

**Before the
Federal Communications Commission
Washington, D.C. 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 Inter-carrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	

**COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES**

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April 18, 2011

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND EXECUTIVE SUMMARY	1
A. INTRODUCTION	1
B. THE CONFUSION OF CONCEPTS	4
C. AND CONFUSION ABOUT THE LAW	6
1. <i>Universal Service</i>	6
2. <i>Intercarrier Compensation</i>	7
D. GENERAL USF PRINCIPLES	8
E. GENERAL ICC PRINCIPLES.....	10
F. SUMMARY OF REMAINDER OF COMMENTS	11
G. SUMMARY OF NASUCA POSITIONS.....	12
PART ONE: PRINCIPLES FOR USF REFORM (NPRM ¶¶ 10-11).....	22
PART TWO: NASUCA SUPPORT FOR (AND DIFFERENCES WITH) THE OMAHA PLAN	26
PART THREE: THE LEGAL BARRIERS TO PROVIDING USF SUPPORT FOR BROADBAND.....	27
PART FOUR: THE BASIS FOR REFORM.....	35
PART FIVE: IMMEDIATE REFORMS FOR THE USF THAT WILL FREE UP FUNDS FOR THE CAF	41
PART SIX: INITIATING THE CAF	47
A. INTRODUCTION	47
B. WHERE ARE THE UNSERVED AREAS?	48
C. ADOPTION IS AS MUCH – IF NOT MORE – OF A PROBLEM THAN DEPLOYMENT.	49
D. THE PROBLEMS WITH AUCTIONS	57

E.	ONE PROVIDER PER SERVICE AREA.....	71
F.	THE COMMISSION SHOULD NOT LINK THE CAF TO INTRASTATE ACCESS REFORM.....	72
G.	THE COMMISSION MUST ESTABLISH PUBLIC INTEREST OBLIGATIONS FOR PHASE I CAF.	75
H.	REQUIREMENTS FOR THE SUPPORTED SERVICES SPEED	76
I.	ELIGIBILITY REQUIREMENTS FOR RECEIPT OF THE CAF	81
J.	NASUCA’S PROPOSAL FOR A PROCUREMENT MECHANISM	84
	PART SEVEN: ACCOUNTABILITY	85
	PART EIGHT: INTERCARRIER COMPENSATION.....	87
A.	INTRODUCTION	87
B.	THE COMMISSION DOES NOT HAVE THE LEGAL AUTHORITY TO IMPOSE A UNIFIED ICC REGIME.	93
C.	THE COMMISSION SHOULD NOT USE INCREMENTAL COSTS AS THE BASIS FOR ICC.....	96
C.	BILL-AND-KEEP SHOULD NOT BE A MANDATED FORM OF ICC	103
D.	INTERCARRIER COMPENSATION FOR ALL-IP NETWORKS AND VOIP	106
E.	THE PATH TO MODERNIZE EXISTING RULES AND ADVANCE IP NETWORKS IS NOT TO BE FOUND IN THE NPRM.	106
	PART NINE: RECOVERY OF LOST ICC REVENUES	109
II.	CONCLUSION.....	116

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**COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES¹**

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

The NPRM ties the Universal Service Fund (“USF”) and the Connect America Fund (“CAF”) to intercarrier compensation (“ICC”), and proposes to address all three.

¹ Per the directions in the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”), FCC 11-13 (rel. February 9, 2011), these comments cover all but Section XV of the NPRM. The National Association of State Utility Consumer Advocates (“NASUCA”) previously submitted comments on Section XV.

This is inappropriate and unnecessary. In these comments, NASUCA² objects to many of the proposals in the NPRM.³

To paraphrase a wise man, Yogi Berra, “**This is really a déjà vu of déjà vu of déjà vu all over again.**”⁴ It is a “global solution” that covers only part of the globe, and is not really a solution for many of the issues addressed. Earlier, there was the Missoula Plan.⁵ More recently, there was the Plan proposed by Chairman Kevin Martin in 2008⁶ (referred to later here as “Chairman Martin’s Proposal”), which also attempted to deal with USF and ICC simultaneously. Especially with regard to ICC issues, many of the issues as to which the NPRM requests comment or makes proposals have been addressed many times before,⁷ although the Commission has never acted on the earlier comments.⁸

Indeed, back in 2004 and 2005, NASUCA made proposals on ICC to the Commission which, like the industry proposals, fell by the wayside.⁹ In retrospect, those

² NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

³ These comments owe much to the work of Dr. Trevor R. Roycroft.

⁴ See http://en.wikipedia.org/wiki/Yogi_Berra.

⁵ See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (“01-92”), Public Notice, 21 FCC Rcd 8524 (2006); see also *id.*, 21 FCC Rcd 13179 (2006); *id.*, 22 FCC Rcd 3362 (2007).

⁶ See *High-Cost Universal Service Support*, WC Docket No. 05-337, et al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475,6497-6654, App. A; *id.*, at 6697-6853, App. C 6495, para. 37 (2008) (“2008 Order and ICC/USF FNPRM”).

⁷ See, *e.g.*, 01-92, NASUCA Comments (May 23, 2005) (“NASUCA 5/23/05 Comments”).

⁸ See NPRM, ¶ 501 (efforts over the last decade to comprehensively reform ICC “stalled”).

⁹ NASUCA 5/23/05 Comments at 4-7; see also 01-92, NASUCA *ex parte* (December 17, 2004).

proposals appear fundamentally solid, although, in contrast to the thrust of the NPRM, it seems that the need for unifying access interstate and intrastate access charges has become less, rather than more, important than it was in 2005. This may largely be due to the continuing decline in access minutes.¹⁰ But given that other forms of ICC are much less divergent than access charges, the decline in access minutes actually significantly reduces the need for global ICC “reform,” especially where the solutions proposed will likely burden many companies and virtually all consumers.

Unfortunately, in issuing its current various proposals for “reform,” the FCC has failed to tackle the most fundamental issue of all: determining what costs are reasonable and necessary for voice service and for broadband service and, thus, are appropriately recovered through ICC and universal service support.¹¹ Instead, the FCC has largely followed the ideological path set forth by the industry and assumed that “reform” for universal service and ICC is a zero sum game, in which: audits have no place; a true examination of the costs of providing voice, broadband and video service is irrelevant; and accurate and consistent treatment of the costs of the shared plant used to provide interstate and intrastate, regulated and unregulated services is a concept that does not deserve consideration. Thus, the “reform” proposed by the FCC is mainly a shell game with carriers seeking guarantees for revenue recovery that is not substantiated by data and leaves consumers picking up the tab. This myopic approach to “reform” has been accompanied by the FCC’s acquiescence to carrier proposals to eliminate relevant data reporting and its absolute failure to require sufficient data to assess the true level of

¹⁰ See NPRM, Figure 13.

¹¹ See transcript of 4/6/11 revenue recovery workshop (remarks of Iowa Utilities Board Commissioner Krista Tanner).

funding necessary to support either universal service programs or revisions to ICC.

As previously proposed by NASUCA,¹² as the first step for long-run reform, the FCC should address separations (to determine the costs that need to be supported, for only then will we know how much support is needed for local service and how much for broadband); then the FCC should address ICC (to determine the share of those costs that carriers will have to pay, as described below); and then the FCC should address USF, actually the legacy high-cost fund (“HCF”) piece of the USF (to determine the amount of support needed to ensure reasonably comparable rates for legacy service, resulting in reforms that will free up additional funding for broadband). Most of the key issues can be addressed and solutions can be accomplished without attempting a global solution, with all of its complications.

B. The Confusion Of Concepts

In earlier conflicts, a catchphrase was “Loose lips sink ships.”¹³ In the present conflict among social goals, the phrase should be updated to: “Loose talk and loose concepts sink ships (and we will all drown).” Among the conceptual errors and faulty assumptions frequently committed here are:

- Referring generally to the USF (which should actually be the HCF – which is “only” 60% of the total USF);

¹² See, e.g., *In the Matter of Connect America Fund*, WC Docket No. 10-90, et al. (“WC Docket No 10-90”), NASUCA Comments (July 12, 2010), Appendix A at 11-15.

¹³ See <http://www.usingenglish.com/reference/idioms/loose+lips+sink+ships.html>.

- Referring to “subsidy” rather than “support”¹⁴;
- Forgetting the robustness and importance of the plain old telephone service (“POTS”) network in seeking to replace it with “pretty advanced new stuff” (“PANS”);
- Assuming that broadband deployment is the solution to all problems (and assuming that broadband will replace legacy voice), without addressing broadband adoption, including but not limited to broadband Lifeline (because the adoption problem is not just a low-income problem);
- Forgetting that consumers have already paid – over and over – for a broadband network from the large carriers¹⁵;
- Failing to consider the relative costs each service imposes on a common network used to provide voice service (local, toll, and ancillary services), data service and video services; and failing to consider the relationship between cost causation and cost recovery (i.e., pricing) for services provided over networks receiving universal service support;
- Issuing ICC proposals without data on the actual level of regulatory arbitrage resulting from current ICC disparities (without knowing this data, how can a decision to reduce access charges because of arbitrage¹⁶ be data-driven?);
- Presuming that carriers are not deploying broadband networks for fear of losing access charges, without any supporting data¹⁷;
- Presuming that phantom traffic and traffic pumping are the result of inter- or intra-jurisdictional differentials in ICC;

¹⁴ See NPRM, ¶ 15; for the correct usage of “subsidy” see Part Eight, *infra*; see also *In the Matter of Intrastate Carrier Access Reform Pursuant to S.B. 162*, PUCO Case No. 10-2387-TP-UNC, Reply Comments of the Office of the Ohio Consumers’ Counsel (January 19, 2011), Reply Affidavit of Trevor R. Roycroft, Ph.D. (“Roycroft Ohio Reply Affidavit”) (accessible at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=79dd509e-1cfe-4ef7-b7b2-b9aefbee4fe3>).

¹⁵ See [http://www.alternet.org/story/148397/how_the_phone_companies_are_screwing_america_the_\\$320_billion_broadband_rip-off?page=entire](http://www.alternet.org/story/148397/how_the_phone_companies_are_screwing_america_the_$320_billion_broadband_rip-off?page=entire). Related to this is AT&T’s position that companies that do not receive additional funding for broadband should be relieved of their carrier of last resort (“COLR”) obligations. See 10-90, AT&T Comments (July 12, 2010) at 18, n.40.

¹⁶ NPRM, ¶ 495.

¹⁷ *Id.*, ¶ 40. In fact, it is the rural carriers with (justifiably) higher access charges that have deployed more broadband. It is the larger carriers that have had their access charges lowered have failed to put in broadband.

- Assuming that because per-minute charges are inconsistent with IP networks,¹⁸ that per-minute charges must be eliminated, which amounts to eliminating charges for interconnection and transport arrangements;
- Assuming that there is something wrong with ICC being priced above carriers' incremental costs;¹⁹
- And using the SLC as a non-bypassable revenue recovery mechanism,²⁰ rather than for the recovery of the interstate portion of "common line" costs (hence "end user common line charge" or "subscriber line charge").

These are indeed slender and fraying threads from which so many of the proposals in the NPRM hang.

C. And Confusion About The Law

It is also symptomatic of much of the debate or discussion in this area that stakeholders overlook (or ignore) or forget the law when it is inconvenient for their cause. Similarly, stakeholders submit proposals based on the law as it could (or possibly should) be, not the law as it is. Some of those areas include:

1. UNIVERSAL SERVICE
 - The law focuses on telecommunications **and** advanced services, not on advanced services **instead of** telecommunications services;²¹ it contemplates **adding to** the list, not **subtracting from** the list.

¹⁸ Id.

¹⁹ Id. See Part Eight, below.

²⁰ See NPRM, ¶ 545.

²¹ 47 U.S.C. § 254(b)(3): "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications **and** information services, including interexchange services **and** advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." (Emphasis added.)

- Universal service **is** telecommunications service under § 254(c)(1), not an information service.²²
- By contrast, the principles in § 254(b) that include advanced services are only aspirational.²³
- Support is supposed to go only to “telecommunications carriers” as ETCs under §214(e)(1), which must be common carriers.²⁴
- State commissions “shall” designate multiple ETCs in non-rural carrier territory, and “may” designate multiple ETCs in rural carrier territory; all consistent with the public interest.²⁵
- USF contributions come from telecommunications carriers and services, under § 254(d).²⁶

These statutory requirements may not be convenient for certain parties’ positions, but they are not ambiguous.

2. INTERCARRIER COMPENSATION

As discussed in Part Seven below, the Commission does not have statutory

²² 47 U.S.C. § 254(c)(1): “Universal service is an evolving level of **telecommunications services**...” (Emphasis added.)

²³ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199-1200 (10th Cir., 2001) (“*Qwest I*”). All of the principles must be considered, but Congress did not dictate how much weight must be given to each principle. *Id.*

²⁴ 47 U.S.C. § 254(e): “[O]nly an eligible **telecommunications carrier** designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support”; 47 U.S.C. § 214(e)(1): “A **common carrier** designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title.” (Emphasis added.)

²⁵ 47 U.S.C. § 214(e)(2): “Upon request **and consistent with the public interest, convenience, and necessity**, the State commission **may**, in the case of an area served by a rural telephone company, **and shall**, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.” (Emphasis added.)

²⁶ 47 U.S.C. § 254(d): “Every **telecommunications carrier** that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” (Emphasis added.)

authority either to establish the methodology for setting, or to actually set, intrastate access charges. Further, under the law, the Commission has the authority to establish the methodology for setting reciprocal compensation, but has no authority to actually set reciprocal compensation rates.

