</sup>—the distance-conquering benefits of broadband can be even more important in America's more remote small towns, rural and insular areas, and Tribal lands.<sup>4</sup> Furthermore, the benefits of broadband grow when all areas of the country are connected. More users online means more information flowing, larger markets for goods and services, and more rapid innovation. Congress recognized as much in 1996 when it directed the Commission to examine regularly whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely manner,<sup>5</sup> and more recently in February 2009 when it tasked the Commission with developing a National Broadband Plan “to ensure that all people of the United States have access to broadband capability,” and a “strategy for achieving affordability of such service and maximum utilization of broadband infrastructure.”<sup>6</sup>

4. In the 21st century, Americans will use fixed and mobile networks to experience the benefits of broadband. Businesses, anchor institutions, and individuals rely on the high-speed capabilities of fixed broadband networks for services such as high-definition remote medical consultations, “telepresence” videoconferencing, and video-based distance learning. Meanwhile, as desktop PCs give way to laptops, netbooks, smart phones, and tablets, more people are taking their broadband devices on the road and using mobile broadband connectivity in their jobs, education, and health care. The benefits of mobility may be particularly important to rural consumers and schoolchildren who typically travel farther distances to reach work and school, and are vital for public safety: Approximately half of all 911 calls today are made from mobile phones. At the same time, fixed networks remain essential for mobile services, which typically depend on fixed backhaul to connect cell towers and enable mobile communications to other networks.

5. Today, while most Americans have access to broadband,<sup>7</sup> as many as 24 million Americans—one in thirteen of us—live in areas where there is no access to any broadband network, fixed (e.g., DSL or cable Internet service) or mobile.<sup>8</sup> The unserved include the family in Alachua County,

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<sup>2</sup> See generally Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), at xi (National Broadband Plan).

<sup>3</sup> See Industry Analysis and Technology Division, Wireline Competition Bureau *Internet Access Services: Status as of December 31, 2009*, at chart 19 (Dec. 2010) (Dec. 2010 Internet Access Services Report).

<sup>4</sup> Throughout this document, except in reference to the current interim cap on high-cost support for competitive ETCs, “Tribal lands” include any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian Allotments, see 47 C.F.R. § 54.400(e), as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 108, et seq., as amended.

<sup>5</sup> 47 U.S.C. § 1302(a).

<sup>6</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (Recovery Act).

<sup>7</sup> National Broadband Plan at 20.

<sup>8</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the* (continued....)

Florida whose daughter routinely drives to a vacant public library parking lot at night to use the WiFi connection to download her high school homework, because her family cannot get broadband at home. They include the family in Montgomery County, Ohio who is frustrated that they cannot get broadband from their local telephone company, even though broadband is available two miles away in the town of Brookville. They include the Native Alaskan community of Kotzebue, which cannot retain teachers due to the lack of basic amenities including Internet connectivity. There are unserved areas in every state of the nation and its territories, and in many of these areas there is little reason to believe that Congress's desire "to ensure that all people of the United States have access to broadband capability" will be met any time soon if current policies are not reformed.

6. Our USF and ICC programs currently are directed at telephone service, not broadband. The component of the Fund that supports telecommunications service in high-cost areas has grown from \$2.6 billion in 2001 to \$4.3 billion in 2010,<sup>9</sup> but it still primarily supports voice, including, in some instances, broadband-capable infrastructure that delivers voice. While the Fund's support has enabled some rural telephone companies to deploy broadband-capable lines, many rural areas receive insufficient support for broadband, creating a "rural-rural divide." The ICC regime, too, was designed for a world of voice minutes and separate long-distance and local telephone companies. It has had the effect of rewarding carriers for maintaining outdated infrastructure rather than migrating to Internet protocol (IP)-based networks. Thus, current rules actually *disincentivize* something necessary for our global competitiveness: the transition from analog circuit-switched networks to IP networks.

7. In addition, fundamental inefficiencies riddle both USF and ICC. In many areas of the country, USF provides more support than necessary to achieve our goals, subsidizes a competitor to a voice and broadband provider that is offering service without government assistance, or supports several voice networks in a single area. Similarly inefficient ICC rules create incentives for wasteful arbitrage. In particular, because rates that local carriers receive to deliver a call vary widely depending on where the call originated and the classification and type of service providers involved, the carriers paying such charges may mask the origination of voice traffic to reduce or avoid payments, creating "phantom traffic." In addition, regulations allowing some carriers to assess above-cost rates for delivering traffic to their subscribers create incentives for local carriers to artificially inflate their traffic volumes, thereby increasing the payments they receive, a practice referred to as "access stimulation" or "traffic pumping." Practices like these and the disputes surrounding them cost hundreds of millions of dollars annually that could be used for investment and more productive endeavors—costs that are ultimately borne by consumers.

8. We face these problems because our universal service rules and our ICC system, designed for 20th century networks and market dynamics, have not been comprehensively reassessed in more than a decade, even though the communications landscape has changed dramatically. Mobile services are vastly more prominent than even a few years ago—more than 27 percent of adults live in households with only wireless phones.<sup>10</sup> Broadband Internet access revenues have grown from \$13.1

(Continued from previous page) \_\_\_\_\_

*Telecommunications Act of 1996, Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, Report, 25 FCC Rcd 9556 (2010) (*Sixth Broadband Deployment Report*).

<sup>9</sup> Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 96-45, *Universal Service Monitoring Report*, CC Docket No. 98-202, at Table 3-1 (Dec. 2010) (2010 Universal Service Monitoring Report); staff analysis of 2010 High-Cost Disbursement Data, <http://www.fcc.gov/wcb/iatd/miscdata> (forthcoming) (2010 Disbursement Analysis); USAC High-Cost Disbursement Data, <http://www.usac.org/hc/tools/disbursements/default.aspx> (USAC High-Cost Disbursement Tool). Numbers shown reflect nominal growth. Adjusting for inflation over the same time period, high-cost support has increased from \$2.6 billion to \$3.5 billion in 2001 dollars.

<sup>10</sup> Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January - June 2010*, National Center for Health Statistics, Centers for Disease Control (Dec. 21, 2010), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf>.

billion in 2003 to \$36.7 billion in 2009, while traditional wireline telephone (switched access) minutes plummeted from 567 billion in 2000 to 316 billion in 2008.<sup>11</sup> From 2008 to 2009, interconnected Voice over Internet Protocol (VoIP) subscriptions increased by 22 percent, while switched access lines decreased by 10 percent.<sup>12</sup> Incumbent telephone companies that operate in rural areas increasingly face competition from other providers, including cable and wireless companies in portions of their service area, but remain the carrier of last resort (COLR) outside of towns, where there are typically too few customers to support a sustainable business.<sup>13</sup>

9. As Representative Lee Terry and Rick Boucher, former Chairman of the House Subcommittee on Communications, Technology and the Internet, said last year, “the Universal Service Fund is broken.”<sup>14</sup> And because of the interrelationship between USF and ICC, and the importance of both to the nation’s broadband goals, reform of the two programs must be tackled together. As the Commission said in its Joint Statement on Broadband, released when the National Broadband Plan was delivered to Congress last March, “[USF] and [ICC] should be comprehensively reformed to increase accountability and efficiency, encourage targeted investment in broadband infrastructure, and emphasize the importance of broadband to the future of these programs.”<sup>15</sup>

10. Consistent with the Joint Statement and the Broadband Plan, the Commission plans to be guided by the following four principles, rooted in section 254, as we proceed with USF and ICC reform:

- *Modernize USF and ICC for Broadband.* Modernize and refocus USF and ICC to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks. Unserved communities across the nation cannot continue to be left behind.
- *Fiscal Responsibility.* Control the size of USF as it transitions to support broadband, including by reducing waste and inefficiency. We recognize that American consumers and businesses ultimately pay for USF, and that this contribution burden may undermine the benefits of the program by discouraging adoption.
- *Accountability.* Require accountability from companies receiving support, to ensure that public investments are used wisely to deliver intended results. Government must also be accountable for the administration of USF, including through clear goals and performance metrics for the program.

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<sup>11</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, *Trends in Telephone Service*, at 10-1 (Sept. 2010) (Sept. 2010 Trends in Telephone Service); Telecommunications Industry Association, *2010 ICT Market Review and Forecast*, Table 1-1.5 (Voice, Video and Data Services Revenues).

<sup>12</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition Report: Status as of December 2009*, at 6 (Jan. 2011) (Jan. 2011 Local Competition Report).

