

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92

**COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

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SUMMARY

RICA has long supported the essential goals of the NPRM, to reform the Universal Service Support and Intercarrier Compensation rules and to transition to a mechanism that will provide support necessary to ensure ubiquitous broadband availability. The NPRM, however, fails to recognize the history of important contributions to universal service that have been made by rural Competitive Local Exchange Carriers or provide for any meaningful role for them in the future.

RICA member rural CLECs have made broadband available to rural citizens in areas long neglected by the large ILECs, but could have done much more to narrow the “rural-rural digital divide” but for the discredited “identical support” rule and a inadequate access charge revenues. The proposal to eliminate the insufficient support of the identical support without any realistic replacement will ultimately mean that the broadband services now enjoyed by many rural residents will disappear.

RICA recognizes that the burden on end users of the current contribution system cannot be increased, but it is entirely irrational for the Commission to set a goal of replacing the POTS world with ubiquitous broadband and then to cap the support amount based on the declining revenues of the POTS world. The failure to simultaneously examine what the contribution base and methodology should be in the new world leads the Commission to the false choice that it can only support broadband service for those presently without by reducing or eliminating the support that makes existing broadband possible.

In the near term the Commission should quickly eliminate the identical support for CETCs and replace it with cost-based support. The identical support rules provides support without regard to need so that it provides too little support to some carriers and too much to others. But this does not mean support should be eliminated for CETCs. In the *Interim Cap Order* the Commission created an exception for CETCs that submit cost studies. USAC has refused to recognize these studies without

guidance from the Commission and the Commission has failed or refused to provide such guidance. Because the exception is part of the “rule” adopted by the Commission and because the court of appeals relied on the exception to reject claims that the cap resulted in insufficient support, it is unlawful for the Commission not to accept properly completed cost studies. The identical support rule should be phased out, but the cost study exemption should be implemented immediately.

The long term proposal to migrate all support to the CAF under rules giving ILECs a right of first refusal for support would be both unlawful and bad public policy. The Commission can certainly set criteria under which eligible carriers qualify for support, such as minimum cost of service levels, but it cannot simply exclude rural CLECs from an equal opportunity to compete for support in a given area. Any competitive selection process should be based on the competitive procurement model rather than an auction with support going to the lowest bidder. The former enables selection to be made based on rational consideration of all relevant factors, including a demonstrated commitment to the area, competence in providing quality service and a sound business plan. Selection on the basis of lowest bidder will ensure that subscribers obtain only the lowest quality, performance and reliability.

Both fixed and mobile networks should be supported by the CAF. Adequate mobile service is critical in rural areas to provide for public safety, commerce and social needs where there are often great distances between communities. Areas for which support is to be provided will be best determined by the service providers rather than artificial boundaries.

Intercarrier compensation reforms are also needed to adapt to the new world as well as repair the serious problems that have been on the table for at least ten years. RICA suggests that such reforms should recognize the principle that a carrier using another carrier’s facilities to originate or terminate traffic must compensate the other carrier. A second principle is that the compensation, together with any support, should be sufficient that rural carriers’ end user rates are comparable to those in urban areas.

An obvious first step is to bring intrastate and interstate access rates to the same level. In the current situation, the Commission should be able to work cooperatively with the states to accomplish this result. The alternative proposal to bring all access compensation into the reciprocal compensation regime of Sections 251 and 252 should not be pursued. Those sections were designed to regulate carrier to carrier rates when both provide end user services in the same general local area, and not as a replacement for access.

Any recovery mechanism for replacement of access revenues must be available to rural CLECs as well as ILECs.

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**COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

The Rural Independent Competitive Alliance (“RICA”) files its comments with respect to the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceedings. RICA is a national association of rural competitive local exchange carriers (“CLECs”) that are affiliated with incumbent rural telephone companies (“ILECs”).

I INTRODUCTION

- A. RICA supports the fundamental goals of the NPRM, however revisions to the proposed rules are required to recognize and enhance the contribution of rural CLECs to the accomplishment of those goals.

The NPRM proposes to revise and reform the Commission’s Universal Service Fund (“USF”) and intercarrier compensation (“ICC”) rules to ensure the availability of “robust,

affordable” broadband to all Americans.¹ RICA agrees with this objective and the conclusion that the Commission should be guided by the four principles of: Modernize USF and ICC for Broadband, Fiscal Responsibility, Accountability, and Market Driven Policies.² It is important as well that in creating new USF and ICC rules the Commission recognize that the provision of telecommunications service in this country has long history that provides valuable lessons with respect to how the service can be provided in the highest cost, most remotes areas. The central lesson from that history, as opposed to economic theory, is that when the appropriate resources and rational regulatory policies are in place, enterprises under local ownership and control are most likely to actually get the job done.