D. General USF Principles

NASUCA supports many aspects of the Omaha Plan that was submitted to the Joint Board, as explained in section G. and Part Two below. On the other hand, the NPRM states,

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 [sic] 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.²⁷

The NPRM's reference to "less efficient uses" of the HCF, and to the CAF as a "more efficient" use of these funds is, as discussed here, just about half right. There are plenty of inefficiencies in the current HCF, and the NPRM has identified some of them.²⁸

NASUCA has previously made numerous proposals for squeezing inefficiencies out of the current fund, but these comments will not repeat those proposals.²⁹

Yet as discussed herein, the notion that the CAF is a more efficient means of meeting the nation's universal service goals misses at least three fundamental points: First, the broadband service proposed to be funded through the CAF has not yet been

²⁷ NPRM, ¶ 19.

²⁸ Id., ¶ 21.

²⁹ See NASUCA 7/12/10 Comments for the most recent summary of NASUCA proposals.

designated – and may only problematically be designated – as a supported service under § 254.³⁰ And, equally importantly, support for broadband cannot and should not – at this point at least – supplant support for traditional voice service.³¹ Further, in many areas (high-cost and low-cost both), voice and broadband services are being, or will be, provided by the same carriers over the same networks. Trying to “squeeze inefficiencies” out of funding for one service without addressing underlying separations and cost causation issues that are fundamental to both services is a pointless exercise.

Then there is the “overall size” question for the USF³²; and the question of whether total disbursements should be lower in the future³³; and whether additional money will be necessary.³⁴ The first principle observed here should be that no greater burden on customers will be imposed.³⁵ It is, however, impossible to say what the long-term size of the fund will be:

- (a) The FCC has no idea of how much money is needed to preserve current voice service, much less advance it; but it is certainly less than the amount currently being paid by the high-cost fund.
- (b) The FCC has no idea of how much money is needed to ensure universal availability of broadband (either one-time or continuing, where there is no business case for providing broadband); or to ensure reasonably comparable broadband rates).
- (c) The FCC has no idea of how much money is needed to ensure universal availability of mobility (whether broadband or not) (either one-time or continuing,

³⁰ See section C.1. above and Part Three below.

³¹ See Part One below.

³² NPRM, ¶ 23.

³³ Id.

³⁴ Id.

³⁵ Id.

where there is no business case for providing mobility services).³⁶

The bottom line (literally and figuratively) is that the FCC should take the current \$4.3 billion in the HCF as the budget limit going forward.³⁷ The time it will take to achieve (b) and (c) will depend on what is left over after addressing (a).

E. General ICC Principles

Carriers should be able to agree to any ICC arrangement that suits them,³⁸ but the fundamental principle is that carriers should pay for the use of other carriers' networks.³⁹ There **should be** a uniform ICC rate for each company, for all methods of access to the network ("a call is a call"). These are currently categorized as reciprocal compensation, for local traffic, over which the FCC has jurisdiction to set the methodology, with states setting the actual rates; interstate interexchange access, over which the FCC has jurisdiction to set the rates; and intrastate interexchange access, over which the states have jurisdiction to set the rates.⁴⁰

But the rates set must adequately compensate the carrier for the joint and common costs of its network. Reciprocal compensation includes recovery of joint and common cost other than the local loop, which the Commission determined, under the 1996 Act reciprocal compensation standards, is not an "additional cost" of transport and

³⁶ And as discussed in Part One, many of these questions can be answered only after the separations process is updated to reflect current uses of the networks.

³⁷ See <http://www.naruc.org/special/Omaha%20Plan%202011%2002%2007.pdf> at pages 5-6.

³⁸ Although there needs to be concern about certain carriers' market power.

³⁹ See NASUCA 5/23/05 Comments at 4.

⁴⁰ The FCC also asserts jurisdiction over wireless termination charges, both interstate and intrastate (NPRM, ¶ 511, 539) and over nomadic VoIP service. The Commission has not yet determined the extent of its jurisdiction over fixed VoIP service.

termination, and thus is not included in reciprocal compensation charges.⁴¹ For interexchange access, the carrier has no local loop (except perhaps on the other end of the call). Thus interexchange access must include compensation for terminating or originating on the carrier's local loop. And because costs will vary between carriers, ICC charges will vary among carriers, especially interexchange access, because loop costs are variable.

F. Summary Of Remainder Of Comments

The remainder of these comments deviates significantly from the structure of the NPRM. NASUCA has rearranged the subjects in the NPRM, to give greater prominence to the subjects that demand more attention, and placed certain subjects at the end, to deemphasize them. This de-emphasis includes less focus on the long-term vision for the CAF, simply because we have so much progress and process to get through, and so many changes are likely if not certain, before the long-term plan can be settled on.

These comments:

- Generally support (but also raise questions about) the four FCC-proposed principles for USF reform;
- Express support for the concepts behind the Omaha Plan submitted to the Federal-State Joint Board on Universal Service ("Joint Board");
- Discuss at length the legal barriers to the USF providing support for broadband services under the FCC's current classification of broadband;
- Discuss the basis for reform set forth in the NPRM;

⁴¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, August 8, 1996, ¶1057. The loop is a separate unbundled network element ("UNE"); the presumption is that the carrier either has a local loop of its own, or leases the loop as a UNE.

- Express support for (but also raise questions about) the immediate reforms for the USF that the FCC proposes to free up fund for the CAF;
- Discuss at length the many issues surrounding initiating the CAF, including the uncertainty about the location of currently-unserved areas; the need to address adoption as well as deployment; the problems with auctions and the decision to support one provider per service area; the improper linkage of the CAF to ICC reform; public interest requirements for the services supported by the CAF and eligibility requirements for the recipients of CAF funding; and NASUCA’s proposal for a procurement mechanism to replace auctions for CAF funding;
- Express support for accountability for the CAF;
- Discuss at length the many issues surrounding ICC “reform,” including the limitations on the Commission’s ICC authority; the inappropriateness of incremental cost and mandated bill-and-keep as the basis for setting ICC rates; and other conceptual errors in the NPRM; and
- Support the Commission’s apparent decision not to guarantee recovery for lost ICC revenues, but challenge proposals to allow revenue recovery through the USF or through the SLC.

G. Summary Of NASUCA Positions

As the Commission knows, the state members of the Joint Board have had three plans for universal service and ICC submitted to them by Joint Board staff and consultants. These have been dubbed the “Consultants Plan,” the “Omaha Plan,” and the “Shifman Plan.” The plans were explained and discussed at a Joint Board workshop held at the Commission on February 17, 2011.⁴²

Taking the proposals together with the proposals in the NPRM, NASUCA has prepared the following chart that summarizes (at a high level) all the proposals, and indicates NASUCA’s position (again, at a high level) on the proposals.

⁴² See FCC 11J-1. The plans and other white papers are accessible at <http://www.naruc.org/special/>.

COMPARISON OF FCC + Joint Board PLANS; PROPOSED NASUCA RESPONSE (as of 4/11/11)⁴³

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Fund Size	\$4.5 B	\$4.5B	\$4.5B; freeze support per carrier	\$15 B (includes all current USF, ICC and SLCs)	Support capping plan at \$4.5B
New Funds	<ul style="list-style-type: none"> • Connect America Fund • Mobility Fund 	<ul style="list-style-type: none"> • POLR Fund base + \$500M • Broadband Fund \$500M • Mobility Fund capped at \$500M 	<ul style="list-style-type: none"> • Legacy Fund \$1.1B • Broadband Fund \$2.0B • Mobility Fund \$1.4B 	<ul style="list-style-type: none"> • Network Access Fund (NAF) • Exceptional Support Fund • Broadband Stimulus Fund • Mobility Fund 	Support legacy/broadband/mobility structure

⁴³ Note: This chart should be reviewed in context with NASUCA's recommendation (discussed in these comments) that the order of business should be separations updates first, then ICC changes, then USF changes.

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
USF	<p>Short Term</p> <ul style="list-style-type: none"> • Rural "reforms" <ul style="list-style-type: none"> ○ Reduce HCL pay-out % ○ Eliminate Safety Net additive ○ Phase out LSS ○ Cap-ex and Op-ex caps ○ \$3K/yr/line support cap • Phase out IAS • Eliminate identical support rule • CAF with reverse auctions <ul style="list-style-type: none"> ○ 2012 \$500M - \$1B • Accountability measures 				<ul style="list-style-type: none"> • Support "reforms," accountability measures • Oppose elimination of legacy fund (as contrary to statute) • Oppose reverse auctions; support a procurement process

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
USF	<p><u>Long Term</u></p> <ul style="list-style-type: none"> • Comment on 3 options <ol style="list-style-type: none"> 1. CAF auctions for all 2. Incumbent local exchange carrier ("ILEC") right-of-first-refusal ("ROFR") based on model support; auctions where refused 3. CAF or ROFR for price cap carriers; continue with reformed rate of return for rural carriers 				<ul style="list-style-type: none"> • Need to evaluate short-term impacts before addressing long-term issues • First option is preferable

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Legacy support		<ul style="list-style-type: none"> • Eliminate identical support rule • Plan describes a “modular” process • Support = total company cost minus total company revenue⁴⁴ <ul style="list-style-type: none"> ○ RoR = 11.25% • Use existing cost model with specific changes,⁴⁵ except rural carriers can use embedded costs (w/ investment and expense caps?) • Focus on “donut” (non-competitive) area; suggestions on how to allocate between “donut” and “hole” • Costs per location rather than per line • 5 yr. phase-in • Default is proxy model • Support limited to \$100 per month per location; default satellite service? 	<ul style="list-style-type: none"> • Transition to new funds over 5 yrs. • Continued participation in Legacy fund would require showing of total company costs and revenues at 8.625% RoR 	<ul style="list-style-type: none"> • Eliminate existing USF mechanisms • Eliminate SLC • NAF = ICC loss + SLC loss + FUSF loss + SUSF loss • NAF paid for by new Network Access Charge <ul style="list-style-type: none"> ○ Nomadic VoIP and wireless one NAC per tel. number ○ Others, one NAC per location • NAC = Funding requirements ÷ NAC units. <ul style="list-style-type: none"> ○ Estimate NAC currently approx. \$6.50/month • No NAF support for PC carriers • One ETC per area • All ETCs have COLR obligations 	<ul style="list-style-type: none"> • Oppose lack of consideration of basic service rates

⁴⁴ Excludes video costs and revenues.

⁴⁵ Use geo-coded location data, special access data, “road-constrained” minimum spanning tree

		<ul style="list-style-type: none"> • Payment is larger of high-cost or ICC funding • Support reduced if no state USF; replacement if state USF • BB build-out and other SQ adjustments • “Revenue model” à la NBP <ul style="list-style-type: none"> ○ Minimum rate levels and take-rates <ul style="list-style-type: none"> • Local rate benchmark = \$25; but can use other specific revenue benchmarks 		<ul style="list-style-type: none"> • Support conditioned on BB availability; no support if not 100% digital subscriber line (“DSL”) by 2013 • Exceptional Support Fund <ul style="list-style-type: none"> ○ State finds extraordinary needs 	
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	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Broadband Fund	<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> • Wireline Broadband Fund • Capped at \$500M • Unserved and underserved areas • Year 1: \$50M, year 2: \$100M; year 3: \$200M; year 4: \$300M; year 5: \$400M? <ul style="list-style-type: none"> ○ 50% of cap-ex times "Bond interest rate" ○ Support ends after 10 years ○ Total ○ 50% of Benchmark per line cap-ex • "Bond interest rate" 	<ul style="list-style-type: none"> • Broadband and Mobility funds allocated to states based on % unserved <ul style="list-style-type: none"> ○ Single provider, competitive bidding • Unserved and underserved areas • Broadband fund recipients must demonstrate network capable of 100Mbps • Broadband continues as information service, but all recipients required to be ETCs, subject to § 214 obligations, uniform pricing • Funding for capex and 3 years of opex • Options for state (st) and/or company (co) match: <ol style="list-style-type: none"> 1. 75% fed, 25% st/co 2. 50% fed, addl. 25% fed if st or co match 25% 50% fed, 25% st, 25% co 	<ul style="list-style-type: none"> • Redefine BB as supported service • "Everything is combined jurisdictionally"?⁴⁶ • Grant for cap ex where NAC not sufficient • Must be 3 Mbps in all weather • Support increases as availability increases • Awarded on a project by project basis 	<ul style="list-style-type: none"> • Support Omaha allocation based on % unserved • Support Omaha state proceedings⁴⁷ • Support Omaha state matching (as opposed to consultants' 50% cost standard) • Must be network "scalable" to 100 Mbps • Legal issues of supporting info service + imposing obligations on info service

⁴⁶ Apparently this would combine all services into a single rate.

⁴⁷ Default to FCC.

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Mobility Fund	<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> • Unserved and underserved areas • Year 1: \$50M, year 2: \$100M; year 3: \$200M; year 4: \$300M; year 5: \$400M? <ul style="list-style-type: none"> ○ 50% of Benchmark Tower cap-ex times "Bond interest rate" ○ Support ends after 10 years ○ Total 	<ul style="list-style-type: none"> • Unserved and underserved areas • State proceedings to distribute funds • BB and Mobile funds allocated to states based on % unserved <ul style="list-style-type: none"> ○ Single provider 	<ul style="list-style-type: none"> • Mobility Fund • Grant for cap ex where O&M > 3x national average 	<ul style="list-style-type: none"> • Support allocation based on % unserved • Support state proceedings⁴⁸

⁴⁸ Default to FCC.