<sup>13</sup> National Telecommunications Cooperative Association, *NTCA 2010 Broadband/Internet Availability Survey Report*, at 3, 8 (Jan. 2011) (“Ninety-eight percent of survey respondents indicated that they face competition in the provision of advanced services from at least one other service provider [such as cable companies and wireless Internet service providers] in some portion of their service area,” but forty-four percent of those respondents indicate that “competitors were serving only the cities and towns in their service areas.”).

<sup>14</sup> See Boucher, Terry Introduce Universal Service Reform Act of 2010, Press Release, 111th Congress (rel. July 22, 2010).

<sup>15</sup> *Joint Statement on Broadband*, GN Docket No. 10-66, Joint Statement on Broadband, 25 FCC Rcd 3420, 3421 (2010).

- *Market-Driven Policies.* Transition to market-driven and incentive-based policies that encourage technologies and services that maximize the value of scarce program resources and the benefits to all consumers.<sup>16</sup>

11. We seek comment on these principles for reform. Section 254 of the Act lays out principles for Commission policies to preserve and advance universal service.<sup>17</sup> Section 254(c)(1) defines universal service as evolving; thus, we are seeking to modernize it.<sup>18</sup> Section 254(b)(5) requires that support be “sufficient, predictable and sufficient,” which courts have interpreted as requiring support that is sufficient but not excessive, consistent with our commitment to fiscal responsibility and market-driven, incentive-based policies.<sup>19</sup> Finally, accountability is essential to ensure that our programs are in fact preserving and advancing universal service by providing the “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation” that Congress envisioned in section 254(b)(2).<sup>20</sup>

12. As we proceed with USF and ICC reform, we intend to avoid sudden changes or “flash cuts” in our policies, acknowledging the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption. We note that if additional funding were available for USF and ICC reform, it could accelerate and ease the necessary transitions.

13. We recognize that USF and ICC are both hybrid state-federal systems, and that reform will work best with the Commission and state regulators cooperating to achieve shared goals. We also acknowledge that crucial work has already been done to advance broadband deployment in hard-to-serve areas—including by the National Telecommunications and Information Administration (NTIA) and the Rural Utilities Service (RUS) through American Recovery and Reinvestment Act grants and loans as well as ongoing RUS programs, and by states through their own efforts to extend broadband. We seek to incorporate the lessons learned from those programs. We seek input from our federal and state partners and Tribal governments on how best to coordinate efforts to ensure that all Americans have access to modern communications networks so that we can continue to work together to build on the past success of universal service.

## II. EXECUTIVE SUMMARY

14. This section summarizes our proposed framework for reform. Our proposals are designed to achieve the four core principles above—modernizing and refocusing USF and ICC to ensure all Americans have access to robust, affordable broadband and to accelerate the transition to IP networks; fiscal responsibility; accountability; and use of market-driven and incentive-based policies—and we seek to ensure that the future of USF and ICC are consistent with those principles. We recognize, however, that there are a number of potential paths to that future state. We also recognize the difficulty of precisely forecasting the consequences of changes to a system as complex and interdependent as USF and ICC, as well as the benefits of piloting innovative policies—such as competitive bidding to support build out and ongoing operation of fixed and mobile broadband networks—before broader implementation. We therefore propose several specific, near-term steps that will accelerate broadband investment in unserved areas and set USF and ICC on a path that is consistent with the principles we have proposed; we then describe alternatives for completing the reform process over the longer term. We intend to monitor the progress of the near-term reforms and adjust course as necessary as we complete the reform process from among the longer-term options.

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<sup>16</sup> We recognize that in some geographic areas there may be no private sector business case for offering voice and broadband services. This is not in tension with our commitment to use market-driven regulation.

<sup>17</sup> 47 U.S.C. § 254.

<sup>18</sup> 47 U.S.C. § 254(c)(1).

<sup>19</sup> 47 U.S.C. § 254(b)(5). *See infra* para. 412.

<sup>20</sup> 47 U.S.C. § 254(b)(2).

15. We believe the USF and ICC regimes will benefit from simplification and unification: The Connect America Fund (CAF) we propose to create would ultimately replace all other explicit support provided by the current high-cost fund as well as implicit subsidies from the ICC system. To be clear, we are not proposing to eliminate universal service support for communications services in high-cost areas of the country; rather, we are proposing to improve the efficiency and effectiveness of that support.

16. Our reforms must balance a number of other important and possibly competing priorities. These priorities include advancing broadband service to all Americans; sustaining high-quality, reliable voice service for all Americans; sustaining and expanding mobile voice and mobile broadband coverage throughout the country; increasing adoption of advanced communications services; and minimizing the burden on consumers and businesses, who pay for universal service. We seek comment on the relative importance of these objectives and look forward to developing a full record on the appropriate balance among them.

17. Reform will require all major stakeholders in the USF and ICC system to grapple with the practical consequences of change. We do not propose any “flash cuts,” but rather suggest transitions and glide paths that we believe will facilitate adaptation to reforms. Change to USF and ICC policies need not and should not be sudden or overly disruptive, but change must begin so that our country can reach its broadband goals in an efficient and accountable way.

#### A. Universal Service Fund

18. Building on the recommendations of the National Broadband Plan and the record from the *USF Reform NOI/NPRM*,<sup>21</sup> we propose to transform the existing high-cost program—the component of USF directed toward high-cost, rural, and insular areas (which we often refer to as “USF” in this document)—into a new, more efficient, broadband-focused Connect America Fund. As shown in Figure 1 below, we propose to undertake this comprehensive reform in two stages: a set of immediate reforms including, among other near-term goals, the establishment of the CAF, followed by the final selection of the long-term CAF funding mechanism, based on monitoring and evaluation of experiences with the near-term reforms.

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<sup>21</sup> *Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, GN Docket Nos. 09-51, 09-47, 09-137, Public Notice, 24 FCC Rcd 13757 (2009) (NBP PN #19); *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, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657 (2010) (*USF Reform NOI/NPRM*).

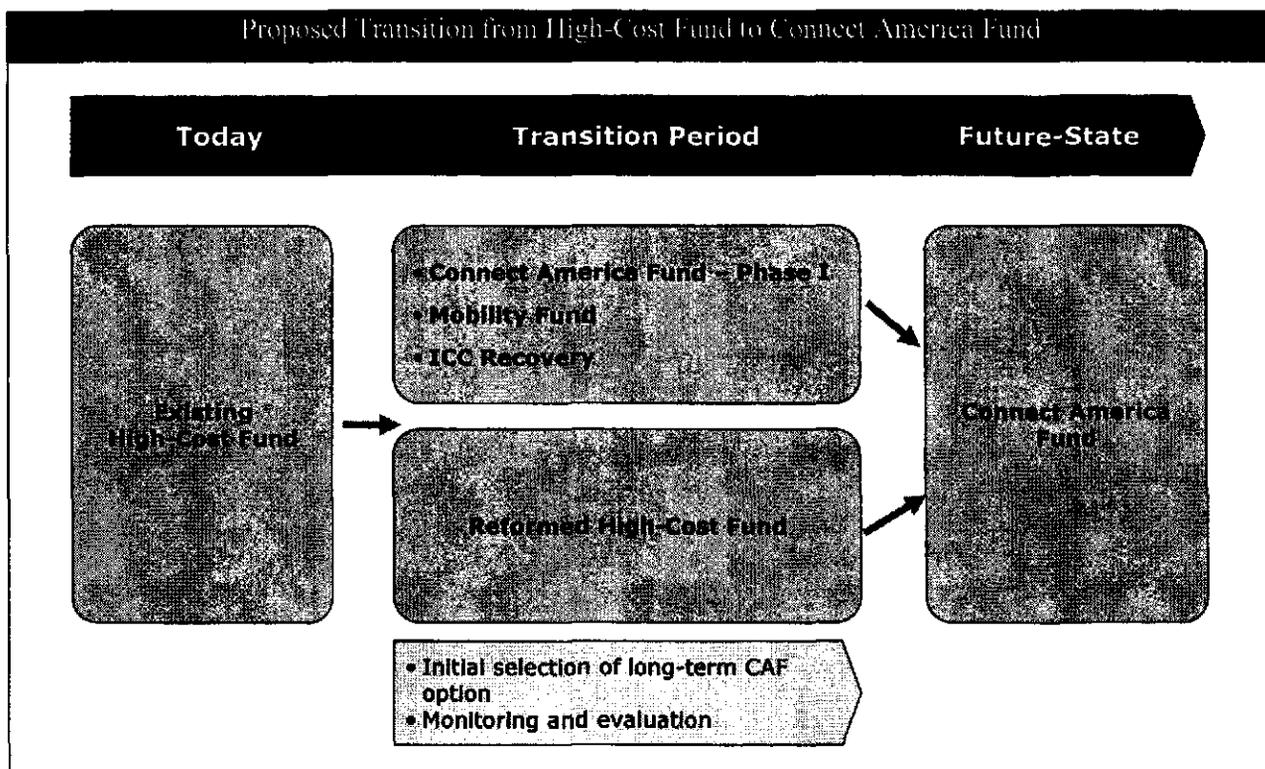


Figure 1

### 1. Immediate Reforms

19. In October 2010, we issued the *Mobility Fund NPRM*, which proposed a Mobility Fund intended to spur build out of advanced mobile wireless networks in areas not served by current-generation mobile networks. We now continue our reform efforts in this proceeding by proposing steps to spur broadband build out, whether fixed or mobile, in unserved areas, which exist in every state as well as the territories. We propose to do this by transitioning funds from less efficient uses to more efficient uses, include through the creation of the CAF. We also seek comment on other measures to reduce inefficiencies, extend broadband, and increase the accountability of companies receiving support.