Since its creation in 1999, RICA has actively participated in all of the major Commission proceedings attempting reform of Universal Service and Intercarrier Compensation. In the dozens of comments filed and ex parte meetings held, RICA has consistently emphasized that its members have brought substantial public benefits in the form of improved telephone service and broadband Internet access to rural areas long neglected by large carriers.³ RICA has also explained that rural CLECs could do much more to bridge the rural-to-rural digital divide if the identical support rule was replaced with cost based support and the rural CLEC access had not been reduced in the MAG order.

Accordingly, these comments will focus on the importance of developing rules and policies that enable, rather than restrict, the inherent incentives of the nation’s rural CLECs to maximize the availability of the most modern communications and information services to their

¹ NPRM at paras 1.

² NPRM at para. 10.

³ RICA Comments, *Connect America Fund, A National Broadband Plan for our Future, High-Cost Universal Service Support*, WC Doc. No. 10-90, GN Doc. No. 09-51, WC Doc. No. 05-337, Jul. 12, 2010; RICA Comments, *Developing a Unified Intercarrier Compensation Regime*, CC Doc. No. 01-92, May 23, 2005.

rural neighbors. RICA comments are intended to reflect the following USF Policy Principles that it has adopted:

RICA USF Policy Principles

1. USF should support both fixed and mobile broadband: RICA supports adoption of a universal service policy that provides for complimentary mobile and fixed broadband services.

2. Number of USF recipients: If the FCC adopts a policy that limits universal service support to a single carrier in an area determined by a market mechanism, as proposed in the FCC Broadband Plan:

A. RICA opposes the use of auctions which will produce a “race to the bottom” instead of fostering service to rural consumers.

B. Any qualitative market mechanism evaluation process used to designate the carrier eligible to receive USF should:

1. Encourage funding of carriers that have demonstrated commitment to investing in the provision of advanced communications services in high cost to serve areas.
2. Require USF recipients to provide universal service (including highspeed broadband access) as a common carrier with open access/network neutrality (access open to all application providers with rational network management).

3. Transition mechanism for Rural CLECs: All current CETCs and rural CLECs should have a transition mechanism that provides for recovery of investment they have incurred in reliance on existing USF and access charge revenues.

4. Cost-based determination of Funding: The amount of universal service funding distribution to a carrier should equal the residual costs that cannot be recovered from “comparable rates” charged to end-users for “comparable services” provided in the market areas of the nation that are not high cost to serve areas.

5. Designation of geographic areas qualifying for USF funding: The Broadband Plan proposes that high cost to serve areas where carriers are eligible to receive USF should be base on “neutral geographic units such as U.S. Census -based geographic areas, not the geographic units associated with any particular industry segment. RICA urges that this proposal should be implemented in a manner that encourages and enables carriers seeking USF to define the area in which they seek support in order to ensure that the designation of supported areas does not result in the designation of large area masses that would discourage small businesses and rural carriers from participation.

6. USF Contribution methodology: RICA urges adoption of a new methodology that assesses a portion of the high cost support program to all users. A “numbers” or basic connections based methodology alone, however, is not sufficient or equitable. A “fair share” methodology should reflect a fair and equitable allocation of the high cost network funding requirement that incorporates consideration of the size of the connection and the utilization of network transport facilities to the internet portal.

7. Middle-Mile Costs: In order to achieve the national broadband universal service objectives anticipated in the FCC’s Broadband Plan, the high cost support mechanism of the USF must support the inordinately high costs incurred by rural carriers to connect to Tier 1 internet portals. In rural high cost to serve areas, middle miles are “middle miles and miles.”

8. Expansion of Universal Service Definitions: Universal voice service should not be limited to basic dial-tone and local calling, but should be expanded to include nationwide 2-way voice connectivity.

- B. Rural CLECs have served the Public Interest by providing advanced Services to areas long ignored by large carriers

RICA members’ competitive service was initiated following the 1996 Act in response to demands to rural ILECs for their service from citizens in adjoining areas served by large ILECs. These service demands were the result of the large carriers’ historical provision of inferior service and lack of any local points of contact. RICA member rural CLECs provide telecommunications and information services in low-density, high-cost areas that are essentially comparable in density and demographics to the areas served by their affiliated ILEC.