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Intercarrier Compensation	<ul style="list-style-type: none"> • Immediate Reforms <ul style="list-style-type: none"> ○ Access stimulation ○ Phantom traffic ○ VoIP determination • Gradually reduce per-minute charges • Seeks comment on federal and state roles 	<ul style="list-style-type: none"> • Reduce high terminating rates but increase low rates (no explanation of how increases are to happen) • Max terminating rate set in 2012 as lesser of current interstate rate or average ICC revenue • Applies to toll and local traffic • Lost revenue recovered by SLC to cap, remainder to legacy fund • Payment is larger of high-cost or ICC funding • Proposal to address traffic pumping 	<p>Not in plan, but proposed adaptation would:</p> <ul style="list-style-type: none"> • Adopt uniform terminating rate for all minutes • Cost recovery assuming/ imputing national average basic rate • Eliminate recovery for any affiliate ICC • Additive to legacy funding 	<ul style="list-style-type: none"> • Unify all ICC including access, recip. comp., and local • Single term. rate per carrier (\$0.0005 to \$0.05) • Lost revenues go into NAF • Four rate zones in state, urban, rural, very rural, and ISP and other • Originating carrier hauls and terminates (or pays) • Traffic pumping: For ILECs, frequent updates of billing determinants or justify traffic growth > 10%; for CLECs, low rate or end mirroring rule • Phantom traffic: require payment for all terminating calls 	<ul style="list-style-type: none"> • Support immediate reforms • Legal questions about FCC authority over intrastate access & setting rates for reciprocal compensation • Oppose presumption that access charges need to be reduced/ eliminated • Oppose revenue recovery without showing of impact on basic service rates; especially oppose SLC increases

	FCC NPRM	Consultant's Plan	Omaha Plan	Shifman Plan	NASUCA response
Contribution	<ul style="list-style-type: none"> • Not addressed 	<ul style="list-style-type: none"> • Expand base to include BB, text messaging 	Contributions based on total telecom and information service revenues	<ul style="list-style-type: none"> • Not addressed 	<ul style="list-style-type: none"> • Support expanding base, given legal issues on collecting from information services and intrastate services
Mechanism					

PART ONE: PRINCIPLES FOR USF REFORM (NPRM ¶¶ 10-11)

In the NPRM, the Commission begins by setting forth four principles by which it plans to be guided as it proceeds with USF and ICC reform,⁴⁹ and seeks comment on the principles.⁵⁰ NASUCA has brief comments on the four principles.

But first, we must assert that the FCC should implement immediate HCF reforms (see Part Five below) to free up funds for a short-term CAF, and the FCC should take the actions set forth in the Section XV comments, to ensure a fairer ICC system. Then the FCC must address separations, in order to determine the current cost and revenue responsibilities of the still-separate regulated and non-regulated services and the interstate and intrastate jurisdictions. Then, and only then, the Commission should address longer-term ICC reform, once it is determined where the responsibilities lie. Then and only then can the FCC properly size a legacy fund (as discussed in Part Six), to ensure that the voice services that have been the hallmark of universal service since the beginning continue to meet the directives of 47 U.S.C. § 254(b). And then, finally, the Commission should address the longer-term CAF. The main requirement for all of this, of course, is prompt FCC action, in contrast to the inaction and delay of the past.

That being said, it should be clear that NASUCA's only disagreement with the Commission's first principle (to "Modernize USF and ICC for Broadband") is not with modernization; it is with the explicit decision to treat voice communications as "ultimately [just] one of many applications running over fixed and mobile broadband

⁴⁹ NPRM, ¶ 10.

⁵⁰ Id., ¶ 11.

networks.”⁵¹ Voice is the fundamental “application,” regardless of the type of network that exists. NASUCA does strongly agree, however, that “[u]nserved communities across the nation cannot continue to be left behind.”⁵² But the move to broadband must also not leave behind those customers who are simply not interested in – or cannot afford – the additional features offered by broadband.

The Commission then proposes a principle of “Fiscal Responsibility.”⁵³ How can anyone object to such a principle, as if the Commission would or should adopt the counter-principle of “fiscal **irresponsibility**”? NASUCA’s members, who represent the “American consumers and businesses [who] ultimately pay for USF,”⁵⁴ have consistently insisted that such responsibility must be in the forefront. But, as usual, the devil is in the details.

The Commission’s third principle is “Accountability.”⁵⁵ It is not entirely clear what the Commission intends as the difference between “accountability” and “fiscal responsibility.” NASUCA submits that it is difficult if not impossible to have fiscal responsibility without accountability. It is conceivable, however, to be accountable and to be fiscally irresponsible: Spending too much, but knowing exactly where the money is going. It also seems likely, however, that the cost of that accountability must be considered, in order to ensure fiscal responsibility.

Finally, the NPRM identifies “Market-Driven Policies” as a core principle. The

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

problem with making this a core principle, especially for universal service generally and broadband deployment in particular, is that the market has not, and probably cannot, solve the problems outlined by 47 U.S.C. § 254(b)(3). That is, the market has not ensured 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 interexchange services **and** advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

If the market had or could assure that this goal was met, there would be no need for the HCF or a CAF.

It is thus somewhat surprising for the Commission to state, “We recognize that in some geographic areas there may be no private sector business case for offering voice and broadband services” but then to also assert that “[t]his is not in tension with our commitment to use market-driven regulation.”⁵⁶ It would make more sense if the last statement were clarified to the effect that the lack of a private business case “is not in tension with our commitment to use market-driven regulation **where practicable.**”

As the Commission notes, “Section 254 of the Act lays out principles for Commission policies to preserve and advance universal service.”⁵⁷ That remains true, and those principles remain in the law.⁵⁸ So, once again, it is not entirely clear what status the Commission intends the four “new” principles set forth in the NPRM to have.

It should be recalled that § 254(b)(7) allows the Joint Board and the Commission

⁵⁶ Id., ¶ 10, n.16.

⁵⁷ Id., ¶ 11, citing 47 U.S.C. § 254.

⁵⁸ 47 U.S.C. § 254(b)(1)-(6).

to adopt “other principles” in addition to those set forth in (b)(1)-(7). To date, the Commission has adopted one such principle, competitive neutrality.⁵⁹ That principle, while as “American as apple pie” on the surface, has led to disputes and immense problems of its own. These include the duplication of support without significant benefit to the public, which the Commission had to address by adopting the competitive ETC cap⁶⁰ and the inequities of the “identical support” rule, which the Commission now proposes to do away with.⁶¹

In response to the Commission’s request for “comment on the relative importance of these **objectives**”⁶² perhaps it is reading too much into the request to see a difference between “objectives” and the “principles” set out in the law or arrived at between the Joint Board and the Commission.⁶³ As the Commission well knows, it ignores the statutory principles at its peril.⁶⁴ But “objectives” are able to be down-graded if necessary.

The Commission is correct to note that “Section 254(c)(1) defines universal service as evolving; thus, we are seeking to modernize it.”⁶⁵ Yet as discussed more fully in Part Three below, regarding support for broadband, the words of the statute are that

⁵⁹ See *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (“*USF First Report and Order*”), ¶¶ 48-49.

⁶⁰ *High -Cost Universal Service Support*, WC Docket No. 05-337 (“WC Docket No. 05-337”), Order, 23 FCC Rcd 8834, 8837, ¶ 5 (2008) (“*Interim Cap Order*”).

⁶¹ NPRM, ¶¶ 241-260; see Part Five, below.

⁶² NPRM, ¶ 16 (emphasis added).

⁶³ By not involving the Joint Board in the process of developing the four new “principles” (or objectives), the Commission has apparently taken the principles outside the scope of 47 U.S.C. § 254(b)(7).

⁶⁴ *Qwest Communications International Inc. v. FCC*, 398 F.3d 1222, 1233-1237 (10th Cir. 2005) (“*Qwest II*”).

⁶⁵ NPRM, ¶ 11, citing 47 U.S.C. § 254(c)(1).

“[u]niversal service is an evolving level of **telecommunications services**...” (Emphasis added.) Thus in order to be part of universal service, a service must be a telecommunications service. As discussed in Part Three, this makes support for broadband problematic. Likewise, it makes support for VoIP problematic, such that the Commission’s proposed “clarification” that “voice service can be provided by any technology, **including VoIP**, so that USF can be used directly to support modern IP-based networks”⁶⁶ may not be possible under the current legal framework. It is also problematic because it effectively requires customers to subscribe to broadband (at additional cost) in order to receive voice service.

PART TWO: NASUCA SUPPORT FOR (AND DIFFERENCES WITH) THE OMAHA PLAN

As discussed in section G. of the Introduction, NASUCA generally supports the concepts set forth in the Omaha Plan, with a few relatively minor differences. One area of difference, however, is with regard to the legal question, discussed in the next Part, of the Commission’s legal authority to provide support for the deployment of broadband service, currently defined as an information service.⁶⁷ Another difference is with the Omaha Plan’s conclusion that because broadband is “a competitive service, or somewhat competitive service given the dearth of providers in some areas, broadband should rely on market forces to assure that consumers receive fair value and good service.”⁶⁸ In NASUCA’s view, broadband is, in most locations, at best a duopoly (as discussed at

⁶⁶ Id., ¶ 26 (emphasis added).

⁶⁷ Another area of difference (discussed in Part Six.J. below), includes using auctions, rather than a procurement process, to allocate broadband support funds.

⁶⁸ Omaha Plan at 13.

greater length below); and, especially where federal funds are used to promote it, the Commission must assure that consumers receive, among other things, fair value and good service.

PART THREE: THE LEGAL BARRIERS TO PROVIDING USF SUPPORT FOR BROADBAND

In Section IV of the NPRM, the Commission discusses its statutory authority to provide universal service support for broadband.⁶⁹ Not surprisingly, the Commission finds that it has such authority.⁷⁰ Despite our strong and continuing support for increasing the deployment and adoption of broadband service, NASUCA wishes the matter was that simple. But before addressing the Commission’s stated bases for the authority, we must review the governing law.

First, the law defines universal service as a telecommunications service, not an advanced or information service: 47 U.S.C. § 254(c)(1) states clearly and unambiguously that “[u]niversal service is an evolving level of **telecommunications services**....” (Emphasis added.) Furthermore, when describing the process of expanding universal service support, 47 U.S.C §254(c)(1) states that the Joint Board makes recommendations to the Commission regarding **telecommunications services**, which among other factors, are being deployed by **telecommunications carriers in public telecommunications networks**. The law **does not** say that “universal service is an evolving level of telecommunications service and/or advanced services....”

⁶⁹ NPRM, ¶¶ 55-74.

⁷⁰ Id., ¶ 55.

Second, universal service support can go only to “telecommunications carriers” as ETCs under §214(e)(1), which must be common carriers: “[O]nly an eligible **telecommunications carrier** designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support....”⁷¹ And “[a] **common carrier** designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title.” (Emphasis added).⁷² Thus non-telecommunications carriers and non-common carriers cannot receive USF.

And finally, it must be noted that USF contributions come from telecommunications carriers and services, under § 254(d):

Every **telecommunications carrier** that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. ... Any other provider of interstate **telecommunications** may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(Emphasis added.)

So universal service is telecommunications service, and universal service support goes to telecommunications carriers, and comes from telecommunications carriers and providers of telecommunications. The statutory description of universal service does not mention advanced service.⁷³

⁷¹ 47 U.S.C. § 254(e) (emphasis added).

⁷² 47 U.S.C. § 214(e)(1) (emphasis added).

⁷³ By contrast, § 254(c)(3) and (h) specifically allow support for services that are not included in the § 254(c) definition of universal service. See specifically § 254(h)(2).

These statutory requirements may not be convenient for certain parties' positions, but they are not ambiguous, in this respect at least. The Commission and stakeholders must deal with the law as it is, not as they might wish it to be.

That said, the Commission's theories as to how it can support broadband can be examined. The first proposal is for the Commission to adopt another principle under § 254(b)(3) – in addition to the six explicit principles already in the act and the competitive neutrality principle adopted by the Joint Board and the Commission in 1998.⁷⁴ As the Commission notes, “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.’”⁷⁵

NASUCA supports the adoption of this principle, but must note that such principles – like the competitive neutrality principle – can have unintended consequences. But the key here is that the adoption of such a principle does not really advance the broadband ball much. As the Tenth Circuit noted, the principles in § 254(b) are all ones the FCC is required to consider in its deliberations, but the individual principles – including ones adopted by the Joint Board and the Commission – are only aspirational.⁷⁶ And as the D.C. Circuit held last year in *Comcast*, the Commission's authority must be found in more specific provisions of the Act that grant such authority, rather than those that merely set forth policy aspirations.⁷⁷ So the adoption of another principle will not

⁷⁴ See *USF First Report and Order*, ¶¶ 48-49.

⁷⁵ NPRM, ¶ 58, citing *Joint Board 2010 Recommended Decision*, 25 FCC Rcd at 15625, ¶ 75.

⁷⁶ See *Qwest I*, 258 F.3d 1191, 1199-1200; see also *Texas Office of Public Utility Counsel v. FCC*, 183 F.2d 393, 421 (5th Cir. 1999).

⁷⁷ *Comcast Corp. v. FCC*, 600 F.3d 642, 654-655 (D.C. Cir. 2010).

allow the FCC to spend consumers' dollars on supporting broadband unless there is a separate grant of authority for such spending.

The Commission attempts to find this authority in § 254. That analysis must be dissected, however: First, the FCC notes that “[s]ome 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.”⁷⁸ And that “Section 254(b) requires the Commission to promote access to ‘advanced telecommunications and *information services*,’ which requires supporting broadband networks.”⁷⁹ As explained above, however, § 254(b) includes no such “requirement”; rather, it sets forth principles on which the Commission must base its policies. Then the Commission states, “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.’”⁸⁰ Here, the Commission omits the fact that § 254(c)(1) requires the definition to be for “an evolving level of telecommunications services **taking into account** advances in telecommunications and information technologies and services.” (Emphasis added.) Finally, the Commission states, “Section 254(c)(2), which authorizes the Joint Board to ‘recommend to the Commission

⁷⁸ NPRM, ¶ 61, citing 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*).

⁷⁹ NPRM, ¶ 61, citing *AT&T USF White Paper* at 3 (emphasis in original).