20. In 2010, the high-cost fund disbursed \$4.3 billion through five separate mechanisms designed to support different kinds of costs and different types of carriers, as shown in Figure 2, below:

Existing High-Cost Fund (2010 Actual)  
(\$ amounts in millions)

	High-Cost Model Support	Interstate Access Support (capped)	High-Cost Loop Support (capped)	Local Switching Support	Interstate Common Line Support	Total
<b>Total Support</b>	\$310	\$545	\$1,379	\$359	\$1,675	\$4,268
<b>Incumbent Support</b>	\$157	\$458	\$1,024	\$276	\$1,141	\$3,055
<b>Competitive ETC Support (capped)</b>	\$153	\$88	\$355	\$83	\$533	\$1,213
<b>Who receives</b>	Large "non-rural" incumbents (Bell operating companies and mid-size telcos) and competitive ETCs operating in their territories	Large incumbents (price cap companies) and competitive ETCs operating in their territories	Small incumbents (mostly rate of return but some mid-size companies), and competitive ETCs operating in their territories	Small incumbents (mostly rate of return, but some price cap companies) and competitive ETCs operating in their territories	Small "rural" incumbents (rate of return companies and recent mid-size price cap converts) and competitive ETCs operating in their territories	
<b>What it supports</b>	Subsidizes intrastate loop, switching, and interoffice transport costs based on forward looking cost model	Interstate access revenue replacement targeted to UNE zones where carrier cannot recoup revenues through SLCs	Subsidizes intrastate loop costs based on embedded (actual) costs of the carrier	Helps cover fixed intrastate switching costs for operating companies with less than 50,000 lines	Interstate revenue recovery when SLC cap does not permit full recovery of common line revenues	

Source: USAC actual disbursements January – December 2010. Amounts shown reflect disbursements made on an accrual basis for all study areas for which USAC had line count information as of November 2011. Disbursements may include true-ups for earlier years, and disbursements for calendar year 2010 are subject to additional true-ups during future periods.

Note: Competitive ETC support is capped at approximately \$1.366 billion per year.<sup>22</sup>

Figure 2

21. In this proceeding, we propose the following reforms to be implemented beginning in 2012:

- Three components of the high-cost program primarily support smaller carriers regulated under "rate-of-return" rules:<sup>23</sup> high-cost loop support (HCLS), which provided \$1 billion for incumbents

<sup>22</sup> See Letter from Sharon Gillett, Chief, Wireline Competition Bureau, to Karen Majcher, USAC, WC Docket No. 05-337, DA 11-243 (dated Feb. 8, 2011) (Interim Cap Adjustment Letter). These estimates include amounts disbursed to Sprint and Verizon Wireless, which agreed in 2008 to phase out their competitive ETC support over five years as a condition of the approval of certain transactions. Last year, the Commission provided instructions for implementing the commitments of both Verizon Wireless and Sprint to surrender their high-cost universal service support, resulting in recapture of amounts previously disbursed in 2009. See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, WC Docket No. 05-337, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010) (*Corr Wireless Order*). Net of the support provided to Sprint and Verizon, the amount of competitive ETC support shown in the table would have been \$921 million.

<sup>23</sup> Rate-of-return regulation is a form of rate regulation in which a carrier's rates are set at levels to give the carrier an opportunity to recover its operating costs plus an authorized rate of return on the regulated rate base (plant in service minus accumulated depreciation).

in 2010; local switching support (LSS), which provided \$276 million for incumbents in 2010; and interstate common line support (ICLS), which provided \$1.1 billion for incumbents in 2010.<sup>24</sup> As currently structured, these funding mechanisms provide poor incentives for rate-of-return carriers to operate and invest efficiently. While individual carriers may act in the best interests of their own customers and communities, excessive spending by any one community limits opportunities for consumers in other communities and may not be in the best interests of the nation as a whole. HCLS, for example, creates incentives for companies to outspend their peers in order to receive more funding under the current capped formula. For all three programs, there are few, if any, benchmarks for determining whether network investment is justified or appropriate, allowing a company to spend millions of dollars to build a state-of-the-art network that may serve only a few customers. LSS was originally created to help small telephone companies that lack economies of scale to afford large switches, but since then the industry has moved to software-based routers and switches which can be more easily scaled to a company's size and even shared among companies. LSS now provides perverse incentives for companies *not* to realize efficiencies by combining service areas. We seek comment on a suite of reforms to these components, which will increase accountability and start rate-of-return carriers on the path towards market-driven, incentive-based regulation. Specifically, we seek comment on:

- Reducing the reimbursement rates for the current high-cost loop program, in order to distribute funding—which has been capped since the 1990s—in a more equitable manner among rural carriers. Today, high-cost loop support largely goes to companies that have accelerated network upgrades throughout their territory, leaving nothing available for other smaller companies that choose to upgrade their networks more incrementally.
  - Phasing out Local Switching Support or, alternatively, combining LSS and HCLS into a single, more efficient mechanism to support network costs. Larger holding companies are able to exploit the current LSS rules to gain additional support for switching costs, increasing the burden on American consumers who support the Fund.
  - Setting reasonable guidelines for reimbursements for capital and operating expenses based on benchmarks developed from investments made by comparable companies. Today, there are few controls on such reimbursements, leaving companies with broad discretion to control how much public money they get and how they use it.
  - Limiting the total support per line any one carrier in the continental United States can receive, absent exceptional circumstances. While we recognize that USF provides support to the hardest-to-serve areas, which may be very costly to serve, it is not clear that all of the amounts provided today are necessary to provide reliable service. We propose a process in which companies operating in the continental United States receiving in excess of \$250 per month per line would have to justify higher amounts of support.
  - Streamlining the study area waiver process to eliminate barriers to consolidation and rationalization of service territories.
  - Modifying rules that limit support when acquiring lines from another provider in situations where the acquired lines are substantially unserved by broadband (the “parent trap rule”), in order to provide greater incentives to upgrade those facilities.
- We propose to phase out Interstate Access Support (IAS) over a period of a few years. In 2010, IAS totaled \$545 million. Originally created in 2000 as an interim part of a five-year transitional reform plan, IAS has long outlived its intended lifespan. The comments received in response to the *USF Reform NOI/NPRM* suggest that this fund is not critical to ensuring rural voice service,

<sup>24</sup> Some of the larger, price cap carriers, however, do receive some HCLS, LSS, and ICLS. For instance, mid-size companies that recently converted from rate-of-return to price cap regulation receive ICLS that is frozen on a per-line basis.

and we believe the funds could be more productively used to support the deployment of broadband to unserved areas.

- In addition, we propose to eliminate the “identical support” rule and to rationalize funding for competitive Eligible Telecommunications Carriers (ETCs) over a several-year period. In 2010, non-IAS competitive ETC funding totaled \$1.1 billion. Under the Commission’s identical support rule, competitive ETCs (mostly wireless carriers) receive this support, subject to an interim cap, regardless of actual costs or needs, as a per-line, dollar-for-dollar match with the incumbent wireline carrier support per line in the same area. As a result, the funding is poorly targeted—in some areas, as many as four or more providers are receiving redundant ETC funding, while other areas lack even a single provider of broadband or mobile voice. Two of the largest ETCs have voluntarily agreed to relinquish their ETC support in the context of transactions, and the *USF Reform NOI/NPRM* record supports the conclusion that current levels of competitive ETC support are unnecessary to ensure fixed or mobile voice service in many areas of the country that receive support today.