In addition to the descriptions over the years in RICA comments describing the rural CLEC industry, the Commission has recognized specific examples of situations in which the superiority of their service offerings have resulted in substantial market share.⁴ The Commission’s

⁴ *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to Be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Doc. No. 02-78, Report and Order, 21 FCC Rcd 11506 (2006) (“*Mid-Rivers Order*”); *Petition of South Slope Cooperative Telephone Company, Inc. For an Order and Rule Pursuant to Section 251h)(2) Declaring that South Slope Cooperative Telephone Company, Inc. shall Be Treated as*

records also reflect that in several cases, the success of rural CLECs in capturing market share from the incumbents as a result of their superior service has been a factor in inducing the incumbent to sell the exchanges to the rural CLECs ILEC affiliate. The Commission has then permitted the CLEC lines to be acquired by the affiliate, subject to conditions restricting receipt of USF support.⁵

For the past eleven years that RICA has been making the point on the record that its members bring improved telecommunications and broadband Internet access to communities that would otherwise still be without. The investments of rural CLECs in the facilities needed to provide modern, reliable and advanced telecommunications and information services provide substantial economic benefits to those communities in terms of businesses retained or attracted to small towns, jobs created and increased and increased educational and cultural opportunities.

RICA has commented for many years that the identical support rule often results in inadequate support for high cost rural areas because they are located in large ILEC study areas that on average do not qualify for high cost support. The Commission's decision to require the large carriers to provide implicit support to their high cost rural areas combined with the identical support rule has often meant that rural citizens are saddled with inferior service from the incumbent, but the lack of support makes the area financially infeasible for CLECs.

The NPRM appears to acknowledge that the point has been made, but claims the Commission has not been provided "specific data or analysis sufficient for the Commission to draw any particular conclusion regarding the role of competitive ETC support in advancing

an Incumbent Local Exchange Carrier in the Iowa Exchanges of Oxford, Tiffin and Solon, Notice of Proposed Rulemaking, 23 FCC Rcd 15046 (2008).

⁵ *Heart of Iowa Communications Cooperative and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules*, Order, 21 FCC Rcd 2858 (2006); *Partner Communications Cooperative and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Order, 21 FCC Rcd 4406 (WCB 2006).

universal service.”⁶ This statement fails to recognize information provided over eleven years of filings, meetings and Joint Board hearings on the very subjects of this NPRM during which no Commission representative has asked RICA or its members for more data or analysis to determine whether the presence or absence of support for rural CLECs promotes Universal Service. All ETCs are required by Section 254(e) to use USF funds only to provide the supported services, yet the this statement in the NPRM suggests the Commission doesn’t know whether the billions of dollars in CETC support paid have advanced universal service.⁷

RICA understands the thrust of the rule change proposals in the NPRM with respect to rural CLECs is to quickly eliminate both the small amount of USF support that some of them receive⁸ and the inadequate interstate access revenues to which they were relegated by the MAG order.⁹ At best the result will be slow strangulation, more likely the result will be not only to slow any further expansion of their services to their unserved and underserved neighbors

⁶ NPRM at para. 245. The statement follows a sentence referring to comments that support to competitive ETC is used to extend mobile service to areas they would otherwise not serve, with a citation (n. 399) to separate comments by the Rural Telecommunications Group and RICA in July 2010. While the former comments were focused on mobile issues, RICA’s were focused on its members’ provision of wireline service. The imprecision of this analysis is at least consistent with the theme of the entire NPRM that because wireline CETCs are a small minority of CETCs they can simply be ignored. There are, however, material differences in the public policy impacts of eliminating support for multiple wireless carriers as opposed to a single wireline competitor.

⁷ Section 54.209 of the Commission’s Rules requires detailed annual reports from ETCs designated by the Commission regarding their use and plans for USF. Most if not all RICA member CETCs were designated by their respective states, however. In addition to its authority and obligation to enforce Sections 214(e) and 254(e), the Commission is required by Section 218 to keep itself informed as to the manner and method by which the management of the business of all carriers is conducted.

⁸ NPRM at paras. 241-260.

⁹ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Doc. 00-256, 16 FCC Rcd 19613 (2001) at para. 128.

adjoining their current service areas, but to place the rural CLECs, and thereby the excellent service enjoyed by their subscribers, in grave financial distress.

A central goal of the 1996 Act was to benefit the public by introducing competition into local exchange service. While the majority of the CLEC industry has focused on urban areas and enterprise customers, it is the RICA member rural CLECs that took the challenge from Congress to bring competition to the areas that were most in need of improved service, but the NPRM proceeds as if their continued existence is of no public policy consequence.

- C. Given the goal of replacing the POTS world with ubiquitously available broadband Internet access upon which voice service is just one application, it is not rational to establish a support budget based on the declining revenues of the POTS world.