⁸⁰ *Id.*; 47 U.S.C. § 254(c)(1) (emphasis added).

modifications in the definition of the *services* that are supported,⁸¹ does not explicitly limit the Joint Board to telecommunications services.”⁸² Again, the Commission omits key language: § 254(c)(2) states, “The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which **such telecommunications services**” meet the criteria set out in 254(c)(1)(A)-(D). (Emphasis added.)⁸³ It seems that by accepting the arguments in the two cited AT&T ex partes, the Commission has run afoul of the problem identified by Justice Scalia in his dissent in *Brand X*, that “[a]ny reasonable customer would conclude at that point that his interlocutor was either crazy or following some too-clever-by-half legal advice.”⁸⁴

The same barrier exists for a finding that broadband is a supported service under § 254(c)(2), which the Commission addresses in ¶ 63 of the NPRM. As the Commission acknowledges, “[b]efore modifying the list of supported services, the Commission must ‘consider the extent to which such **telecommunications services**’” (emphasis added) meet the statutory criteria.⁸⁵ NASUCA strongly agrees that if broadband were a telecommunications service it would meet all four of the § 254(c)(2) criteria.

The language of § 254, even where it is ambiguous, does not allow universal service funds to go to information services or information service providers. This is

⁸¹ Id. § 254(c)(2) (emphasis added).

⁸² NPRM, ¶ 64.

⁸³ The Joint Board’s recommendation that mobility be classified as a supported service (*Joint Board 2007 Recommended Decision*, 22 FCC Rcd at 20491-94, ¶¶ 55-68) was focused on mobile **telecommunications** services.

⁸⁴ *National Cable & Telecommunications Ass’n. v. Brand X Internet Services*, 545 U.S. 967, 1007 (2005) (“*Brand X*”), (Scalia, J., dissenting).

⁸⁵ Id. (emphasis added).

especially true in light of *Comcast*, where the issue was whether the statutes **authorize** Commission action,⁸⁶ not whether something in the statutes **forbids** such action, as the Commission puts it in the NPRM.⁸⁷

The Commission then posits first, that 47 U.S.C. § 706 authorizes supporting broadband,⁸⁸ and second, that such support would be allowed under its ancillary authority under Title II.⁸⁹ For the first proposition, the Commission cites the D.C. Circuit’s conclusion in *Ad Hoc* 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.”⁹⁰ But the Commission does not recognize in this context – as it does in the ancillary authority area a bit later⁹¹ – that in 2010 the D.C. Circuit found that § 706 could not be stretched far enough to allow regulation of broadband providers’ deceptive throttling of service.⁹² Hence it seems unlikely that a court would find that § 706 would allow the Commission to collect consumers’ dollars to support advanced or information services under the § 254 framework.⁹³

Even more definitively, *Comcast* is a barrier to the Commission’s use of ancillary authority under Title II to provide financial support for broadband deployment. It seems

⁸⁶ *Comcast*, 600 F.3d at 654-655.

⁸⁷ NPRM, ¶ 71.

⁸⁸ *Id.*, ¶¶ 66-67.

⁸⁹ *Id.*, ¶¶ 68-69.

⁹⁰ *Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

⁹¹ NPRM, ¶ 68.

⁹² *Comcast*, 600 F.3d at 654-655.

⁹³ Just as it is doubtful that a court would find that providing these funds from other customers is “removing barriers to infrastructure investment” under § 796. *Id.*, ¶ 68.

more than unlikely that a court would find that ancillary authority would allow the Commission to collect consumers' dollars to support advanced or information services under the § 254 framework.

The Commission also posits that another approach it could take to allow support for broadband would be forbearance under 47 U.S.C. § 160:

[C]ould we forbear from applying section 254(c)(1), which defines universal service as an evolving level of telecommunications services? Could we likewise forbear from applying sections 254(e) and 214(e), which restrict universal service support to ETCs?⁹⁴

The problem here is that, similar to the FCC's recent argument in another context,⁹⁵ forbearance would not create authority to provide support for broadband or allow support to non-ETCs, but would instead "create a vacuum" where there would be no authority.⁹⁶

Finally, the Commission asserts that it "has authority to direct high-cost or CAF support toward broadband-capable networks by conditioning awards of universal service support on a recipient's commitment to offer broadband service alongside supported voice services."⁹⁷ NASUCA agrees that the Commission has the authority to condition receipt of high-cost support in such a fashion.⁹⁸ But the question is, of what value would be such conditions? As NASUCA has previously argued,⁹⁹ the support would be available only to those carriers currently receiving high-cost support, and the carriers in whose territories broadband deployment is most lacking are those that have consistently

⁹⁴ Id., ¶ 72.

⁹⁵ *Feature Group IP West, et al. v. FCC* (D.C. Cir. No. 10-1257), FCC Brief (March 23, 2011) at 25-28.

⁹⁶ *Core Communications v FCC*, 545 F.3d 1 (DC Cir 2008).

⁹⁷ NPRM, ¶ 70.

⁹⁸ Although that authority would not appear to allow the creation of a CAF, focused exclusively on broadband service, in the first place.

⁹⁹ WC Docket No. 05-337, et al., Comments of NASUCA, et al., (November 26, 2008) at 25.

complained about the lack of high-cost support. And it must be mentioned that the NPRM proposes phasing-out current high-cost support and replacing it with the CAF.¹⁰⁰ So under the Commission's plan, the value of the conditions would be decreasing.¹⁰¹

So where does that leave us? Should the Commission embark on a convoluted course that would be unlikely to withstand legal challenge in order to accomplish its laudable goals of ensuring greater broadband deployment?¹⁰² NASUCA submits that the wisest choice would be for the Commission to bite the proverbial bullet, and reclassify (at least part of) broadband service as a telecommunications service,¹⁰³ fully eligible for designation as a part of universal service and for support under § 254. On that path, the Commission would not need to engage in questionable interpretations of § 254, or risky assertions of ancillary authority or authority under § 706, or vacuum-creating forbearance.

Clearly, the reclassification of broadband is not without its opponents – largely the network owners whose interest lies in their control over broadband facilities provided in markets with little or no competition. NASUCA will not repeat here all of the arguments in favor of the reclassification, but will refer the Commission to those arguments as set forth in NASUCA's earlier comments.¹⁰⁴ Notably, the Commission did

¹⁰⁰ E.g., NPRM, ¶ 10.

¹⁰¹ If this approach is used, it is all the more important to ensure appropriate separations and recognize multi-use networks.

¹⁰² As discussed in Part Six(C), encouraging broadband **adoption** needs to be just as significant a goal.

¹⁰³ AT&T has in fact noted that many rural carriers in fact offer broadband as a telecommunications service. See the AT&T January 29, 2010 ex parte cited in footnote 78, at 5-6.

¹⁰⁴ In the Matter of Framework for Broadband Internet Service, GN Docket 10-97, NASUCA Comments (July 15, 2010); id., NASUCA Reply Comments (August 20, 2010).

not find reclassification necessary for the December 2010 *Open Internet Order*¹⁰⁵; but it should be clear that such reclassification would have provided that Order – which will be subject to appeal once it is published in the Federal Register¹⁰⁶ – with a firmer legal foundation. Similarly, reclassification will provide a much clearer and much stronger foundation for providing USF support for broadband.

That fundamental dispute should be resolved first, before the Commission attempts to proceed with the CAF. Partly for that reason, NASUCA has not commented on many of the questions on which the Commission requests comment in this section.

PART FOUR: THE BASIS FOR REFORM

The NPRM identifies “[a]s a critical first step for reform... propos[als] for] strategic priorities for the program. In light of changes in technology and the marketplace, we also propose to re-examine the requirements for eligible telecommunications carriers and to update and modernize the public interest obligations of fund recipients.” NASUCA does not attempt to address all the issues in this section of the NPRM.

NASUCA supports the importance of cost control for the program.¹⁰⁷ NASUCA in particular supports the need to select the most cost-effective approach for each

¹⁰⁵ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191; *Broadband Industry Practices*, WC Docket No. 07-52, FCC No. 10-201 (rel. December 23 16, 2010) (“*Open Internet Order*”).cite

¹⁰⁶ See *Verizon v. FCC*, DC Cir No. 11-1014, *MetroPCS v FCC*, DC Cir No. 1016, Order (April 4, 2011).

¹⁰⁷ NPRM, ¶ 78.

unserved area.¹⁰⁸ Another method of cost control would be the (waivable) requirements for state contributions proposed in the Omaha Plan.¹⁰⁹

As for competitive neutrality, the FCC states, “We believe our proposal to support broadband is competitively neutral because it will not unfairly advantage one provider over another or one technology over another.”¹¹⁰ Ensuring that the broadband program is competitively neutral goes beyond establishing a selection process for determining which eligible applicants or bidders receive funding. The FCC should also establish conditions on funding to ensure that broadband facilities constructed with public funds are themselves used to provide all services in a competitively neutral manner, and are subject to open access and interconnection requirements. Thus, the Commission should **require** that advanced networks constructed with public money be subject to net neutrality and open access requirements. This is consistent with the requirements applied to infrastructure projects receiving funding from the Broadband Technology Opportunities Program (“BTOP”). BTOP infrastructure projects were subject to the nondiscrimination and network interconnection obligations set forth in section V.C.2.c of the Notice of Funds Availability and in Section 6001(j) of the Recovery Act¹¹¹ and the same requirements should apply to networks funded with ratepayer monies.

The FCC asks whether public interest obligations for recipients should vary depending on whether broadband is a supported service, or alternatively, if support is

¹⁰⁸ Id., ¶ 82. This would include considering local governments for receipt of funds for local area networks (“LANs”)

¹⁰⁹ Omaha Plan at 8-10.

¹¹⁰ NPRM, ¶. 82.

¹¹¹ http://www.whitehouse.gov/sites/default/files/omb/circulars/a133_compliance/2010/Compliance_Supplement_06-2010.doc

provided to voice recipients conditioned on their deployment of broadband-capable facilities.¹¹² The Commission needs to tread carefully here. Given the economics of serving those regions of the country currently without broadband, and the economies of joint production inherent in telecommunications networks, it is highly likely that many recipients of broadband infrastructure support will also be providing essential voice service. It may well be that this support is used to extend facilities of existing networks. The FCC should not create a situation where fundamental public interest obligations apply only to some carriers, and benefit and protect only some customers and not others.

But the Commission also proposes that “all recipients be required to meet public interest obligations tied to the provision of voice and/or broadband services.”¹¹³

NASUCA supports this principle. For example, public interest requirements that both voice and broadband service be reliable and fairly and affordably priced should not vary, regardless of whether a provider has received voice or broadband universal service infrastructure support.

Likewise, as mentioned above, the public interest requires that supported networks provide open access to all reasonable network applications and content. At a fundamental level, the provision of both voice and broadband will rely on the use of underlying networks. Requirements for non-discriminatory provision of service are fundamental for all services utilizing telecommunications networks and the historical principles associated with common carriage should apply, regardless of which services are being offered, or how they are offered. Under 47 U.S.C. §214(e), a USF fund

¹¹² NPRM, ¶¶92, 94.

¹¹³ Id., ¶93.

recipient, as an ETC, has COLR-like responsibilities. That said, there may be specific circumstances in which a public interest obligation is imposed that relates solely to broadband, such as an obligation to undertake education and/or information programs intended to foster broadband adoption, which was not applicable to voice services. These are the only types of variance that the FCC should contemplate.

NASUCA agrees that recipients of CAF funding should be required to provide voice service as a stand-alone service.¹¹⁴ That stand-alone service must be affordably priced and must be priced reasonably comparably to the voice service provided in urban areas.¹¹⁵

Likewise, CAF recipients must be required to offer a stand-alone broadband service. That stand-alone service must also be affordably priced and must be priced reasonably comparably to the broadband service provided in urban areas.¹¹⁶

To truly consider the questions posed here, the Commission must take the steps necessary to obtain valid data pertaining to the costs of providing both voice and broadband. How is the Commission to determine a reasonable price absent some reference to reasonable costs? Clearly, a simple comparison of rates is insufficient. Rates established for voice telephone service have been impacted by the FCC's failure to adjust the separations mechanism to properly reflect regulated vs. unregulated costs, and state vs. interstate costs. Broadband services have been unregulated and unaudited, and broadband markets are anything but effectively competitive. Thus broadband prices

¹¹⁴ NPRM, ¶ 99.

¹¹⁵ Id, ¶ 150. See 47 U.S.C. § 254(b)(1), (3).

¹¹⁶ Id.

convey little information regarding broadband costs. Concluding that broadband prices are “reasonable” flies in the face of economic reality in which broadband service in even the nation’s largest markets is limited to two main providers – the large ILECs and cable companies. In the absence of separations reform and adequate analysis of the respective costs associated with the joint provision of broadband and voice service, it is not reasonable for the FCC to conclude that this market structure has produced prices that can be used as a reasonable yardstick for affordable pricing.

The FCC asks how it can create incentives for states to “re-evaluate and harmonize the requirements that they impose on the ETCs that they designate to be consistent with any new federal requirements?”¹¹⁷ The Commission should exercise extreme caution when considering enforcing “consistency” across federal and state requirements. The Commission need look no further than federal 911/E911 requirements. Those federal requirements are inferior to those imposed by some states. For example, the current California requirement requires free unlimited access to 911/E911 emergency services, which has been interpreted and applied as access to **local** 911/E911. The FCC standard, which was geared toward wireless carriers, only requires access to regional 911. If this standard were imposed on states, the result could be an inferior type of 911/E911 service which, if implemented, would result in delays in contacting emergency services and would therefore be harmful to the public interest. Efforts to “harmonize” federal and state requirements should not require states to implement standards for service inferior to those that currently exist. Instead, the FCC’s requirements should serve as a floor.

¹¹⁷ NPRM, ¶101.