At the same time, we recognize the importance of mobile voice and mobile broadband coverage in all areas of the country and seek comment on how to balance the desire for universal mobile coverage with other USF priorities. Our proposal in the Mobility Fund proceeding was intended to provide a one-time infusion to expand mobile coverage.<sup>25</sup> We seek comment here on how best to factor the need for mobility into the reforms proposed in this proceeding to achieve our universal service objectives.

22. Taken together, the proposed changes to the high-cost program will enable significant funds to be used to support fixed and mobile broadband, as discussed below, and potentially a recovery mechanism associated with ICC reform, where necessary, as summarized below.

23. We seek comment on the appropriate size of these programs. We propose that, together with remaining high-cost support, total disbursements remain no greater than the high-cost program would be under current rules. We seek comment, however, on whether total disbursements should be lower in the future to minimize the burden on consumers. In light of the high costs that would be required to ensure ubiquitous mobile coverage and very-high-speed broadband for every American and the length of the transition to the proposed Connect America Fund, we also seek comment on whether additional investments in universal service may be needed to accelerate network deployment.

24. To spur immediate new broadband investment through the CAF, we propose to conduct a competitive bidding process (also known as a reverse auction or a procurement auction) in which providers seeking a one-time infusion of support to build out and operate broadband networks in unserved areas across the country compete against one another by bidding for the lowest amount of support they would require to provide service to unserved housing units. Specifically, using the forthcoming National Broadband Map to identify areas that currently lack broadband, we propose to award a significant amount of funding, such as \$500 million to more than \$1 billion, through a technology-neutral reverse auction in 2012, with additional auctions potentially to follow. Recipients – which could be either fixed (wireline or wireless) or mobile wireless providers – will be subject to enforceable requirements to deploy broadband to the unserved areas (defined as census blocks or aggregations of census blocks) identified in their bid within a specified time period, such as three years, and provide service for a defined period of years after deployment is complete. They will be permitted to subcontract with other providers, including satellite broadband providers, to fulfill their service obligations in particularly difficult to reach portions of their proposed service areas. We seek comment on whether the broadband service obligation should be defined as a minimum of 4 megabits per second (Mbps) downstream and 1 Mbps upstream, or whether we should use other metrics.

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<sup>25</sup> See *Universal Service Reform, Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14716 (2010) (*Mobility Fund NPRM*).

25. If the auction winner is not the existing incumbent recipient of USF in the area during this interim transition period, that incumbent carrier of last resort would continue to receive its existing support, subject to the other reforms proposed in this Notice. If the auction winner is the existing provider, the new funding would supplement its existing support, subject to the other reforms proposed in this Notice. This use of a market-driven process to award support will spur high-impact broadband deployment and give the Commission and the private sector experience with a mechanism for providing consumers access to high-quality network infrastructure in an efficient manner.

26. To further promote deployment of broadband, we also seek comment on what broadband service obligations, based on section 254 of the Act, should apply to recipients of CAF support under the competitive bidding process described above, as well as whether any such obligations should apply to recipients of the reformed high-cost fund. We seek comment on how to ensure that service in rural areas is available at rates that are reasonably comparable to rates in urban areas. In addition, we propose to clarify that voice service can be provided by any technology, including VoIP, so that USF can be used directly to support modern IP-based networks.

27. Finally, we propose a variety of measures to increase accountability and better track performance of the Fund as a whole. Specifically:

- We propose to adopt performance goals and measures for the Fund as a tool to monitor how it is advancing the statutory goals set forth in section 254.
- We propose to adjust reporting requirements for Fund recipients, including requiring submission of certain financial information regarding operations, to enable the Commission to ensure that funds are being used efficiently and effectively. We seek comment on obtaining pricing data to ensure that services in rural areas are available at rates that are affordable and reasonably comparable to urban areas.
- We propose to revise our certification and audit processes to reflect updated public interest obligations for all Fund recipients, such as the requirement to deploy broadband networks.

28. In addition to substantially increasing Americans' access to broadband and eliminating wasteful or inefficient spending, our proposed reforms will move USF and the companies that rely on it along the road to the future state of reform. They will also provide the Commission and industry valuable experience with market-based mechanisms for allocating support, while improving the Commission's data on the functioning of USF. Finally, these reforms will introduce elements of incentive-based regulation to rate-of-return carriers.

29. To reduce uncertainty and help companies reliant on USF and ICC plan and invest for the future, we also propose several options for long-term CAF funding mechanisms, as described below. We seek comment on these options and may select the path for long-term reform at the same time we adopt the immediate reforms just described. But we propose to monitor the outcomes that result from these immediate reforms on an ongoing basis and evaluate them comprehensively beginning no later than three years after adoption of an order implementing initial reforms, to determine what course corrections may be needed at that time along the path to long-term reform.

## **2. Long-Term Vision**

30. In the second stage of our comprehensive universal service reform, we propose to transition all remaining high-cost programs to the CAF. The CAF would provide ongoing support to maintain and advance broadband across the country in areas that are uneconomic to serve absent such support, with voice service ultimately provided as an application over broadband networks.

31. We seek comment on longer-term options for providing sufficient, but not excessive support for service to be provided in rural areas at rates that are affordable and reasonably comparable to rates in urban areas. Under one option, the Commission would award all ongoing support through a competitive, technology-neutral bidding mechanism (including using technology-neutral geographic areas). Under a second option, in each part of the country requiring ongoing universal service support,

the Commission would offer the current voice carrier of last resort (likely an incumbent telephone company) a right of first refusal to serve the area as the broadband provider of last resort for an ongoing amount of annual support based on a cost model. If the provider refuses this offer, the Commission would hold a competitive, technology-neutral process to select a provider to serve the area and take on all service obligations, a process in which the current voice carrier of last resort could participate. Under either approach, we propose that all ongoing support for carriers operating in high-cost areas would come from the CAF. This funding would replace all other explicit support as well as all implicit subsidies from ICC, as described in the next section.

32. In the alternative, we seek comment on limiting right-of-first refusal or auction-based support to a subset of geographic areas, such as those served by price cap companies, while continuing to provide ongoing support based on reasonable actual investment to smaller, rate-of-return companies. Should we take this approach to the CAF, we seek comment on possible changes to the current rate-of-return system beyond those discussed in the previous section, including capping and shifting interstate common line support to an incentive regulation framework that would establish support amounts periodically (such as every five years) to generate an appropriate forward-looking return for an efficient carrier for the investments at issue, implementing a more rigorous process to examine whether investment is used and useful, and re-examining the current 11.25 percent interstate rate of return.

33. Building on the interim reforms laid out in the previous section, we believe each of these proposals for long-term reform provides a possible path to complete the transformation of the existing high-cost fund into an accountable, fiscally responsible, market-driven and incentive-based system focused on the nation's broadband challenge.

#### **B. Intercarrier Compensation**

34. We propose to take action in the near term to reduce inefficiency and waste in the intercarrier compensation system while providing a framework for long-term reform. This long-term reform would gradually phase out the current per-minute ICC system and implement a recovery mechanism (based on costs and/or revenues), which could enable some carriers to receive additional explicit support from the CAF. Figure 3 below illustrates the proposed transition.