The NPRM takes its lead from the National Broadband Plan (“NBP”) in recognizing that the evolution of telecommunications and information services from circuit switched TDMA networks to broadband IP technology is a transformative change of Schumpeterian scope requiring fundamental regulatory change.¹⁰ There is little disagreement that there are significant challenges to developing policies that will replicate in the broadband world the near ubiquitous level of service that has been achieved in the POTS world. The most difficult of these challenges is that of bringing service to the last five or ten percent of the population in the highest cost to serve locations consistent with the principles established by Congress of reasonably comparable rates and service.¹¹

A fundamental flaw in the NPRM’s approach is the assumption the totality of the funds available to provide this support to achieve ubiquitous broadband service in the IP world (absent Congressional appropriation) are only those raised by the current contribution rules from the declining pool of interstate voice telephony end users revenues. It is not rational to establish the

¹⁰ NPRM at paras. 6-8, 398; National Broadband Plan at Chap. 8.

¹¹ 47 U.S.C. 254 (b)(3).

support budget for a new and fundamentally different business model and industry structure based upon the revenues available under the old business model and industry structure. Yet the Commission puts off to the indefinite future consideration of what the contribution rules should be in the new environment.

The economic justification for requiring users of a network to contribute to expansion of the network is that the more nodes on a network the more valuable it is to all participants.¹² The Act instructs the Commission to establish equitable and nondiscriminatory contribution requirements applicable to telecommunications carriers and to other providers of telecommunications as the public interest requires.¹³ The present contribution rules require contributions from only a diminishing subset of the rapidly growing universe of providers of telecommunications that benefit from a ubiquitous broadband network. The Commission will therefore be required to revise the contribution rules in the broadband world. It makes no sense to expect that ubiquitous broadband availability can be rapidly achieved with a support pool determined by the diminishing voice telephony market. Simply put the Commission's universal service budget should assume that, telecommunications providers that use and benefit from the broadband network contribute to the support pool for that network.

The failure to revise the disbursement and contribution rules simultaneously leads the Commission into the false choice error: that because of the supposedly limited funds available it must eliminate support from existing providers of voice services who also provide broadband in order to support expansion of a very limited broadband service to areas now unserved.¹⁴ The

¹² Metcalf's Law posits that the increase in value is proportional to the square of the number of additional nodes. George Gilder, *Metcalf's Law and Legacy*, *Forbes ASAP*, Sep. 13, 1993.

¹³ 47 U.S.C. 254(d).

¹⁴ As discussed in Section II, RICA has long advocated elimination of the identical support rule and its replacement with a cost based system. Such a change would both reduce duplicative

error is compounded by the (unstated) conclusion that supported broadband services in rural areas will be required to provide only a small fraction of the speed generally available in urban areas, despite the statutory principle that urban and rural telecommunications and information services should be reasonably comparable.

- D. The CAF should be based on a conservative approach to the Commission's jurisdiction and powers in order to minimize the uncertainty of litigation.

The NPRM asks for comment in multiple places with respect to the Commission's legal authority to adopt the measures proposed.¹⁵ Without purporting to analyze each of these issues, RICA suggests that given the discouragement to investment that results from continuing uncertainty, the Commission should choose the alternatives where its authority is most well established and avoid "pushing the envelope" or adopting rules for which there are reasonable arguments as to their invalidity. For example, the Commission should make the telecommunications component of broadband Internet access a supported service, but not purport to support information service. Similarly, the Commission should not use this proceeding to test the limits of its forbearance authority because at some point there must remain some direction from Congress before a court finds the delegation unconstitutional.

II THE "IDENTICAL SUPPORT" RULE SHOULD BE QUICKLY ELIMINATED AND REPLACED WITH COST BASED SUPPORT

- A. The "identical support" rule is not defensible, but "rationalizing" support for CETCS cannot mean extinguishing it.

The NPRM proposes to eliminate the "identical support" rule and "rationalize" funding for CETCs over five years.¹⁶ By "rationalizing" support the Commission indicates it intends to

support and allow expansion of CETC services into areas without broadband. Nevertheless, even a very substantial reduction in the current \$1.36B in CETC support would not come close to resolving the rural-rural broadband service gap identified in the NBP.

¹⁵ NPRM at paras. 55-74, 260, 262, 509-522.

¹⁶ NPRM at paras 241-260.

choose between either phasing out support to CETCs or phasing out support while holding out hope to some mobile carriers that they may be have some continuing support in areas that would otherwise be unserved.¹⁷ Since even this dim ray of hope is not offered to wireline CETCs, the proposal is clearly just to remove the small portion of the total CETC support they now receive.

RICA has argued for many years that the identical support rule is inconsistent with the Act because the amount of support provided, if any, bears no relationship to the cost of providing service to the CETC.¹⁸ Since support is unrelated to cost, it is impossible to determine whether support is sufficient—i.e. too little or too much. With no correlation to cost, there is no real way to demonstrate how the funds are used to provide the supported service. The rule harms high cost underserved rural areas in the study areas of large companies with average study area wide costs. Those companies do not qualify for HCM support so no support is provided to a CLEC that might, with support based on wire center costs, be able to enter and offered improved service.