The Commission seeks comment on many of the characteristics of the services to be provided under the CAF.¹¹⁸ A number of those issues are discussed in Parts Six(G-I), below. At this point, however, NASUCA will indicate:

- Support for annual certification and auditing¹¹⁹; and
- Support for a requirement of service to all homes passed unless a waiver is granted.¹²⁰

NASUCA also proposes that the Commission leave the terms and conditions of service to states, beyond a minimum standard established at the federal level.¹²¹

Finally, the Commission asks, “To the extent broadband is not a supported service, should we nonetheless require recipients to market their broadband service, and if so, should we specify minimum requirements?”¹²² This question is decidedly unclear, like others. While there is some danger in assuming the needed correction to the question, presumably the Commission is envisioning a situation where voice services continue to be supported, and the support recipients continue to provide broadband, which will continue to be a non-supported service. In other words, this proposal is an attempt to partially ignore the 800-pound gorilla of existing support implicitly supporting broadband.

Because there is a chance that the Commission will keep playing this losing game, the following is offered: If broadband is not a supported service, funding recipients

¹¹⁸ Id., ¶¶103-156.

¹¹⁹ Id., ¶ 122.

¹²⁰ Id., ¶¶ 124-125.

¹²¹ Id., ¶ 127.

¹²² Id., ¶ 150. The Commission asks other questions, also apparently based on the idea of broadband not being a supported service.

should be required to market their broadband service, with minimum marketing requirements; funding recipients should be required to provide customers with the option to subscribe to a basic broadband service on a stand-alone basis, without having to subscribe to voice or pay television services; and funding recipients should be prohibited from requiring a term commitment or imposing an early termination penalty.

One problem here comes from supposing that a broadband provider could be a “recipient” of funding, without broadband being classified as a supported service. How can you support something without it being a supported service? In any event, even if the funding is for broadband as an “unsupported” service, funding recipients should be subject to the requirements just outlined.

PART FIVE: IMMEDIATE REFORMS FOR THE USF THAT WILL FREE UP FUNDS FOR THE CAF

As the NPRM demonstrates,¹²³ the current HCF consists of five separate mechanisms, as follows, in order of their size in millions of dollars:

Mechanism	Amount to incumbents	Amount to CETCs	Total
Interstate Common Line Support (“ICLS”)	\$1,141	\$533	\$1,675
High-Cost Loop Support (“HCL”)	\$1,024	\$355	\$1,379
Interstate Access Support (“IAS”)	\$458	\$88	\$545
Local Switching Support (“LSS”)	\$276	\$83	\$359
High-Cost Model Support (“HCM”)	\$157	\$153	\$310
Totals	\$3,055	\$1,312	\$4,268

¹²³ NPRM, ¶ 20.

Arrayed in this fashion, certain things become evident: First, 30% of the HCF goes to CETCs, based on the current “equal support” rule. This demonstrates the wisdom of the FCC’s proposal to eliminate that rule, as discussed in ¶¶ 241-260 of the NPRM, and consistently supported by NASUCA.¹²⁴ As discussed below, this and the other reforms can be accomplished before other long-term changes are made in order to fund a CAF.

Second, all the sound and fury in recent years about the HCM for non-rural incumbents (some of which NASUCA has participated in), addresses less than 4% of the current incumbent HCF. Surely there are quicker ways to find inefficiencies than engaging in a protracted effort to redo the HCM.¹²⁵

The NPRM proposes five different measures to limit current HCF: phasing out Local Switching Support; setting limits on reimbursements for capital and operating expenses; limiting the total support per line available to carriers; phasing out Interstate Access Support; and eliminating the identical support rule. There is also a proposal to reduce reimbursement rates for the High-Cost Loop program, which will not reduce funding from the current capped program, but, according to the Commission, will distribute it more equitably.¹²⁶ There is a proposal to streamline the study area waiver process, the effect of which on support levels is uncertain. And finally, there is a proposal to modify the “parent trap” rule that limits support to acquired lines, which will

¹²⁴ E.g., NASUCA 7/12/10 Comments at 15-18.

¹²⁵ Which is not to say that simple measures – such as eliminating the HCM entirely, or at least making some of the “quick fixes” identified by NASUCA and others (see, e.g., NASUCA 7/12/10 Comments at 18-19) would not be helpful.

¹²⁶ NPRM, ¶ 175.

increase support.

Unfortunately, the NPRM does not contain an estimate of the total impact of these changes. But – using the figures from the table above – phasing out the incumbent piece of LSS will save \$276 million – as long as the alternative of combining LSS with HCLS is not taken. Eliminating the incumbent piece of IAS will save \$458 million. And eliminating CETC funding will save a whopping \$1.352 billion. **From these three elements alone**, at the end of (for example) a five-year phase-in (or phase-out) period, \$2.086 billion per year will be available to bring broadband to unserved and underserved areas, with a cumulative total of almost \$6.27 billion.

Year	Savings	Cumulative savings
1	\$417.2M	
2	\$834,4M	\$1.2566B
3	\$1.2566B	\$2.5132B
4	\$1.6688B	\$4.182B
5	\$2.086B	\$6.268B

It is unfortunate that the degree to which, as the Commission asserts, “these funding mechanisms provide poor incentives for ... carriers to invest efficiently”¹²⁷ is fairly speculative. But, in truth, the extent to which the current mechanisms are necessary to meet the goals of § 254(b) is also speculative.

NASUCA has previously proposed numerous savings measures for both the rural

¹²⁷ NPRM, ¶ 21.

and non-rural HCFs.¹²⁸ Notably, eliminating the IAS and CETC support were prominent in those proposals. It is long past time that the proposals should be adopted.

There are a few other items in this section on which NASUCA must comment. First there is the assertion in the NPRM, regarding HCLS, that “[e]ven as these companies experienced increasing rates of access line loss, their investment in net plant continued to increase. This may suggest that these companies continue to invest and upgrade their networks more than otherwise would be considered prudent for a company that is losing customers.”¹²⁹ A better reason for this investment is that the company is investing in order to keep the customers it still has.¹³⁰

By contrast, the Commission’s review of the data on LSS¹³¹ is consistent with NASUCA’s views that larger rural carriers’ study areas within a state should be combined.¹³² NASUCA had also argued that those carriers should be subject to a forward-looking cost test,¹³³ which the Commission should also consider.

A more substantial question is raised by the Commission’s proposal to place limits on the total per-line high-cost support that ILECs receive.¹³⁴ This sounds good in concept, but appears to limit support to those areas that need the most support. The Commission states, “Out of a total of approximately 1,442 incumbent LECs receiving

¹²⁸ See 10-90, NASUCA 7/22/10 Comments.

¹²⁹ NPRM, ¶ 178.

¹³⁰ Clearly, the Commission’s speculation is not based on any hard data. This is scarcely a basis for reasoned regulatory action.

¹³¹ *Id.*, ¶ 188.

¹³² See 10-90, NASUCA 7/22/10 Comments.

¹³³ *Id.*

¹³⁴ NPRM, ¶ 208-215.

support, less than 20 incumbent LECs received more than \$3,000 per line annually.”¹³⁵

This is a very small number of companies that undoubtedly serve a very small number of lines. The Commission should address this issue. But it should be noted that \$3,000 annually amounts only \$60,000 per year. Even if the total amount received by these companies is considered,¹³⁶ this is but a fly speck in terms of the current total ILEC USF.

The Commission asks whether these carriers should not be required to provide information to justify their receipts.¹³⁷ It may be that the cost of the companies’ compiling this data – and the Commission or USAC reviewing the data – would exceed the dollars being funded. A smaller set of data requirements would probably be feasible. On the other hand, it might be simpler to impose conditions on the carriers, such as requiring them to offer broadband.

With regard to IAS, NASUCA strongly supports the proposal to eliminate it. It should be noted that IAS was originally supposed to last only five years,¹³⁸ which makes the idea of a five-year phase-out for ILECs¹³⁹ more than generous. This is especially true given that IAS, despite being disbursed under the auspices of a § 254 “high-cost” program, was never determined to be necessary to meet the § 254 principles. It is absurd, however, to use a similar phase-out period for CETCs, given that the CETCs – mostly wireless carriers – never charged the access charges that the IAS was designed to

¹³⁵ Id., ¶ 209. Of course, the \$3,000 threshold appears arbitrary; the NPRM does not appear to justify that figure.

¹³⁶ See id., Figure 12.

¹³⁷ Id., ¶ 214.

¹³⁸ Id., ¶ 230.

¹³⁹ Id., ¶ 234.

replace.¹⁴⁰

NASUCA supports the redirection of IAS to support broadband in the states where it has been paid.¹⁴¹ On the other hand, NASUCA adamantly opposes any exogenous adjustment for lost IAS,¹⁴² especially given the lack of any exogenous adjustment that occurred upon § 271 approval or grants of forbearance, which benefited the price-cap companies.

NASUCA also supports, in principle, the Commission's proposals on reducing barriers to operating efficiencies.¹⁴³ These measures should reduce carriers' dependency on the USF, and should help the carriers in deploying broadband. NASUCA does, however, question the basis for the condition regarding unserved areas.¹⁴⁴ This will be meaningless unless there is a condition that these unserved areas in fact are receiving service once the "parent trap" rule is waived.

Finally, in many previous comments, NASUCA has supported elimination of the identical support rule, but will not repeat here all the reasons for that support.¹⁴⁵ NASUCA strongly reiterates that support. The Commission now offers three choices: 1) redirecting CETC support to the CAF and broadband; 2) redirecting support, but allowing CETCs to seek waivers; and 3) redirecting support, but creating an exception for CETCs

¹⁴⁰ The Commission notes that its "proposal in the Mobility Fund proceeding was intended to provide a one-time infusion to expand mobile coverage... and seeks comment "on how best to factor the need for mobility into the reforms proposed in this proceeding to achieve our universal service objectives." Id. ¶ 21. NASUCA submits that nothing beyond what was proposed in the Mobility Fund proceeding and for the CAF here is necessary.

¹⁴¹ Id., ¶ 238.

¹⁴² Id., ¶ 235.

¹⁴³ Id., ¶¶ 216-227.

¹⁴⁴ Id., ¶ 226.

¹⁴⁵ See 10-90, NASUCA 7/22/10 Comments.

meeting certain criteria.¹⁴⁶ The first choice is preferable, but allowing waivers would be acceptable. Creating exceptions would likely lead to mischief.

PART SIX: INITIATING THE CAF¹⁴⁷

A. Introduction

For the CAF, the Commission “propose[s] to award a significant amount of funding, such as \$500 million to more than \$1 billion, through a technology-neutral reverse auction in 2012....”¹⁴⁸ As discussed below, NASUCA fundamentally objects to the so-called “auction” proposal, and instead proposes a procurement process that acknowledges the highly-likely lack of bidders to provide service in these areas where there currently is no economic case for the service.

That said, however, it must also be noted that the amount of funding that will be freed up for the CAF – however the CAF is structured – from the HCF reforms proposed in the NPRM will likely be in the low end of the \$500 million to \$1 billion range for 2012. This is shown in the table in Part Five, above.

Fundamentally, for the many reasons discussed below, NASUCA objects to the FCC’s proposed (fundamentally mis-named) “reverse auction” process. NASUCA proposes, instead, a “procurement” process similar to that used throughout federal, state and local governments. Regardless of the methodology for arriving at the identity of the funded provider for unserved (and underserved) areas, there must be a set of stringent

¹⁴⁶ NPRM, ¶¶ 248-255.

¹⁴⁷ In this as in many other areas, NASUCA does not attempt to respond to all of the Commission’s requests for comment.

¹⁴⁸ NPRM, ¶ 24.

conditions placed on the provider's receipt of CAF funds. Those conditions are explained below.

But first, two other issues that seem to be neglected in the NPRM are briefly discussed. First, there is the level of the information available to the Commission about just where in the United State those unserved areas are located. Second, there is the importance of adoption – in addition to deployment – for ensuring that all Americans have the benefits of broadband service.

B. Where Are The Unserved Areas?

As discussed above, the Commission proposes “to award a significant amount of funding” through its “reverse auction” process.”¹⁴⁹ The Commission plans to use “the forthcoming National Broadband Map to identify areas that currently lack broadband....”¹⁵⁰ Clearly, in order to spend this money, the Commission must have assurances that the funds are being spent in areas that are unserved – or at the very least, underserved. It appears, however, that the recently-released National Broadband Map cannot be used as an unimpeachable source of information about unserved areas.¹⁵¹ Thus the Commission must carefully vet any area where it plans to “deploy” CAF funds.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ See <http://www.phoenix-center.org/PolicyBulletin/PCPB27Final.pdf>; <http://www.telecompetitor.com/broadband-com-hopes-to-build-on-national-broadband-map-data/>; <http://blog.connectedplanetonline.com/unfiltered/2011/03/11/newly-minted-law-school-grad-questions-accuracy-of-national-broadband-map/>. See also <http://www.publicknowledge.org/blog/what-expect-national-broadband-map>. For a fairly scathing comment on the National Broadband Map that implies that deployment is **overstated**, see http://niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00501.

C. Adoption Is As Much – If Not More – Of A Problem Than Deployment.

It is puzzling that the NPRM does not address the question of how to foster adoption of the broadband services that the Commission envisions as the primary targets of universal service infrastructure support. The importance of adoption was evident from the extensive comments and reply comments filed by parties in GN Docket No. 09-51¹⁵² and yet it is virtually ignored in the NPRM. For example, the United States Internet Industry Association and Netliteracy (collectively “USIIA”) pointed out that “[t]hough there remain[s] a need for better data regarding the nation's broadband infrastructure and targeted programs to build out and enhance that infrastructure, the larger and more critical issue is how to spur the adoption of broadband among the one-third of Americans who currently do not or will not utilize it.”¹⁵³ Those comments were filed in 2008, and not much has changed. The most recent Pew report on *Home Broadband Adoption – 2010* found “the adoption of broadband internet access slowed dramatically over the last year. Two-thirds of American adults (66%) now have a broadband internet connection at home, a figure that is little changed from the 63% with a high-speed home connection at a similar point in 2009.”¹⁵⁴ This contrasts to the 98% of households that subscribe to wireline or wireless telecommunications services.¹⁵⁵ Adoption of broadband also varies

¹⁵² *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Initial Comments of the National Association of State Utility Consumer Advocates in Response to the Notice of Inquiry (June 8, 2009) (09-51 NASUCA Comments”).