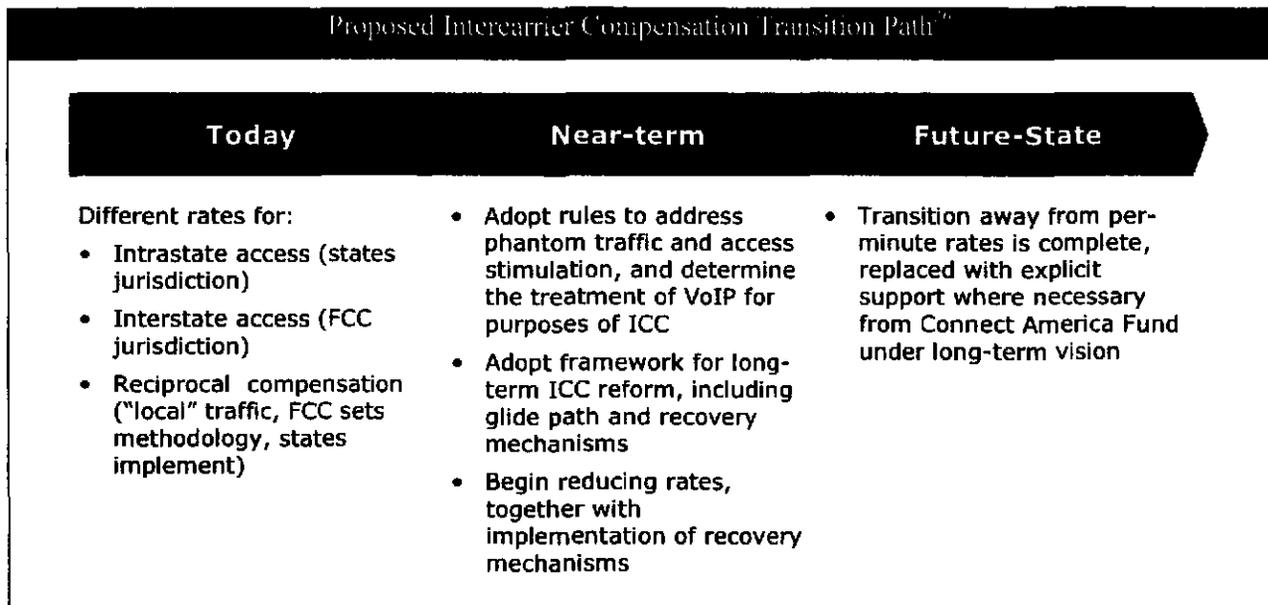


Figure 3

### 1. Immediate Reforms

35. In the near term, we propose several reforms to reduce wasteful arbitrage and increase certainty in ICC payments during the transition away from the per-minute system. The record indicates that arbitrage schemes cost hundreds of millions of dollars each year and that regulatory uncertainty about whether or what ICC payments are required for VoIP traffic is hindering investment in IP-based products and services.

36. We propose to amend our interstate access rules to address access stimulation—arrangements in which carriers, often competitive carriers, profit from revenue-sharing agreements by operating in an area where the incumbent carrier has a relatively high per-minute interstate access rate. Under our existing rules, the competitive carrier benchmarks its rate to that of the incumbent rural carrier, but the revenue-sharing arrangement results in a volume of traffic that is more consistent with a larger carrier. A competitive carrier could, for example, generate millions of dollars in revenues each month from other carriers simply by entering into a revenue sharing arrangement with a company that operates a chat line. A rate-of-return carrier can likewise use our rules to take advantage of revenue sharing by setting a rate based, for example, on historical demand and then entering into an arrangement that inflates demand without adjusting its tariff to reflect a rate appropriate for such demand. We propose that carriers that have entered a revenue-sharing arrangement be required to refile their interstate switched access tariffs to reflect a low rate consistent with their volume of traffic. For rate-of-return incumbent local exchange carriers (LECs), the rate would be adjusted to account for new demand. For competitive carriers, that rate would be benchmarked to that of a large incumbent local exchange carrier (LEC) in the

<sup>26</sup> Today, there are three major forms of intercarrier compensation: interstate access charges, intrastate access charges, and reciprocal compensation. Access charges apply to long distance calls. The Commission regulates rates for interstate calls and states regulate rates for intrastate calls. Reciprocal compensation today primarily governs "local" calls, and rates are either negotiated by carriers or set by states using the Commission's pricing methodology. Intrastate access rates are generally higher than interstate rates, and both are generally higher than reciprocal compensation rates, although large variations exist within each category.

state, rather than to that of the local rate-of-return carrier. We also seek comment on alternative approaches.

37. We propose to amend our call signaling rules to address “phantom traffic” by ensuring that calls received by the terminating provider include sufficient signaling information for that provider to identify and bill the appropriate provider. Phantom traffic today causes carriers to devote substantial resources to resolving billing disputes that could be used to invest or innovate. One provider, for example, estimates that 5-8 percent of all traffic terminating on its network is “phantom” or disguised traffic. Rules requiring the inclusion of appropriate signaling information would apply to all voice traffic, including interconnected VoIP, but the rules would be flexible enough to adapt to a variety of technical standards and accommodate their evolution. We also make clear that applying the signaling rules to interconnected VoIP does not prejudice the determination of any intercarrier payment obligation for interconnected VoIP calls.

38. We propose to determine the obligations for interconnected VoIP traffic under the ICC framework, and we seek comment on the appropriate intercarrier compensation regime. We seek comment on payment obligations for VoIP ranging from adopting a bill-and-keep methodology for VoIP, to applying a VoIP-specific ICC rate, to requiring VoIP calls to pay all existing ICC charges. We also seek comment on the implications for existing commercial arrangements that may address compensation for VoIP traffic.

39. By reducing inefficient use of resources and expenditures on disputes and litigation, we believe these proposals will allow companies to begin directing increased capital resources toward investment and innovation that ultimately benefits consumers.

## 2. Comprehensive Reform

40. At the same time, we propose to adopt a sustainable long-term framework to gradually reduce all per-minute charges. Per-minute charges are inconsistent with peering and transport arrangements for IP networks, where traffic is not measured in minutes. The record suggests that the current ICC system is impeding the transition to all-IP networks and distorting carriers’ incentives to invest in new, efficient IP equipment. Moreover, although the short-term measures we propose will address the most common forms of arbitrage today, wasteful attempts to game the system will likely persist as long as ICC rates remain disparate and well above carriers’ incremental costs of terminating a call.

41. Because the ICC system has not been reformed to reflect fundamental shifts in technology and competition in the last two decades, the current system results in considerable instability for carriers as revenues are declining at often unpredictable rates. Declining minutes for incumbent carriers have led to a concurrent decline in revenues, particularly for price cap carriers. By providing a more certain glide path for the transition to an all-IP future, intercarrier compensation reform will bring much needed predictability to the industry and investors, which will ultimately benefit consumers.

42. We seek comment on several aspects of our proposed reduction of ICC rates. In particular:

- *Federal/State Role:* We seek comment on two possible overall approaches for working with states to reform intercarrier compensation. The first approach relies on the Commission and states to act within their existing roles in regulating intercarrier compensation, such that states would remain responsible for reforming intrastate access charges. Under a possible variation, states would remain responsible for reforming wireline intrastate charges, but we also seek comment on whether we should set a glide path to reform wireless termination charges, possibly including intrastate access charges paid by or to wireless providers. The second approach relies on the Commission using the tools provided by sections 251 and 252 in the 1996 Act to unify all intercarrier rates, including those for intrastate calls, under the reciprocal compensation framework. Under this framework, the Commission would establish a methodology, which states would then work with the Commission to implement.

- *Sequencing.* We seek comment on the sequencing of ICC rate reductions and how the sequencing options relate to the roles of the states and the Commission. Interstate and intrastate access charges could change concurrently, particularly if the Commission and the states each act within their existing roles; alternatively, reforms could proceed sequentially, for example beginning with reductions in intrastate access charges to interstate levels, followed by a reduction of all ICC rates. We seek comment on these possibilities as well as the timing to reduce reciprocal compensation rates and wireless termination charges.
- *Timing.* We also seek comment on the appropriate timing of the overall transition and propose to complete the transition away from per-minute rates consistent with the implementation of long-term CAF support, so that all subsidies necessary to serve an area are explicit as part of whichever long-term CAF funding mechanism is adopted. We seek comment on the glide path to this end point.

43. As ICC rates decrease, we propose to adopt a mechanism for recovery, where necessary, which may include explicit universal service support and reasonable end-user charges. In so doing, we recognize that ICC revenues today remain an implicit subsidy for certain carriers, and we seek comment on how to structure the recovery mechanism to provide certainty and predictability during the transition. We also seek comment on how to structure this mechanism consistent with limiting burdens on consumers and constraining the size of the CAF.

44. By modernizing our policies for a broadband world and reducing the underlying incentives for wasteful arbitrage, we believe these reforms will promote investment in IP facilities and free up valuable resources, provide certainty and ultimately encourage new broadband investment and innovation.

### III. ROLE OF INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE PROGRAMS

45. Intercarrier compensation and universal service have long been intertwined. Historically, both universal service policies and intercarrier compensation policies worked in tandem to enable companies to provide affordable local phone service to residential consumers – which in some areas of the country requires recovery of network costs from sources other than those residential end-user customers.