The NPRM, however, focuses on the problem of provision of support to two or more CETCs in the same area.¹⁹ While that criticism raises serious concerns, it is not applicable to rural wireline CETCs. As RICA has explained, the rural CLEC business model only works in areas where the incumbent's service is so bad that a large portion of the subscribers in an area will overcome inertia to change carriers. Because service improvement requires substantial investment and expense to construct a network, the venture is not feasible without majority market share. As the Commission has recognized, once a CLEC has entered an area and

¹⁷ The proposed rules don't appear to reflect this option. Proposed revised Section 54.307 states that on January 1, 2012 CETCs shall be eligible to receive universal service support pursuant to subpart L and subpart M of this part, however no proposed subpart L is provided and the numbering in proposed subpart M follows the numbering in existing subpart K.

¹⁸ RICA Comments, WC Doc. No. 05-337, CC Doc. No. 96-45, Apr. 17,2008, pp. 13-15.

¹⁹ NPRM at para. 246.

overbuilt the incumbent, it is very unlikely that a third facilities-based wireline entrant will appear anytime soon.²⁰

B. The Commission has unlawfully failed or refused to implement the cost study exception to the *Interim Cap Order*

In recognition of the threat to the economic and political viability of the Universal Service Fund caused by the rapidly growing support to non-rural wireless CETCs, in 2007 RICA conditionally supported the Commission's proposal for an Interim Cap on CETC.²¹ One of the caveats to RICA's agreement was that there should be an exemption from the Cap for CETCs that demonstrate their costs.²² The Commission's Order adopting the "interim" cap on CETC support explicitly adopted such an exemption stating: "...[A] competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC."²³ Accordingly, RICA did not seek reconsideration or judicial review of the order. The D.C. Circuit's decision affirming the Commission explicitly relied on the existence of the cap in rejecting claims that the cap would result in insufficient support.²⁴

It now appears however that the Commission does not intend to permit rural CLECs (or wireless CETCs) from actually receiving support based on their own costs.²⁵ Despite its claim that the Interim Cap Order constitutes a "rule," albeit uncodified, USAC has refused to accept

²⁰ Mid-Rivers Order at n.56.

²¹ RICA Comments WC Doc. No. 05-337, CC Doc. No. 96-45, Jun. 6, 2007.

²² Id. at 3-5.

²³ *High-Cost Universal Service Support, Federal State Joint Board on Universal Service*, WC Doc. No. 05-337, CC Doc. No. 96-45, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*") at para. 31.

²⁴ *Rural Cellular Association et al. v. FCC*, 588 F.3d 1095, 1100, 1104, 1105 (D.C. Cir. 2009).

²⁵ Letter from Stephen G. Kraskin for RICA to Marlene H. Dortch, FCC, Dec. 11, 2009 (urging the Commission to provide USAC with specific guidance and direction with respect to processing of CETC cost studies)..

cost studies, citing lack of direction from Wireline Competition Bureau and the Bureau has given no indication that it ever intends to provide such direction. In addition to being unlawful, the Commission's failure or refusal to follow its own rules is harmful to the unserved and underserved rural subscribers the Commission professes to be attempting to benefit.

- C. Rather than eliminate support for CETCs as the NPRM proposes, the Commission should phase out the identical support rule but immediately accept cost studies as support qualification

The NPRM implies that rural CLECs and other CETCs losing funding under the identical support rule beginning at the end of this year will have the same opportunity as any other provider to obtain funding beginning the first of next year under the First Phase of the Connect America Fund ("Phase 1 CAF").²⁶ That opportunity is even more chimerical than the promised but not implemented cost study exception to the Interim Cap. It does not even purport to offer any support for existing broadband services. Instead it proposes one-time payments targeted to areas unserved by broadband. Such areas, by definition, would not include the areas presently receiving broadband service from rural CLECs. The limitation of Phase 1 CAF to unserved areas necessarily means that "rationalizing" funding for CETCs is simply a euphemism for eliminating funding.²⁷

Eliminating support for CETCs while maintaining support for ILECs or transitioning their support on a much faster schedule is unjust and unreasonable.²⁸ The NPRM proposes that

²⁶ NPRM at paras. 261-398.

²⁷ As explained in Section I, above, and in light of the Commission refusal to implement the cost study exception to its Interim Cap rule, RICA can draw no comfort from the suggestion in paragraph 242 that there might be "some" level of continuing support on a "transitional" basis especially as the suggestion is apparently limited to mobile service.