¹⁵³ *Id.*, NASUCA and the New Jersey Division of Rate Counsel Reply Comments (July 21, 2009) (“09-51 NASUCA/NJ Reply Comments”) at 46-47.

¹⁵⁴ <http://www.pewinternet.org/Reports/2010/Home-Broadband-2010.aspx>

¹⁵⁵ Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2010. National Center for Health Statistics (December 2010), Table 1. Available from: <http://www.cdc.gov/nchs/nhis.htm>.

dramatically based on income, age and ethnicity.¹⁵⁶ It is not unreasonable to assume that the high levels of unemployment and underemployment associated with the current economic downturn affect the ability of Americans to subscribe to all telecommunications services, including broadband.¹⁵⁷

The consensus among policy makers and the wide spectrum of interests who submitted comments on the National Broadband Plan to both NTIA and the FCC is that broadband is now an essential service, necessary for full participation in society. As the Bi-partisan Congressional Rural Caucus stated, “[b]roadband service is no longer a luxury, but is a necessity and a national broadband plan should reflect this transformation as fundamentally important as electricity and water.”¹⁵⁸ And as the National Consumer League explained, without access to affordable broadband consumers are “increasingly cut off from essential government services, workplace and educational opportunities, and social connections.”¹⁵⁹ What if billions of dollars were spent to build broadband but the people it is intended for were unable to use it? The result would be both a colossal waste of time and resources, and a wasted opportunity; particularly given that the federal government has pumped an additional \$6 billion into building out key elements of

¹⁵⁶ See, for example, *Latinos and Digital Technology*, Gretchen Livingston, Senior Researcher, Pew Hispanic Center, February 9, 2011. <http://pewresearch.org/pubs/1887/latinos-digital-technology-internet-broadband-cell-phone-use> See also, *Home Broadband Adoption 2009*, The Pew Research Center Internet and American Life Project report, June 17, 2009, which shows that although adoption is increasing, barriers persist, particularly for elderly and low-income consumers, <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx>.

¹⁵⁷ Gallup reports that the current national unemployment rate is 10% and the national underemployment rate is 19%, which total 29%, slightly above the 26.6% of customers who have either cut the cord or have never subscribed to wireline service. See <http://inlandpolitics.com/blog/2011/01/06/gallup-national-underemployment-rate-climbs-to-19-0-in-december> and footnote 155, supra.

¹⁵⁸ 09-51 NASUCA/NJ Reply Comments, n. 160.

¹⁵⁹ *Id.*, n.171.

broadband infrastructure throughout the country, pursuant to The American Recovery and Reinvestment Act of 2009 (“ARRA”).

There are at least two main elements that must be addressed if barriers to broadband adoption are to be overcome:

- 1) affordability; and
- 2) providing culturally relevant information and education to those who are unfamiliar with broadband and would benefit from using it.

Thus, the Commission should require that recipients of public funding to support broadband deployment should provide service at affordable prices and to provide information and/or community education to foster the widespread adoption of broadband, for those customers who would benefit from its use but would be unable to use the service absent additional information and training.

Affordability

As is recognized by the Recovery Act, any national broadband strategy must address the affordability of broadband services in conjunction with the deployment of broadband services. The benefits of broadband, given the network effects associated with the technology, will be maximized only when broadband subscription rates reach high levels. Thus, the CAF must integrate deployment and affordability issues, and this must be taken into account by the FCC as it revamps universal service support and steers funding to support the build-out of broadband infrastructure.¹⁶⁰

The 1996 amendments to the Act specified that all Americans should have access to affordable and high-quality advanced telecommunications services, and the Recovery

¹⁶⁰ 09-51 NASUCA Comments at 30-31, 64-65.

Act further reinforced this by specifying that the National Broadband Plan should include a detailed strategy for achieving affordability and maximum utilization. Thus,

- 1) broadband service supported by public funds must be affordable; and
- 2) it is not sufficient to make high quality broadband services available only at high prices, while low-quality broadband is deemed “affordable.”

NASUCA’s comments on GN 09-51 proposed that the FCC should initiate a proceeding to establish an affordability standard for broadband services, and we reiterate that recommendation here. Pricing and affordability should be part and parcel of distributing funds to ETCs for the purpose of deploying broadband facilities. Further, affordable pricing should be incorporated into the conditions attached to such universal service broadband funding, as the Commission moves to restructure support for universal service.

While the affordability proceeding proposed by NASUCA in GN 09-51 is appropriate at the national level, state determinations of affordability are also appropriate, and the Commission should consider employing the expertise of consumer advocacy groups and the Joint Board on Universal Service in addressing affordability issues. In addition, it may be necessary to target support programs to consumers with lower incomes and other populations, such as older Americans, to ensure that high-quality broadband is within the reach of *all* U.S. households.¹⁶¹

Defining affordability

In the comments filed in GN 09-51, the Commission has a substantial record on how “affordability” should be defined with respect to broadband access. As discussed

¹⁶¹ Id. at 63.

above, broadband should be reclassified as (at least in part) a telecommunications service, becoming eligible for support under § 254.¹⁶² A broadband Lifeline program should also be developed and initially offered as a pilot.¹⁶³ If broadband is to be a supported service under § 254, it must meet the tests set out in the statute and, therefore, must be “affordable.”¹⁶⁴ A definition of the terms “affordable” or “affordability” should take three factors into account:

- Subscribership/take rates;
- The price of a service relative to the national average price of broadband; and
- The ratio of service price to national median household income.

In its comments to the NTIA and the RUS regarding the broadband stimulus programs established by the Recovery Act, NASUCA recommended judging the affordability of prices for service contained in grant applications by measuring the proposed monthly retail service cost as a percentage of an area’s median household income, and then comparing this with the national average monthly broadband service cost as a percentage of the average median household income. Comparing the average monthly broadband service cost as a percentage of the average median household income is a reasonable starting point for developing a definition of “affordable,” but within the context of comprehensive USF reform, it does not go far enough. The Commission should develop a process to adjust for marketplace changes to such factors as differences in the regional cost of living, the number of competitors and/or service options, price and

¹⁶² See Part Three, *supra*.

¹⁶³ 09-51, Comments of the National Association of State Utility Consumer Advocates on NBP Public Notice No. 19: The Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan (December 17, 2009) at 24-35.

¹⁶⁴ 47 U.S.C. § 254(b)(1).

income levels.

While relying on national averages is convenient, for broadband adoption to be improved, it is important for the Commission to take regional differences into account when considering whether broadband service is affordable. Differences in living costs and income levels in different parts of the country, and even within a given state, can mean that a national average price that is affordable in some areas is unaffordable in others. Given this circumstance, it would make sense for the Commission to cooperate with states to develop a process to allow states to make determinations about affordability, consistent with criteria established by the Commission.

In particular, the Commission must solicit additional information in the form of comments to more fully explore how it might develop and apply the concept of affordable service in the course of implementing a broadband Lifeline pilot program, as it has done in the recent Lifeline NPRM.¹⁶⁵ Parties should be asked to provide detailed information about the criteria for determining affordable prices for other essential services and examples of programs in which regional differences are accounted for when determining eligibility for support.¹⁶⁶

Lack of affordable broadband is a sign of market failure.

As stated above, to address affordability, NASUCA strongly supports the expansion of Lifeline and Link-Up programs to include broadband services. This should be accomplished to the greatest extent possible by providing direct assistance to consumers, rather than to providers. And, as argued above, funds provided to carriers to

¹⁶⁵ *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Notice of Proposed Rulemaking (March 4, 2011), ¶¶ 279-312.

¹⁶⁶ 09-51 NASUCA Comments at 64-65.

support broadband deployment should be conditioned on affordable prices.

Arguably, however, much of the affordability problem in the U.S. stems from the lack of real competition for broadband. Where an area is served by just one provider, there is no incentive to keep down the price of broadband access. High broadband prices are a major factor for the many people who have opted not to subscribe to broadband service.¹⁶⁷ Because many areas have just one cable provider and one provider of DSL service, the market for broadband is in essence a duopoly, providing consumers with little real choice and giving service providers little reason to compete on price. For example, in Reply Comments in 09-51, NASUCA and New Jersey presented evidence demonstrating that Verizon's FiOS pricing practices clearly indicate that the company is not encouraging consumption of higher bandwidths currently available from FiOS.¹⁶⁸ A duopoly market structure does not provide incentives for providers to engage in vigorous price competition and the result is unnecessarily high prices that discourage subscription, particularly on the part of Americans who are on limited or fixed incomes and in an economy characterized by high levels of unemployment and underemployment.

Maximum utilization

As is the case with affordability, in GN 09-51 the Commission received substantial information about the steps that should be taken to employ information and education to foster widespread use of broadband. USF reform should include an educational program and incentives that encourage broadband consumption. The

¹⁶⁷ According to the most recent Pew Internet survey, 20% of non-broadband households cited price as the factor deterring subscription. "Home Broadband 2010," Pew Internet and American Life Project, August 2010, <http://www.pewinternet.org/Reports/2010/Home-Broadband-2010.aspx>.

¹⁶⁸ 09-51 NASUCA/NJ Reply Comments at 12.

education efforts should be oriented toward “lifelong learning,” which will ensure that all members of society will have sufficient knowledge to understand the benefits of information technologies, including broadband.

The promotion of broadband consumption should leverage telework, telehealth, electronic commerce, electronic government, and distance-education activities as key focus areas. Special attention should be given to demonstrating the utility of broadband, for example, the independent living assistance broadband can provide the elderly and disabled; the benefit that broadband can provide with employment training; and the benefits that broadband provide in healthcare provision for all persons. The CAF developed by the Commission should also make special efforts to target those, such as the elderly, disabled, and low income populations that may be less inclined to recognize the benefits that broadband can bring. Promotion of broadband to serve public interest objectives should include the following:

- Tax incentives to encourage consumption;
- Formation of government/industry working groups to identify and address impediments to the adoption of broadband solutions;
- Programs that promote the refurbishment and distribution to low-income households of discarded but serviceable computers, to ensure the availability of computers in low-income households;
- Public service advertising;
- Expanding digital government initiatives;
- Expanding adult/community education programs targeting broadband and computer use; and
- A national initiative to ensure a minimum level of technology education in schools and other appropriate venues.

The Commission should incorporate, where possible, these recommendations into

the conditions attached to the disbursement of broadband universal service funds. At a minimum, ETCs that request broadband universal service funds should be required to demonstrate to the Commission that they have either developed and implemented, or have partnered with community-based institutions and organizations to develop and implement, educational programs targeting broadband and computer use within their service territory. There must be a showing that an effort is being made to improve take rates for broadband by providing necessary training and education to those on low or fixed incomes, the elderly, and ethnic populations that historically have lower levels of broadband subscription.

D. The problems with auctions

Moving back to the matters raised by the NPRM, the Phase I CAF places a significant emphasis on competitive bidding. In reviewing the history of the Commission’s consideration of auctions, the NPRM notes that despite their theoretical advantages, auctions were initially rejected “because there likely would have been no competition in a significant number of rural, insular, or high-cost areas.”¹⁶⁹ It is further observed that “much has changed since then, including the advent of cable and wireless Internet, and we therefore seek comment on whether it would be appropriate at this time to test the use of a competitive process for awarding support.”¹⁷⁰

Given the program for reverse auctions outlined by the NPRM, this conclusion appears to be misguided. The problem at which the Phase I CAF is targeted is the lack of broadband service in a specific area. Thus, for an area to be eligible to receive funds

¹⁶⁹ NPRM, ¶263.

¹⁷⁰ Id.

under the Phase I CAF, not only must there be no competition, but there must be no broadband service. While it is indisputable that cable and wireless Internet are available in most urban areas, the reach of these service providers has failed to extend to the very areas targeted by the Phase I CAF. Even if cable and wireless Internet providers are waiting in the wings to serve areas which currently do not have terrestrial service available,¹⁷¹ the degree of bidding competition under the Phase I CAF cannot reasonably be expected to be robust. At best, it is likely that only a small number of bidders will emerge, and such small numbers do not generate efficient outcomes.¹⁷² The key assumption of the NPRM with regard to auction bidding, i.e., that there will be robust competition in the Phase I CAF, is not supported by the record.¹⁷³

The competitive process proposed in the NPRM is not a “reverse auction.”

The NPRM seeks comment on the use of a “competitive process” to determine recipients of support and support amount. This process is described incorrectly, as a reverse auction. The problems with this “competitive process” are discussed below.

Comparing all bids across all areas

The NPRM seeks comment on a methodology that would treat bidding areas unequally with respect to their potential to receive support for broadband. The NPRM

¹⁷¹ As noted *id.*, ¶272, satellite service is capable of reaching most areas unserved by terrestrial broadband today.

¹⁷² See, for example, WC Docket No. 10-90, Affidavit of Trevor R. Roycroft, Ph.D. on Behalf of The National Association of State Utility Consumer Advocates, The Maine Office of Public Advocate, Office of the Ohio Consumers’ Counsel, Pennsylvania Office of Consumer Advocate, and The Utility Reform Network, p. 49 (July 12, 2010) (“Roycroft Affidavit”); see also, for example, Klemperer, Paul, “Using and Abusing Economic Theory,” *2002 Alfred Marshall Lecture to the European Economic Association*, p. 13. <http://www.nuff.ox.ac.uk/economics/papers/2003/W2/usingandabusing.pdf>.