46. *Pre-AT&T Divestiture.* A primary policy objective of regulators during the 20th century was to promote universal service through affordable local telephone rates for residential customers. To accomplish this objective, regulators created a patchwork of implicit subsidies. Thus, for example, regulators permitted higher rates to business customers so that residential rates could be lower, and they frequently required similar rates for urban and rural customers, even though the cost of serving rural customers was higher.<sup>27</sup> Similarly, AT&T<sup>28</sup> was permitted to charge artificially high long-distance toll rates, and then shared a portion of these interstate revenues with independent telephone companies and AT&T's Bell Operating Companies (BOCs).<sup>29</sup> These high long-distance rates enabled regulators to promote universal service through lower residential rates for the BOCs and independent local telephone companies.

<sup>27</sup> See, e.g., Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age 10–15* (2007) (Digital Crossroads).

<sup>28</sup> See AT&T, *A Brief History: Origins*, <http://www.corp.att.com/history/history1.html> (last visited Feb. 9, 2011).

<sup>29</sup> The sharing of revenues was known as the “settlements” process and was a major source of support for small rural companies, in some cases representing as much as 85% of certain costs allocated to the interstate jurisdiction. See Gerald W. Brock, *The Second Information Revolution 188* (2003).

47. *Access Charges and Universal Service.* Following the divestiture of AT&T,<sup>30</sup> the Commission created access charges to provide intercarrier payments from long distance companies to local companies.<sup>31</sup> In conjunction with access charges, the Commission introduced flat-rated, per-line monthly charges for end users, known as the subscriber line charge or SLC, to enable carriers to recover some of the costs of their network.<sup>32</sup>

48. Access charges require a long distance carrier to pay both the originating local carrier and the terminating local carrier a per-minute rate to originate and terminate the call (e.g., when a consumer in Philadelphia places a call to Miami, the consumer's long distance carrier pays access charges to both the originating carrier in Philadelphia and the terminating carrier in Miami).<sup>33</sup> The access charge rules enabled local carriers to recover their historical costs, including common network costs and overhead,<sup>34</sup> from long distance carriers. These intercarrier payments were one means by which local telephone companies were able to keep residential rates low by recovering some of their network costs from other carriers rather than the telephone companies' own customers.<sup>35</sup>

49. Also in the 1980s, the Commission created what was then known as the Universal Service Fund, or high-cost assistance fund, using its Title I authority to promote and preserve universal service.<sup>36</sup> Historically, through the separations process, incumbent telephone companies have been required to separate their costs and revenues between the intrastate and interstate jurisdictions.<sup>37</sup> The Universal Service Fund effectively shifted cost recovery for a portion of loop costs from the intrastate jurisdiction to the interstate jurisdiction. In addition, the Commission provided support for switching costs for smaller carriers, enabling those companies to assign a greater portion of local switching costs from the intrastate jurisdiction to the interstate jurisdiction. And, in the early 1990s, the Commission began moving away from traditional rate-of-return regulation of the interstate switched and special access rates—of the Bell Operating Companies and GTE, moving to a form of incentive regulation, known as

<sup>30</sup> In 1974, the Department of Justice filed an antitrust lawsuit against AT&T, which ultimately led to AT&T's divestiture under the Modification of Final Judgment (MFJ). See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The 1982 consent decree, as entered by the court, was called the Modification of Final Judgment because it modified a 1956 Final Judgment against AT&T stemming from a 1949 antitrust lawsuit.

<sup>31</sup> *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 683, para. 2 (1983).

<sup>32</sup> The Commission initially limited the SLC to \$1.00. See *1983 Access Charge Order*, 93 FCC 2d at 253, para. 35; see also *id.* at 243, para. 4. The Commission also permitted the remaining interstate loop costs to be recovered through a per-minute charge, known as the carrier common line charge, imposed on long distance carriers. See *Access Charge Reform Order*, 12 FCC Rcd at 15992, para. 24. Under the current Commission rules, SLCs are subject to caps based on whether the line is: (a) a primary residential or single-line business line; (b) a non-primary residential line; or (c) a multi-line business or Centrex line. For price cap and rate-of-return carriers, the current SLC cap for residential and single-line business lines is \$6.50, 47 C.F.R. §§ 69.104(n)(1)(ii)(C); 69.152(d)(1)(ii)(D0, and the current SLC cap for multi-line business and Centrex lines is \$9.20, 47 C.F.R. §§ 69.104(o)(1)(i); 69.152(k)(1)(i). Price cap carriers currently also have a SLC cap of \$7.00 for non-primary residential lines, 47 C.F.R. § 69.152(e)(1)(i).

<sup>33</sup> The Commission regulates the rates for interstate access charges (paid on long distance calls that cross state lines), and states regulate the rates for intrastate access charges (paid on long distance calls within a state).

<sup>34</sup> See 47 C.F.R. §§ 69.301–502; see also *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6787, para. 1 (1990) (*LEC Price Cap Order*). The rate-of-return regulations are set forth in Part 69 of our rules. See generally 47 C.F.R. §§ 69.1–701.

<sup>35</sup> See, e.g., *Digital Crossroads* 10–15.

<sup>36</sup> 47 U.S.C. §§ 151, 152(a), 154(i).

<sup>37</sup> See, e.g., 47 C.F.R. Part 36. In the 1980's, the Commission adopted a rule allocating a fixed amount—25%—of loop cost to the interstate jurisdiction. See 47 C.F.R. § 36.154(c).

price caps, that was designed to replicate some of the efficiency incentives found in competitive markets.<sup>38</sup>

50. *Telecommunications Act of 1996-Today.* In the Telecommunications Act of 1996, Congress enacted section 254, which provides that consumers in all regions of the nation, including rural, insular, and high-cost areas, should have access to telecommunications and information services at rates that are “reasonably comparable” to those services and charges provided in urban areas.<sup>39</sup> This codified the Commission’s long-standing universal service policy and led to changes in the high-cost fund that existed at the time. In particular, section 254(b) directs, among other things, that there should be “specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service,” and access to advanced telecommunications and information services should be provided in all regions of the nation.<sup>40</sup>

51. The Commission initially implemented the provisions of section 254 in 1997, and preserved the universal service programs that pre-dated the 1996 Act, while concluding that the level of universal service support should be determined based on forward-looking economic costs. The Commission subsequently developed a forward-looking cost model to determine support amounts for the provision of voice service by the largest incumbent telephone companies, primarily the Bell Operating Companies. These carriers continue to receive support determined by this model today.

52. Smaller incumbent carriers operating under rate-of-return regulation at the federal level continued to receive universal service support based on their historical costs, rather than the forward-looking cost model. In 2001, the Commission adopted a five-year plan to maintain the existing high-cost loop support program, with some modifications, for the more than 1,000 smaller carriers that operate in rural areas.<sup>41</sup> In that order, the Commission also adopted what has become known as the “no barriers to advanced services” policy, which permits rate-of-return carriers to upgrade their facilities to modern networks, and continue to receive support based on their historical investment (actual or an average derived from other small companies).<sup>42</sup> This no-barriers policy, coupled with the decision to retain support based on historical costs, has allowed smaller companies to largely finance network upgrades to provide high speed Internet access and, increasingly, video services, in many communities.

53. With respect to intercarrier compensation, the 1996 Act did not displace the existing access charge system,<sup>43</sup> but did introduce another mechanism, known as “reciprocal compensation,” through which local carriers compensate each other for the exchange of traffic. In particular, section 251(b)(5) of the 1996 Act imposed on all LECs a “duty to establish reciprocal compensation

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<sup>38</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20, paras. 257-79 (1990).

<sup>39</sup> 47 U.S.C. § 254(b)(3).

<sup>40</sup> 47 U.S.C. § 251(b)(5).

<sup>41</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 (2001) (*Rural Task Force Order*). Although the Commission originally intended that the rules adopted in the *Rural Task Force Order* would remain in place for five years, in 2006 the Commission extended those rules until such time that it “adopts new high-cost support rules for rural carriers.” *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *High-Cost Universal Service Support*, WC Docket No. 05-337, Order, 21 FCC Rcd 5514, 5515, para. 2 (2006).

<sup>42</sup> *Rural Task Force Order*, 16 FCC Rcd at 11322, para. 199 (“[O]ur universal service policies should not inadvertently create barriers to the provision of access to advanced services.”).

<sup>43</sup> 47 U.S.C. § 251(g).

arrangements for the transport and termination of telecommunications.”<sup>44</sup> For example, reciprocal compensation would apply to calls that begin and end within the same local calling area, such as when a customer of one local telephone company makes a call to a customer of a different local telephone company in the same calling area. As a result, a provider delivering a call to a local carrier pays a different per-minute rate based on whether the call originated across state lines (interstate access, regulated by the Commission), within the state (intrastate access, governed by state law and typically higher than interstate rates), or within the local calling area (reciprocal compensation, rates which are either negotiated by the parties, or set by states using a Commission methodology).