²⁸ The Massachusetts Dept. of Telecommunications and Cable has twice commented that "Complete elimination of support to competitive ETCs, however, is patently discriminatory and unfair in that it provides ILECs with an unfair competitive advantage in rural areas. Comments of Massachusetts Dept. of Telecommunications and Cable, WC Doc. 10-90, GN Doc. 09-51, WC Doc. 05-337, Jul. 12, 2010; CC Doc. No. 96-45, WC Doc. 03-109, Nov. 26, 2008.

CLEC support be transitioned at 20% per year beginning in 2012, while revising several USF mechanisms for rate of return carriers and phasing out Interstate Access Support.²⁹ If the Commission continues to preclude rural CLECs from obtaining support pursuant to the cost study exemption to the *Interim Cap Order*, then the ILEC changes will accelerate the phase out of CLEC support. Thus a CLEC with ETC designation in the territory of an ILEC receiving only IAS support will have a 60% reduction in the first year rather than a 20%.³⁰

Not only will the proposals of the NPRM eliminate Universal Service funding for rural CLECs' existing broadband service, the Phase 1 CAF is designed to ensure that rural CLECs have little opportunity to receive funding under the CAF for any nearby unserved areas that it might otherwise make sense for them to expand into. First, because only one time funding is proposed, the Phase 1 CAF funds will only be of use in higher density, lower cost unserved areas where assistance with the initial capital and start up costs may make the difference for a project otherwise financially unfeasible. Such areas are not typically found in the areas where rural CLECs operate. The low density of the areas they serve not only requires more capital investment in plant facilities than in higher density areas, but the distance between subscribers and other factors impose substantially higher operating costs as well.

In addition, the proposal to auction the one time support on a nationwide basis necessarily means that the lowest cost to serve locations will win the auction and the areas least likely to receive broadband service without USF support will be even further behind the eight ball. But even if the auction were to be structured so that the competition was between service

²⁹ NPRM at paras. 175-215, 228-240, 248, n. 408, Appendix A, proposed 54.807.

³⁰ The NPRM at paragraph 228 discusses reducing IAS over "a few years." The proposed rule, Section 54.807 however provides for a 50% per year reduction, i.e. two years, beginning in 2012.. Paragraph 248 makes clear that CETCs would lose IAS on the same schedule. The combination of 50% and 20% produces an effective 60% first year reduction.

providers instead of locations, rural CLECs would still be unlikely to obtain any support because they cannot expect to outbid large carriers with thousands of times their financial resources. Finally, the proposed accountability requirements will be insufficient to ensure that “low-ball” auction winners actually provide a reasonable level of service.³¹

Instead of the NPRM’s proposal to phase out support to rural CLECs over five years without any replacement by new mechanisms, for the near term the Commission should immediately implement the cost study exception to the Interim Cap and begin phase out of the Identical Support rule at the beginning of 2012.³² This result would be both lawful and sound public policy. The action would be lawful because it would end the current unlawful failure or refusal to implement the exception, upon which the court relied in upholding the Interim Cap, and because it would end the identical support rule which has long been shown to be inconsistent with the governing statute. The action would be sound public policy because it can reasonably be expected to reduce what the NPRM recognizes as wasteful duplicate support payments and reduce the total amount of CETC support.³³ Because CETC cost studies are required to conform to the rules applicable to ILECs, to the extent the Commission adopts the proposed near term

³¹ RICA and others have explained how auctioning support would not serve the public interest. *See, Universal Service Reform, Mobility Fund*, RICA Reply Comments, Jan. 18, 2011 at 4-5.

³² Other issues of implementation of the Interim Cap besides the cost study exception remain unresolved. Although termed a “cap,” the result of the order has been substantial reductions in support for many RICA rural CLECs that are CETCs. In addition the Commission has exceeded its authority by continuing to require contributions for the support no longer received by Verizon and Sprint and reserving the funds for a future support mechanism. RICA has argued that the savings should either be used to restore CETC support to cap levels, or reduce the contribution level. RICA Comments WC Doc. No. 05-337, CC Doc. No. 96-45, Oct. 7, 2020.