¹⁷³ See, for example, Roycroft Affidavit pp. 38-40.

appears to anticipate a lack of bidding interest, as the NPRM indicates that multiple bids for a specific geographic area will be the exception, not the rule.¹⁷⁴

The Commission must recognize that this auction approach is not an “auction” at all. Rather, the method simply groups projects in different geographic areas from least to most expensive, and will draw a cut-off line based on the amount of funds that are available. As a result, the relationship between the outcome and economic efficiency is unknown. It is possible that “low cost” but economically inefficient projects will trump “high cost” but economically efficient projects. Because there is no bidding competition on any specific geographic area, the Commission will be left taking the applicant’s word that their project is a good one relative to other projects.

The NPRM also mentions the potential to utilize a reserve price.¹⁷⁵ Given the likelihood of limited auction entry, a reserve price is essential. Absent the Commission having information on the cost of extending broadband service in the various applicants’ proposed service areas, the Commission will have no basis for determining which projects are the most deserving of funding.

Cost models

It is notable that a cost model could be utilized to the Commission’s advantage in this “auction” format. The Commission Staff made considerable progress with regard to the creation of an updated cost model. However, at this point the exact status of that model is less than clear.¹⁷⁶ It may be the case that the Commission is hesitant to pursue

¹⁷⁴ NPRM, ¶287.

¹⁷⁵ Id., ¶342.

¹⁷⁶ The Commission has taken no action on the comments provided in WC Docket No. 10-90.

the use of a cost model because of concerns regarding protracted litigation that would likely be associated with the construction of the model, based on the various model components – technology choice, fill factors, depreciation rates, capital costs, etc. – that ultimately must go into the finalization of a model. The use of the Phase I auctions could benefit from the use of a cost model, however, and because the use of the cost model will not be for direct ratemaking purposes or establishing support, the need for a protracted proceeding is greatly mitigated.

In its April 21, 2010 Notice of Inquiry in WC Docket No. 10-90, the Commission noted that the Staff’s cost model had the potential to be used for other purposes, including use within the reverse auction process.¹⁷⁷ If the Commission decides to proceed with the Phase I CAF, the Commission should instruct its Staff to consider the comments and reply comments associated with the Commission’s previous NOI, and to make any changes to the broadband cost model that the Staff believes are appropriate. The results of the Staff’s modeling (and the model itself) should be made public. The Commission should then use the corrected model to assist it with the evaluation of bids. This would provide a mutually beneficial process where the Commission would have some basis to consider bids in the Phase I CAF, and the Commission Staff would gain insight into the performance of its cost model. As will be discussed further below, should the Commission ever get to the point where it conducts a real auction – i.e., multiple competing bids for the same geographic area – the cost model could again prove useful in either establishing an explicit reserve price, or in evaluating bids and/or the auction outcome.

¹⁷⁷ 10-90, Notice of Inquiry and Notice of Proposed Rulemaking (April 21, 2010), ¶20.

Results from California

Because of the lack of bidding competition within geographic areas, the CAF would likely generate outcomes similar to those seen with the California Advanced Services Fund (“CASF”). The CASF was established by the California Public Utilities Commission (“CPUC”) using monies formerly targeted for voice service support in high cost areas, and relied on the nomination of unserved and underserved areas, based on a broadband speed standard of 3 Mbps downstream and 1 Mbps upstream.¹⁷⁸ The CASF grants were one-time money, and the recipients were expected to provide 60% of the project’s financing.¹⁷⁹ The CASF program required the CPUC to evaluate proposals, but did not employ a cost model. Thus, the approach lacked the additional grounding that the existence of a model would provide.

What is clear from considering the CASF program is that the per household CASF awards varied widely. Table 1, below, summarizes CASF grants awarded for unserved areas.

Company	Project/Area	Total CASF Award	Households	Total CASF \$ per HH	CASF \$ Per Total Mbps Delivered*
AT&T	Grenada	\$57,596	275	\$209	\$111
AT&T	Hopland	\$61,952	328	\$189	\$100
AT&T	Blanchard	\$35,816	123	\$291	\$155
AT&T	Mount Wilson	\$2,420	2	\$1,210	\$642
AT&T	Comptche	\$18,392	97	\$190	\$101

¹⁷⁸ *Order Instituting Rulemaking into the Review of the California High Cost Fund B Program*, Rulemaking 06-06-028, Interim Opinion Implementing California Advanced Services Fund, CPUC Decision 07-12-054 (December 20, 2007).

¹⁷⁹ The CASF program was later modified to allow applicants to take advantage of the broadband funding available through the American Recovery and Reinvestment Act (Recovery Act) programs. Under this modification, the CASF would provide 10% of the needed funds for a project, thus leaving the applicant to supply 10% of their own funds (assuming the receipt of the 80% federal grant). See CPUC Decision D.09-07-020, available at: http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/104225.PDF.

AT&T	Alta	\$56,628	236	\$240	\$127
AT&T	Warner Springs	\$93,896	236	\$398	\$211
AT&T	Carmel Valley	\$47,916	236	\$203	\$108
Verizon	Pinyon	\$174,000	382	\$455	\$242
Frontier	Pratville	\$41,192	171	\$241	\$60
*Total dollars awarded divided by: sum of upload and download speeds multiplied by the number of households.					
Source: CPUC Resolutions T-17182 and T-17-195					

Table 1 shows that the per-household support awarded for these CASF projects targeted at unserved areas ranged from \$189 to over \$1,200 per household. Determining the economic efficiency of the awards was impossible, as the CPUC had no benchmark to determine the relationship of the project to a reasonable measure of cost.

The experience of the CASF also provides some insight into the ability of support to attract entrants in unserved areas. According to data released by the CPUC, the CASF program had initially earmarked \$91.37 million for 44 projects as of May 5, 2010.¹⁸⁰

Table 2, below, summarizes the CASF earmarks.

Project Type	CASF Funds Earmarked	Number of Projects
Unserved Areas	\$12,040,000	17
Underserved Areas	\$79,330,000	27

What is clear from the data contained in Table 2 is that the CASF program was much more successful in attracting projects for “underserved” areas rather than unserved areas.

The CASF program earmarked 6.6 times as much funding to underserved areas as to unserved areas. This experience of the CASF may point to difficulties at the national level in attracting firms into unserved areas, difficulties that need to be surmounted in

¹⁸⁰ CPUC Resolution T-17274, May 20, 2010, p. 2.

order to bring broadband to Americans in currently-unserved areas.

Importantly, the majority of the grants identified in Table 2 (totaling \$66.92 million) were made contingent on the applicant receiving funding through the Recovery Act. On May 20, 2010 the California Commission rescinded over \$38 million in awards due to the failure of the applicant to secure the needed Recovery Act funding.¹⁸¹

Problems with self-selection

As is the case with the CASF, the downside of the self-selection of geographic areas by the service provider that is advanced in the NPRM is that the Commission has more limited ability to establish priorities with regard to the deployment of broadband. Even if the Commission were to limit projects to unserved areas, self-selection would likely target the low-hanging fruit, leaving the more difficult cases unaddressed. Similarly, the process could yield substantially differing levels of entry depending on whether there was an ILEC in place that did not provide broadband, but which received subsidy for voice-service provision. The expedited approach associated with the Phase I CAF could result in an insufficient evaluation of the joint provision of voice and broadband by the ILEC, and could result in excessive support. The existence of incumbents complicates the picture and raises doubts regarding the merits of self-selection as a general component of universal service reform.¹⁸²

The structure of the “auction”

The NPRM raises a number of questions regarding the structure of the Phase I

¹⁸¹ CPUC Resolution T-17272, May 20, 2010. Available at: http://docs.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/118542.PDF

¹⁸² Furthermore, how self-selection would be applied if the Commission decides to address reform of the existing voice subsidy program in areas that already have a broadband provider supported under the existing voice service support program is not clear.

auction process.¹⁸³ While the Commission apparently hopes to replicate the level of success that it has achieved with its spectrum auctions, the Commission must recognize that awarding universal service support will not be as straightforward. With spectrum auctions, the Commission has generally established a set of constraints associated with types of technology that the spectrum must be used with, and has established build-out requirements. With spectrum auctions, the Commission has not had to concern itself with the prices of the services offered by the winning bidders: Given multiple licenses awarded in each geographic area, there has been some degree of competition for wireless services in many areas of the country. This framework has made the award of licenses a relatively straightforward process, with the winning bid conveying information on the value of the resource to society.

But if the Commission intends to utilize auctions to award universal service support for broadband, a different dynamic is in place. Because it is the Commission's apparent intention to have only one supported service provider in each geographic area, the supported service will be provided on a monopoly basis. Thus, absent regulatory oversight, retail prices are not likely to reflect an economically efficient level, and the objectives of the Act and the National Broadband Plan with regard to affordability are not likely to be supported. As a result, the Commission must establish maximum pricing targets for supported broadband services.

It is also important to note that the price of the supported service will also play a critical role in interpreting bids. A bidder planning on charging a high price for the supported service will be able to undercut a bidder who plans on offering an affordable

¹⁸³ NPRM, ¶331-336.

price for the supported service. Thus, in addition to bidder qualifications, the characteristics of the technology, and the geographic scope of coverage, the Commission must incorporate broadband price as a parameter that is known prior to the bidding process. Thus, while the NPRM states “the auction mechanism could be simpler if the Commission establishes minimum (coverage) requirements,”¹⁸⁴ the auction mechanism will be intractable unless the Commission also establishes maximum allowable pricing requirements along with speed and coverage requirements, as discussed below.

Use of funding

The NPRM indicates that the process proposed for the Phase I CAF will be for non-recurring support.¹⁸⁵ The NPRM also indicates that Phase I support should be for “broadband” networks.¹⁸⁶ However, with regard to ongoing support, the NPRM envisions recurring support being used for “affordable IP-based networks that are capable of providing both high-quality voice service and broadband Internet access service.”¹⁸⁷ The difference between the Phase I support and the long-term vision of the plan (“Phase II”) is substantial, and it is not at all clear why it makes sense to split the universal service mission statement between Phase I and Phase II.¹⁸⁸ The NPRM apparently also envisions a transition period where potential recipients of Phase I CAF support may compete with

¹⁸⁴ Id., ¶335.

¹⁸⁵ Id., ¶266.

¹⁸⁶ Id., ¶261.

¹⁸⁷ Id., ¶398.

¹⁸⁸ The NPRM is at times unclear whether there is in fact a split between the Phase I CAF and the “long-term vision for the CAF.”

Phase II recipients.¹⁸⁹ Thus, it would appear to make sense to condition Phase I support on the provision of both voice and broadband Internet Access, otherwise, the stated goal of a single supported provider¹⁹⁰ would be undermined.

Phase I CAF will provide few lessons for the long term

There are substantial differences in the distribution of one-time support for unserved areas and the distribution of recurring support for areas that are already served. As such, the lessons that the Commission learns from the Phase I CAF may not transfer to the distribution of recurring support and is also unlikely to hold few lessons for the more costly areas where broadband service is unavailable. The NPRM states:

We further note that differences in the cost to deploy broadband vary significantly among these unserved areas, and our proposed reverse auction will identify and target funding to those unserved areas that could be served at the lowest cost (i.e., the lowest level of public support).¹⁹¹

Thus, the planned auction design is not compatible with solving even the difficult problems with higher-cost unserved areas – the bidding process envisioned in the NPRM will only result in the “low hanging fruit” being targeted for support. From a public policy perspective, this is exactly backward. It is reasonable to expect that the lower cost areas will be more likely to eventually generate interest from either ILECs or cable companies that decide the time is finally ripe to upgrade or expand their networks, or from some other source of supply that does not require government support.

Apparently the design of the auction process envisioned in the NPRM attempts to

¹⁸⁹ Id., ¶446, “If a COLR currently receiving support refuses the [right of first refusal] ROFR and subsequently does not win the auction, a transition may be appropriate because there may be a period of time before the new provider is able to build-out and serve the area.”

¹⁹⁰ Id., ¶264.

¹⁹¹ Id., ¶267.

simulate bidding competition by ranking “successful” bids based on the “lowest cost” projects. “In other words, the competition in our proposed auction would primarily be among providers seeking to serve different geographic areas rather than among providers seeking to serve the same geographic area.”¹⁹² This is very different competition as opposed to multiple providers bidding to serve a single area, and it thus has inherent limitations with regard to the auction’s ability to provide lessons regarding future formats. The process proposed in the NPRM will effectively exclude higher cost areas from the process, and deny broadband service to customers in those areas. These scenarios present a much more challenging situation for a reverse auction as either the high costs of building out or the existence of an incumbent will likely result in less entry and unacceptable auction performance.

In addition, if auctions move forward, the Commission must not permit “all or none” bids so that the Commission can award one contract for each unserved area for the bidder that has the low bid for that area. In other words, the Commission must require bids for individual areas, in addition to allowing combined bids.

Further, in a footnote the NPRM states,

As noted above in the Legal Authority section, we could potentially allow ETCs not to provide all supported services, and therefore allow ETCs to provide only broadband service. On the other hand, if we were to condition receipt of support for the provision of voice service on the deployment of broadband, a participant in the CAF would have to provide voice as well as broadband service.¹⁹³

This statement highlights the problem of trying to implement an auction process when the Commission has not finalized the vision of the universal service program. If the

¹⁹² Id.

¹⁹³ Id., ¶284, n.444.