54. Since 1996, the Commission has made incremental efforts to modify the intercarrier compensation regime to reflect technological and marketplace changes in the telecommunications network, but the last intercarrier compensation reform occurred a decade ago in the 2000 *CALLS Order* and 2001 *MAG Order*, when the Commission reduced certain interstate access charges for the larger, price cap carriers and rate-of-return carriers respectively. Both orders permitted local carriers to offset the interstate access rate reductions through an increase in SLCs and also created two new offsetting funding vehicles within the universal service fund: Interstate Access Support for price cap carriers,<sup>45</sup> and Interstate Common Line Support for rate-of-return carriers.<sup>46</sup> Although the high-cost program increased in size as a result of the creation of these programs, consumers also typically saw reductions in their long distance phone bills during this time period.<sup>47</sup> Similarly, a handful of states have taken steps to reduce intrastate access rates and realign local residential rates with costs,<sup>48</sup> but the majority of states have not comprehensively reformed intrastate access charges, and continue to maintain intrastate access charges

<sup>44</sup> 47 U.S.C. § 251(b)(5).

<sup>45</sup> See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, 13046-49, paras. 201-05 (2000) (*CALLS Order*) (establishing a “\$650 million interstate access universal service support mechanism”), *aff’d in part, rev’d in part, and remanded in part, Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001) (subsequent history omitted) (*TOPUC*). The price cap companies included the Bell Operating Companies, as well as some of the operating companies of the mid-size incumbent telephone companies.

<sup>46</sup> *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket Nos. 96-45, 98-77, 98-166, 00-256, Second Report and Order and Further Notice of Proposed Rulemaking Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, at 19617, para. 3 (2001) (*MAG Order*). The rate-of-return carriers included many smaller companies and cooperatives that typically have fewer than 10,000 access lines in a study area.

<sup>47</sup> See Industry Analysis and Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, at Chart 2 (Consumer Price Indices for Toll Service Since 1984) (2008) (2008 Reference Book of Rates).

<sup>48</sup> See, e.g., *BA-WV’s Intrastate Access Charges*, Case No. 00-0318-T-GI, Commission Order, 2001 WL 935643 (West Virginia PSC June 1, 2001) (ordering that “the traffic-sensitive intrastate access charges of Verizon-WV shall be modified to mirror the interstate rate structure and rate elements”); *Tariff Filing of BellSouth Telecommunications, Inc to Mirror Interstate Rates*, Case No. 98-065, Order (Kentucky PSC Mar. 31, 1999) (requiring BellSouth “to eliminate the state-specific Non-Traffic Sensitive Revenue Requirement . . . , thus moving its aggregate intrastate switched access rate to the FCC’s ‘CALLS’ interstate rate”); *Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Order, 2007 WL 3023991 (Ohio PUC Oct. 17, 2007) (“[T]his Commission requires ILECs to mirror their interstate switched access rate on the intrastate side . . .”). See also Letter from Brian J. Benison, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket No. 05-337; GN Docket No. 09-51, Attachs. 1 & 2 (filed Oct. 25, 2010) (AT&T Oct. 25, 2010 *Ex Parte* Letter) (describing access reforms in various states).

that far exceed interstate charges, with some intrastate access charges in excess of 13 cents per minute.<sup>49</sup> These high intrastate intercarrier rates have enabled local residential rates to remain artificially low in some areas, such as \$8 or less.<sup>50</sup>

#### IV. LEGAL AUTHORITY TO SUPPORT BROADBAND

55. In this section, we propose to adopt a new principle for universal service policies, recently recommended by the Federal-State Joint Board on Universal Service (Joint Board), “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”<sup>51</sup> We then discuss a threshold legal issue: the Commission’s authority to provide universal service support for broadband under both the current high-cost program and the CAF. We believe we have the necessary authority, and we seek comment on this analysis.

56. Section 254 of the Act governs administration of universal service programs. Section 254(b) requires the Commission to “base policies for the preservation and advancement of universal service” on six enumerated principles.<sup>52</sup> Two key principles provide that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation,”<sup>53</sup> and that “[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, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas.”<sup>54</sup> In section 706 of the Telecommunications Act of 1996,<sup>55</sup> Congress likewise directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>56</sup> Section 254(b) further provides that “[q]uality services should be available at just, reasonable, and affordable rates,”<sup>57</sup> and that universal service

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<sup>49</sup> See, e.g., Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, Attach. (filed Dec. 29, 2010) (NECA Dec. 29, 2010 *Ex Parte* Letter);

<sup>50</sup> See, e.g., AT&T Oct. 25, 2010 *Ex Parte* Letter, Attach. 3 (showing the range of incumbent LEC residential local rates); Comments of The Oregon Telecommunications Association and The Washington Independent Telecommunications Association, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51 (filed July 12, 2010), Table 5 (showing local rates for independent telephone companies in the states of Washington and Oregon that are both above and below the nationwide average local rate of \$15.62).

<sup>51</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, Recommended Decision, 25 FCC Rcd 15598, 15625, para. 75 (Joint Board 2010) (*Joint Board 2010 Recommended Decision*).

<sup>52</sup> 47 U.S.C. § 254(b)(1)-(6).

<sup>53</sup> *Id.* § 254(b)(2).

<sup>54</sup> *Id.* § 254(b)(3).

<sup>55</sup> Pub. L. No. 104-104, 110 Stat. 56, § 706, *codified at* 47 U.S.C. § 1302.

<sup>56</sup> 47 U.S.C. § 1302(a). Section 706 defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability.” *Id.* § 1302(d)(1); see also *National Broadband Plan for our Future*, Notice of Inquiry, 24 FCC Rcd 4342, 4309, App. para. 13 (2009) (“advanced telecommunications capability” includes broadband Internet access); *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2400, para. 1 (1999) (Section 706 addresses “the deployment of broadband capability”), 2406, para. 20 (same). Although the Communications Act does not define “advanced telecommunications and information services,” the Commission has observed that the phrase is similar to the term “advanced telecommunications capability” in Section 706. See *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Order, 21 FCC Rcd 11111, 11113 n.9 (2006).

<sup>57</sup> 47 U.S.C. § 254(b)(1).

mechanisms “should be specific [and] predictable.”<sup>58</sup> Section 254(b) is not merely aspirational—it directs that universal service “shall” be based on these principles. “This language indicates a mandatory duty on the FCC,”<sup>59</sup> and reflects “congressional intent to delegate difficult policy choices to the Commission’s discretion.”<sup>60</sup> We may balance these principles to achieve statutory objectives, but may not depart from them altogether to achieve some other goal.<sup>61</sup>

57. Section 254(c) defines “universal service” as “an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”<sup>62</sup> The Joint Board may “recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms,”<sup>63</sup> and has recommended that broadband “should be eligible for support under Section 254.”<sup>64</sup> Section 254(e) provides that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support,”<sup>65</sup> and also states that universal service support “should be explicit and sufficient.”<sup>66</sup> Section 254 provides no particular methodology for determining the amount of universal service support or for distributing support.

#### A. Additional Section 254(b) Principle

58. In November 2010, the Joint Board recommended adoption of a principle “that universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”<sup>67</sup> The Joint Board found that “[s]uch a principle is consistent with section 254(b)(3) of the Communications Act” and would serve the public interest.

59. We believe this principle strikes a reasonable balance between the goal of preserving and advancing universal service as currently supported and the goal of increasing access to advanced telecommunications and information services, and that it provides a beneficial clarification of federal universal service objectives. We propose to adopt this principle pursuant to section 254(b)(7), and seek comment on that proposal. If we adopt the proposed principle, how should we apply it with respect to the other criteria in section 254?

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<sup>58</sup> *Id.* § 254(b)(5).

<sup>59</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10<sup>th</sup> Cir. 2001) (*Qwest I*).

<sup>60</sup> *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5<sup>th</sup> Cir. 2000) (*Alenco*).

<sup>61</sup> *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009) (*Rural Cellular*); *Qwest I*, 258 F.3d at 1199-1200.

<sup>62</sup> 47 U.S.C. § 254(c)(1).

<sup>63</sup> *Id.* § 254(c)(2).

<sup>64</sup> *High-Cost Universal Service*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477, 20492, para. 62 (Joint Board 2007) (*Joint Board 2007 Recommended Decision*).