³³ NPRM at paras. 243-247.

revisions that reduce ILEC support, CETC support would be reduced as well.³⁴ Transitioning CETCs to cost based support would be consistent with the recommendation in the National Broadband Plan that the FCC should “provide any ongoing support necessary to sustain service in areas that already have broadband because of previous support from federal USF.”³⁵

III IN THE LONG TERM A MARKET BASED METHOD OF SELECTING SUPPORT RECIPIENTS SHOULD ALLOW FOR MEANINGFUL COMPETITION WHICH AN AUCTION DOES NOT PROVIDE

- A. The proposal to grant ILECs a right of first refusal would be unlawful and must be rejected

The NPRM’s long term vision calls for all existing support mechanisms to migrate to the CAF and support to be limited to a single provider, or perhaps a fixed and mobile provider.³⁶ Proposals for determining carriers to receive support include a competitive bidding mechanism or offering a “right of first refusal” to the ILEC. RICA opposes the later as both unlawful and bad policy because it would preclude member rural CLECs from receiving support. RICA has previously explained on the record that the Act does not allow the Commission to decide that only ILEC ETCs may receive support, citing, *inter alia*, the requirement of Section 214(e)(2) that in the area of non-rural telephone companies upon request state commission *shall* designate more than one qualified carrier as an ETC.³⁷

The NPRM quibbles with this analysis however, stating that ETC designation is not a guarantee of support and equating “eligible” with “qualified.”³⁸ It is correct that being designated eligible is not a guarantee of high cost support, but the proper context for the analysis is that when Congress adopted this section of the Act the then existing Universal Service Fund provided

³⁴ NPRM at paras. 175-215.

³⁵ National Broadband Plan, Chap. 8, Recommendation 8.1.

³⁶ NPRM at paras 398-430.

³⁷ *Universal Service Reform, Mobility Fund*, RICA Reply Comments, Jan. 18, 2011 at 4-5.

³⁸ NPRM at para. 264.

support to LECs with cost exceeding defined thresholds, but did not provide support to competitive carriers. The 1996 Act instituted competition at the local exchange level by removing barriers to entry and provided that competitive carriers could receive Universal Service support as well as incumbents.³⁹

It is thus one thing to say that ETC designation is not a guarantee of support because the carrier must still show that its costs exceed the minimum level for support, i.e., that while *eligible* for support it is not *qualified* to receive support. It is entirely another thing to say, as the NPRM proposes to do, that an *eligible* competitive carrier is only *qualified* for support if its competitor, the ILEC, turns it down. The former is consistent with the Act, Congressional purpose and the Commission's own competitive neutrality principle; the latter is consistent with none of those requirements. Section 214(e) gives the states (or the Commission acting in lieu of a state) some discretion in designating multiple ETCs in the service areas of rural telephone companies, but once designated there is no legal basis for discriminating between ETCs in the manner proposed.⁴⁰

- B. The selection process should allow meaningful comparison of all relevant factors including a history of commitment to the rural area rather than "reverse auctions."

RICA does not necessarily oppose a fair and open competition process for support under the long term CAF. A process more resembling a competitive procurement in which the various applicants can compete on the basis of relevant factors such as a demonstrated commitment to the area, demonstrated competence in providing quality service, and a credible business plan could serve to benefit the public. A process which chooses recipients on the basis of which carrier bid the lowest level of support would often not. Even a competitive procurement process must be structured,

³⁹ 47 U.S.C. 214(e), 251, 253.

⁴⁰ In this respect it becomes clear that the identical support rule has never been lawful.

conducted and monitored very carefully to guard against a tendency for applicants to promise whatever it takes to be selected, and then once service to the public begins, return to the grantor complaining that unforeseen difficulties render the performance of its promises impossible. This pattern was repeated many times during the build-out of cable franchises in the 1970s and 80s, including several jurisdictions in the Washington Metro area. Given this danger, local community reputation should be considered a very significant factor in the selection process.

C. The CAF should support both fixed and mobile broadband

The NPRM requests comment on proposals to support both fixed and mobile networks with the CAF.⁴¹ RICA has previously supported this concept and continues to do so as the unique characteristics of each technology are both needed in rural America if it is to have service reasonably comparable to that available to citizens in urban areas.⁴² Mobility is a crucial capability in areas where communities, service and public safety establishments are separated by large distances. At the same time the enormous growth in home data usage, including the migration of video programming to the Internet creates demand that only fixed services can economically accommodate in rural areas, especially when a significant portion of subscribers are on line simultaneously.⁴³

D. Applicants for support should have the right to propose the area to be supported.

Where a competitive procurement process, instead of auction, is used as RICA recommends, there is no longer the need to designate artificial boundaries established by the Census Bureau or other entities as service areas. Instead service providers should be free to propose the area they seek to receive support for, subject to the rural telephone company service area requirements of Section 214(e)(5).

⁴¹ NPRM at para. 402.

⁴² *Universal Service Reform, Mobility Fund*, RICA Reply Comments, Jan. 18, 2011

⁴³ Dale N. Hatfield, *The Challenge of Increasing Broadband Capacity*, 63 Fed. Com. L.J. 43, 61, Dec. 2010.

IV INTERCARRIER COMPENSATION REFORM SHOULD PROVIDE A PATH TO A FUTURE IP WORLD BUT MUST NOT DISCRIMINATE AGAINST RURAL CLECS

- A. Intercarrier compensation must recognize changes in technology and market structure while maintaining a recognition that service providers should pay for the use of others facilities that they utilize

The NPRM concludes that the current per-minute access charges are inconsistent with peering and transport arrangements in IP networks and that the current system is impeding the transition to all-IP networks. Accordingly, the NPRM proposes to phase out the current system, but provide CAF support to some carriers where necessary. Two alternative transition mechanisms are set out for comment. The first would leave the Commission and the states in their existing roles so that states would remain responsible for reforming intrastate access charges. The second would bring access under the Section 251/252 framework and unify all intercarrier compensation.⁴⁴

RICA recognizes that fundamental reform is needed in intercarrier compensation as a result of changing technology and market structure. Like ILECs, RICA member rural CLECs have seen a decline in access minutes and struggle with difficulties of relating to a part TDM, part IP world. RICA urges two principles for evaluation of alternatives.

First compensation should be paid by a carrier that uses the facilities of another carrier to originate or terminate traffic for which it is compensated. Second, in the case of rural, high cost carriers that compensation should be a level that recovers a sufficient amount of the carrier's costs so that the rates it charges its end users remain reasonably comparable to urban rates. These principles apply whether the compensation is all directly from the carrier providing the retail service as it was prior to the 1996 Act, mixed with some compensation directly from the retail service carrier and some indirectly through a Section 254 Universal Service Fund, or all

⁴⁴ NPRM at para. 491.

through a Universal Service Fund. Finally, just as the NPRM explains why rates for access should not vary depending on the jurisdiction of the retail traffic, neither should the compensation level vary depending upon whether the carrier is an ILEC or a CLEC.

RICA participated actively in the various comment rounds, discussions and working groups beginning with the institution of CC Docket No. 01-92 ten years ago and through the Missoula Plan. RICA recognized among other points that interstate and intrastate access charges should be brought to the same level. RICA concluded, however, that the Commission did not have authority to preempt state regulation of intrastate access and urged the Commission to seek a legislative solution. The NPRM does not appear to resurrect the pre-emption issue and it may not be necessary as the industry is changing so rapidly that it now appears more likely that voluntary cooperation from the states will occur, especially with appropriate incentives.

The alternative of bringing all access under the reciprocal compensation mechanisms of Section 251 and 252 remains problematic however, despite the NPRM's conclusion that Congress intended to grant the Commission authority over all intercarrier compensation. The Supreme Court recognized in its first decision interpreting the 1996 Act that the legislation is not a model of clarity⁴⁵ and there are words in the two sections that are not specifically limited to local traffic. On the other hand the structure of the two sections, combined with the Congressional purpose to facilitate competition between local exchange carriers indicates that the better reading of the Congressional purpose was to provide for regulation of compensation obligations between carriers operating in the same general area, each of which has a retail relationship with an end user with respect to that traffic. Given the real cost to the industry of the delays and uncertainty of litigation, RICA again recommends that the Commission take a

⁴⁵ *AT&T Corp. v. Iowa Utilities Bd.*, 535 U.S. 366, 397 (1999).

conservative approach, especially where that approach still holds promise to achieve the expected result.

B. Rural CLECs should have the right to participation in the Recovery Mechanism

The concept of a recovery mechanism to replace revenue lost from the phase out of access revenues, with the amounts tied to a benchmark is worthy of serious consideration. RICA's primary concern with this proposal is that it not exclude or discriminate against rural CLECs. In this regard because the current access charge rules based on the MAG Order do substantially disadvantage rural CLECs, RICA supports a new approach which would determine eligibility for CAF support based on a benchmark assuming that benchmark is determined in the same manner for ILECs and CLECs, is comparable to urban rates, and reflects rates for voice and broadband service..

V CONCLUSION

The Universal Service and Intercarrier Compensation regimes should be promptly revised to facilitate the evolution from Plain Old Telephone Service to universal availability of fixed and mobile broadband access. In so doing the Commission should embrace, rather than reject, the demonstrated capabilities of rural CLECs to bring modern reliable telecommunications and information services to high-cost rural areas. The budget for the Connect America Fund must be determined with reference to the broadband world it will be supporting, rather than the declining revenue base of the POTS system that will be replaced. The "identical support" rule should be quickly eliminated and cost study exemption adopted by the Commission in the *Interim Cap Rule* immediately implemented. Phase II of the CAF should select service providers for support based on a competitive procurement system that considers all relevant criteria. The right of first refusal for ILECs should be rejected as bad policy and unlawful. Intercarrier compensation reforms should

provide a path to the IP networks of the future but should not discriminate against rural CLECs, including their right to participate in any Recovery Mechanism.

Respectively submitted

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