<sup>65</sup> 47 U.S.C. § 254(e); see also *id.* § 214(e)(1) (“a common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254”). Section 214(e) governs designation of ETCs. *Id.* § 214(e)(2)-(3), (6).

<sup>66</sup> *Id.* § 254(e).

<sup>67</sup> *Joint Board 2010 Recommended Decision*, 25 FCC Rcd at 15625, para. 75.

## B. Commission Authority to Support Broadband

60. We have express statutory authority to extend universal service support to broadband services that providers offer as telecommunications services.<sup>68</sup> For the reasons set forth below, we believe we also have authority to extend universal service support to broadband services offered as information services under section 254, section 706 and/or our ancillary authority.<sup>69</sup> In any event, we believe we have clear authority to condition awards of universal service support on a recipient's commitment to offer broadband service. We seek comment on these issues, as well as any other approaches that would buttress our legal authority, including use of our section 10 forbearance authority.

### 1. Section 254

61. Some have suggested that section 254 is ambiguous regarding the Commission's authority to support broadband service, but that read as a whole, it may reasonably be interpreted to authorize such support.<sup>70</sup> Section 254(b) requires the Commission to promote access to "advanced telecommunications and information services," which requires supporting broadband networks.<sup>71</sup> Although section 254(c)(1) defines "universal service" as "an evolving level of telecommunications services," Congress expressly contemplated that the definition will evolve over time based on "advances in telecommunications and information technologies and services."<sup>72</sup> Section 254(c)(2), which authorizes the Joint Board to "recommend to the Commission modifications in the definition of the services that are supported,"<sup>73</sup> does not explicitly limit the Joint Board to telecommunications services. The Joint Board in 2007 recommended that broadband be eligible for support, and in 2010 recommended that we adopt a new principle that universal service support be "directed where possible to networks that provide advanced services as well as voice services."<sup>74</sup>

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<sup>68</sup> *Id.* § 254(c) (defining universal service as an evolving level of telecommunications services); see also *Wireline Broadband Order*, 20 FCC Rcd at 14899-903, paras. 86-95. More than 800 incumbent local telephone companies offer broadband transmission as a telecommunications service. See Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies, GN Docket No. 09-51, at 30-31 (June 8, 2009).

<sup>69</sup> See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 978 (2005). An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

<sup>70</sup> See Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109, attachment at 1-5 (Jan. 29, 2010) (*AT&T USF White Paper*); Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-137, WC Docket Nos. 05-337, 03-109, at 3 (April 12, 2010) (*AT&T USF/Comcast Letter*).

<sup>71</sup> *AT&T USF White Paper* at 3.

<sup>72</sup> *Id.*; 47 U.S.C. § 254(c)(1) (emphasis added).

<sup>73</sup> *Id.* § 254(c)(2) (emphasis added).

<sup>74</sup> *Joint Board 2007 Recommended Decision*, 22 FCC Rcd at 20492, para. 62; *Joint Board 2010 Recommended Decision*, 25 FCC Rcd at 15625, para. 75; *AT&T USF White Paper* at 3-4; see also *supra* note 64 and accompanying text.

62. We seek comment on this analysis. Could we provide support to information service providers consistent with section 254(e), which states that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support,”<sup>75</sup> and 214(e), which sets forth the framework for designating “telecommunications carrier[s] . . . eligible to receive universal service support”<sup>76</sup> If not, under what mechanism could we designate and offer support to information service providers? What role would the states play in designating eligible information service providers? Would disbursement of support to information service providers comport with federal appropriations laws?<sup>77</sup> We seek comment on these and other pertinent issues.

63. In the event we interpret section 254 to authorize support of broadband, we also seek comment on adding broadband to the supported services list. Before modifying the list of supported services, the Commission must “consider the extent to which such telecommunications services—(1) are essential to education, public health, or public safety; (2) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (3) are being deployed in public telecommunications networks by telecommunications carriers; and (4) are consistent with the public interest, convenience, and necessity.”<sup>78</sup>

64. In 2007, the Joint Board also recommended that the Commission revise the definition of supported services to include mobility.<sup>79</sup> The Joint Board concluded that both broadband and mobility satisfied the four part criteria and should be eligible for federal universal service support.<sup>80</sup> We note that the Joint Board also recommended that the Commission create separate designations for voice, broadband, and mobility.<sup>81</sup> In 2008, the Commission declined to act on the Joint Board’s recommendation.<sup>82</sup>

65. The Commission currently requires ETCs to provide all of the supported services. If we were to add broadband and/or mobility to the list of supported services, should we create separate designations for each supported service (voice, broadband, and mobility) so that a provider does not need to offer all of the supported services to be eligible for support, as the Joint Board recommended in 2007?

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<sup>75</sup> 47 U.S.C. § 254(e).

<sup>76</sup> *Id.* § 214(e).

<sup>77</sup> *See, e.g.*, U.S. CONST. art. I, § 9, cl. 7 (“[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by law”); 31 U.S.C. § 1301 (“[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law”); 31 U.S.C. § 1341(a)(1) (prohibiting an officer or employee of the federal government from making or authorizing “an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” or involving the government in an “obligation for the payment of money before an appropriation is made unless authorized by law”); 31 U.S.C. § 3302(b) (“an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim”).

<sup>78</sup> *Id.*

<sup>79</sup> *See Joint Board 2007 Recommended Decision*, 22 FCC Rcd at 20491-94, paras. 55-68

<sup>80</sup> *See id.*

<sup>81</sup> *See Joint Board 2007 Recommended Decision*, 22 FCC Rcd at 20494, para. 69.

<sup>82</sup> *See High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, 24 FCC Rcd 6475, 6495, para. 37 (2008) (*2008 Order and ICC/USF FNPRM*), *aff’d Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010); *cert denied*, 131 S. Ct. 597, 626 (2010).

We seek comment on this proposal.<sup>83</sup> We also ask what would be the impact of such an approach on Lifeline providers, who today also are required to offer all supported services.<sup>84</sup>

## 2. Section 706

66. As noted, section 706(a) of the 1996 Act directs the Commission “to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment.”<sup>85</sup> Section 706(b) directs the Commission to undertake annual inquiries concerning the availability of advanced telecommunications capability to all Americans and requires that, if the Commission finds that such capability is not being deployed in a reasonable and timely fashion, it “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>86</sup> In July 2010, a majority of the Commission concluded that “broadband deployment to all Americans is not reasonable and timely” and noted that “[a]s a consequence of that conclusion” section 706(b) was triggered.<sup>87</sup>

67. We seek comment on whether sections 706(a) and (b), alone or in concert with sections 254 and 214(e), grant us authority to provide universal service support for broadband information services. The D.C. Circuit has concluded that “[t]he general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.”<sup>88</sup> We believe that providing universal service support for broadband would “remove barriers to infrastructure investment” by supplying financial incentives to invest in areas where it may otherwise be uneconomic to do so. We seek comment on this issue. Would providing support for broadband information services under section 706 be inconsistent with the definition of universal service in section 254(c) or the limitation of support to ETCs in section 254(e)? If we act pursuant to section 706 alone, would we have authority to collect universal service contributions and disburse them to eligible recipients under the current universal service mechanisms, or should we develop a separate mechanism under our section 706 authority? Would the collection and disbursement of funds comport with federal appropriations laws?<sup>89</sup> What criteria should we use to determine who is eligible to receive support? What role should states play? We seek comment on these and other relevant issues.

## 3. Title I Ancillary Authority

68. Section 1 of the Communications Act states that Congress created the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to

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<sup>83</sup> We note that, as discussed in the *Mobility Fund NPRM*, we have proposed to provide support for the expansion of advanced mobile wireless networks capable of providing broadband without adding broadband and/or mobility to the list of support services.

<sup>84</sup> The Lifeline and Link Up programs reimburse telephone companies for discounts provided to eligible low-income customers on initial service installation (Link Up) and their monthly bill for local telephone service (Lifeline). Together, the Lifeline and Link Up programs help consumers who might not otherwise be able to afford phone service. We will address reform of the Lifeline and Link Up programs in a separate proceeding.

<sup>85</sup> 47 U.S.C. § 1302(a). See also *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order, FCC 10-201, at para. 119 (rel. Dec. 23, 2010) (*Preserving the Open Internet Order*).

<sup>86</sup> 47 U.S.C. § 1302(b) (emphasis added).

<sup>87</sup> *Sixth Broadband Deployment Report*, 25 FCC Rcd at 9558, paras. 2-3.

<sup>88</sup> *Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

<sup>89</sup> See *supra* note 77 (discussing federal appropriations law).