Commission goes down the path of separately supporting voice and broadband services, it will be falling into the same trap as it did when it allowed wireless carriers to gain ETC status and draw from the fund. The size of the USF ballooned as consumers purchased both supported wireless and supported wireline services.¹⁹⁴ Supporting broadband and voice over separate networks raises the same potential – i.e., overlapping support for services that are not real substitutes. Furthermore, given the apparent direction that the NPRM envisions for intercarrier compensation – a transition to IP voice services under a bill-and-keep access payment arrangement¹⁹⁵ – the NPRM’s potential enabling of separately-supported voice and broadband networks in the same geographic area is all the more problematic.

Quality Adjustments

The NPRM proposes to rank bids based on the price per unit covered.¹⁹⁶ As discussed above, this will ensure that the Phase I CAF will go to support projects associated with the “low hanging fruit,” and will thus provide little help in developing a mechanism capable of supporting the more difficult cases. The NPRM also seeks comment on an alternative approach that would allow bidders to commit to “quality adjustments.”¹⁹⁷ The NPRM suggests that these might include “higher speeds, lower latency, mobility, or a better upgrade path,”¹⁹⁸ and that the Commission would take these

¹⁹⁴ 05-337, *Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers; RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order (May 1, 2008), ¶29.

¹⁹⁵ See, e.g., NPRM, ¶527.

¹⁹⁶ NPRM, ¶338.

¹⁹⁷ *Id.*, ¶339.

¹⁹⁸ *Id.*, ¶339.

factors into consideration when evaluating bids.

The first issue regarding this proposal is the notion that the Commission would consider *mobility* as a factor when awarding support for fixed broadband deployment. Given that the Commission issued the Mobility Fund NPRM in October 2010,¹⁹⁹ which proposed a Mobility Fund intended to spur build out of advanced mobile wireless networks in areas not served by current-generation mobile networks, the potential inclusion of mobility as a factor here as well is troubling. As the NPRM elsewhere notes, “The National Broadband Plan recommended that there should be at most one – whether fixed or mobile – subsidized provider of broadband service per geographic area, noting that subsidizing duplicate, competing networks would impose significant burdens on consumers.”²⁰⁰

Whether fixed and mobile broadband are “competing” technologies is debatable. Rather, it appears that households are purchasing both fixed and mobile broadband services, with limited demographic segments (low income consumers) more likely to rely strictly on wireless offerings.²⁰¹ The potential duplication of support between mobility and fixed broadband offerings should be avoided by the Commission at all costs.

The use of weighted criteria, or “bidding credits”²⁰² should also be avoided as the use of this approach will have the potential to inject a high degree of subjectivity into the bidding process. Rather, the Commission should establish the minimum standards

¹⁹⁹ WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14716 (2010).

²⁰⁰ NPRM, ¶402.

²⁰¹ The largest gains in wireless Internet usage have been in households with annual incomes less than \$30,000 (Pew Internet “Mobile Access 2010,” July 7, 2010, p. 8). This same demographic shows low levels of wireline broadband. (Pew Internet, “Home Broadband 2010,” August 11, 2010).

²⁰² NPRM, ¶340.

associated with the supported service. As discussed below, these standards must include basic service quality standards related to speed, latency, jitter, service uptime. The maximum service price to the end-use customer, stated in terms of dollars per Mbps, is also needed as a bidding parameter established by the Commission.

Satellite services

The NPRM describes an expanded role of satellite providers for the provision of both supported voice and broadband services.²⁰³ The NPRM by redefining supported voice services as “voice telephony services,”²⁰⁴ opens the door for degraded levels of service. The NPRM indicates that USF recipients could partner with satellite service providers who offered “voice telephony services.”²⁰⁵ The Commission should reject the use of satellite services to provide supported voice services. Current satellite voice services are subject to signal propagation delays that reduce call quality, and interfere with communication.²⁰⁶ While it may be the case that in competitive markets for products and services, some consumers choose lower quality at a lower price, the market envisioned by the NPRM will continue to be a monopoly market. Consumers subscribing to the supported service will have no choice, and it would not be in the public interest for the Commission to force consumers residing in high-cost areas to subscribe to low-quality voice services.

²⁰³ Id., ¶¶98, 272.

²⁰⁴ Id., ¶96.

²⁰⁵ Id., ¶98.

²⁰⁶ Although “never say never” is a good principle in technology, the limitations of satellite services are caused by distance and the speed of light. It is safe to say that these problems are unlikely to be solved in the near future.

What about Broadband over PowerLines?

Despite its listing on the Broadband.gov page created by the FCC,²⁰⁷ broadband over powerline (“BPL”) is not even mentioned in the NPRM. As Broadband.gov indicates, if there is a reason why BPL is not considered as a source for deployment of broadband in unserved areas, the FCC should explain why:

BPL is the delivery of broadband over the existing low- and medium-voltage electric power distribution network. BPL speeds are comparable to DSL and cable modem speeds. BPL can be provided to homes using existing electrical connections and outlets. BPL is an emerging technology that is available in very limited areas. It has significant potential because power lines are installed virtually everywhere, alleviating the need to build new broadband facilities for every customer.²⁰⁸

E. One Provider Per Service Area

The NPRM indicates that in the interests of efficiency the CAF should only support one provider per geographic area.²⁰⁹ However, the NPRM also states that the current incumbent may be the winning bidder for CAF support.²¹⁰ Allowing incumbents who receive support for “voice” services to expand their draw and take the new CAF funds does not appear to promote efficiency, and illustrates a significant underlying problem with the NPRM’s approach. There is considerable variability among supported ILECs with regard to the coverage and quality of broadband services. Some ILECs offer broadband throughout their service areas, others do not.

That the Commission would award additional support to those ILECs that have not achieved ubiquitous coverage without understanding why these unserved areas

²⁰⁷ See http://www.broadband.gov/broadband_types.html#bpl.

²⁰⁸ Id.

²⁰⁹ NPRM, ¶281.

²¹⁰ Id.

continue to exist in the ILEC's service areas is a significant misstep. Before it awards one nickel more to an ILEC, the Commission must fully understand the ILEC's business operations by auditing the operations of the ILEC, and gaining insight into both the regulated and unregulated services provided by the ILEC, as well the level of returns earned by the ILEC. Otherwise, the Commission could be creating a program that would reward those companies that have mismanaged universal service funds already received, by providing them with additional funds.

Clearly, however, if there is to be only one supported broadband provider for each service area, that provider must be a provider-of-last-resort for that area. The provider must be willing to provide service to all those in the area (especially if the provider is able to self-select that area). In addition, as long as there continues to be legacy voice support – and, as NASUCA discusses above, that should be for the foreseeable future – it must be acceptable for there to be one broadband provider and one voice provider in a given area.²¹¹ The recipient providers need not be identical. This is merely a demonstration that the area in question is uneconomic either for legacy service or for broadband.

F. The Commission Should Not Link The CAF To Intrastate Access Reform.

The NPRM questions whether CAF support should be limited to states that have taken measures “to reduce intrastate switched access rates.”²¹² Especially given the tenuous link between ICC and broadband deployment explained elsewhere in these

²¹¹ See *id.*, ¶ 274.

²¹² *Id.*, ¶ 297.

comments,²¹³ linking CAF support to the status of a state’s access reform would be highly problematic. The solution to the intercarrier compensation problem is not to punish consumers in unserved areas by withholding broadband support.

Furthermore, determining which states would be eligible under the proposed criteria would be difficult. For example, what degree of intrastate access charge reduction would be required? States have taken a variety of actions with regard to switched access rates. Two recent reports, an AT&T ex parte at the FCC and a staff working group report to the North Carolina Public Utilities Commission, have been released that summarize the status of access charges in various states.²¹⁴ What is most striking about the reports is the lack of consistency regarding access regimes across jurisdictions. Some states have taken no action regarding intrastate access charge levels.²¹⁵ Other states represent their own internal patchwork quilts of access reform activity – within any state, some ILECs may have reduced intrastate rates or reduced rates to parity. Other ILECs within the same state, typically smaller ILECs, may not have been required to take any action. Where it has occurred, activity across states regarding the parity of access rates does not exhibit consistent practices. For example, Indiana has implemented an “instant mirroring” parity practice for the state’s largest ILEC, AT&T.²¹⁶

²¹³ Part Eight, *infra*.

²¹⁴ The AT&T ex parte is available at <http://fjallfoss.fcc.gov/ecfs/document/view;jsessionid=NGsXmIXwrznc96l43LDpFFgFyHVdZJ8RmGz3ph780Rk6BldyS2FV!-438269297!NONE?id=7020918733>; the North Carolina working group report is available at <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=TAAAAA78201B&parm3=000131826>.

²¹⁵ According to the AT&T summary, Vermont, New Hampshire, Delaware, Maryland, South Carolina, Alabama, Louisiana, Arkansas, Oklahoma, Colorado, Utah, Wyoming, South Dakota, North Dakota, Montana, and Idaho have undertaken no access charge reform actions.

²¹⁶ AT&T report, p. 9.

Maine's commission, due to statutory requirements, has also required parity of access rates between state and federal levels, but allows a lag of two years between parity updates.²¹⁷ How the Commission would sort out these variations and develop a ranking of the degree of state "reform" would only add unnecessary complexity to an already complex and inequitable process.

Actions that some states have taken should also not be held against the state in terms of denying states that have their own universal service program access to new federal broadband support. However, the Commission should encourage coordination between Federal and state programs. The Joint Board may be the best vehicle to coordinate this support.

The NPRM raises the issue of whether the Commission should take any specific actions regarding states that have restricted municipal broadband deployments.²¹⁸ When a state restricts municipal broadband, it reduces competition facing incumbent broadband providers, thus, it is not surprising that incumbent LECs and cable companies have been proactive in state legislatures in blocking municipal broadband projects.²¹⁹ As such, consumers are made worse off by the elimination of municipal sources of broadband supply. These actions to reduce competition should not be encouraged, but they are the decisions of the state and should not be second-guessed by this Commission. It is also not clear that restricting access to broadband USF would be the best approach to

²¹⁷ Id., , p. 1.

²¹⁸ NPRM, ¶299.

²¹⁹ See, for example, "Frontier is Latest Incumbent Carrier to Oppose Municipal Broadband Proposal," *Telecompetitor*, January 27, 2011, accessible at: <http://www.telecompetitor.com/frontier-is-latest-incumbent-carrier-to-oppose-municipal-broadband-proposal/>. See also, "Cable TV fights municipal broadband," *Newobserver.com*, June 22, 2010, accessible at <http://www.newsobserver.com/2010/06/22/545221/cable-tv-fights-municipal-broadband.html>.

remedying these state choices.

G. The Commission Must Establish Public Interest Obligations For Phase I CAF.

The Commission asks whether public interest obligations should be established for the Phase I CAF.²²⁰ The answer should be clear: “Of course!” The notion that these public funds could be expended without obligations being imposed on the service providers should not even be considered. Some of those obligations are discussed here.

Bidder-Established Versus Minimum Coverage Requirements

The NPRM raises the issue of whether the Commission should establish minimum coverage requirements, or rely on bidder defined areas.²²¹ The NPRM posits that bidder-defined areas might result in more service being made available in more housing units overall than if the Commission were to establish a coverage minimum.

NASUCA believes that it is critical that the Commission establish the coverage requirement. As a basic policy matter, it should be the objective of this Commission to ensure that broadband is extended to all households.²²² However, given the NPRM’s apparent intention to rely on some type of bidding mechanism to distribute support, it is all the more important for the Commission to define exactly what is up for bid, including the geographic scope of coverage. If it does not, then the ranking of applications for CAF funding becomes even more difficult, and the efficiency of a potential bidding mechanism is further undermined.

While the NPRM focuses on the Census Block as the geographic area associated

²²⁰ NPRM, ¶ 309.

²²¹ Id., ¶310.

²²² 47 U.S.C. § 254(b)(3).

with the bidding process,²²³ the NPRM is less than clear on how Census Block geographic areas can be reconciled with existing service areas of incumbent broadband providers. A Census Block may have portions of the geography that are served by an ILEC and/or cable broadband provider, but have other areas where there is no broadband service. Given the NPRM’s mention of “bidder-defined” areas, it would appear to make sense to have any bidder-defined service area correspond to portions of Census Blocks.

The problem of applicant-defined support becomes even more complex in light of the NPRM’s position regarding the use of satellite services to reach the “most high cost” locations.²²⁴ Granting a service provider the ability to self-define service areas would appear to work at cross-purposes with the ability of the service provider to partner with a satellite provider to meet the coverage requirement. As applicants already have the ability to “self select” service areas through partnering with a satellite provider, it makes little sense to offer them another “safety valve” through self-**defined** service areas.

H. Requirements For The Supported Services Speed

The NPRM proposes that the Phase I CAF program require **actual** upload and download speeds of at least 4 mbps and 1 mbps respectively (“4/1”), without defining the term “actual.”²²⁵ There are several points that the Commission should consider regarding this objective. First, the Commission must define the term “actual” prior to proceeding with broadband support. It will be reasonable to identify actual speeds as being measured between the network interface unit (“NIU”) located at the end-user’s premises and the

²²³ NPRM, ¶289.

²²⁴ Id., ¶¶132, 133.

²²⁵ Cf. id., ¶¶113, 311.

service provider Internet gateway that is the shortest administrative distance from that NIU. The actual speed itself should be reflected by performance achieved with a given probability (e.g., 95%) over a set time period (e.g., one hour) that includes peak use times.

With regard to the 4/1 speed objective, the NPRM indicates that the Phase I CAF will distribute funds in 2012 and possibly 2014.²²⁶ Given that the National Broadband Plan has stated that the national goal is to have 100 Mbps service available to 100 million households by 2020,²²⁷ it is troubling to see the NPRM continuing to propose a static 4/1 benchmark through the first half of the decade. NASUCA asserts that whatever funds are expended on broadband deployment, the network created with those funds must be “scalable,” that is, capable of speed upgrades with a minimum of effort and expense. A focus on 4/1 appears to cement rural and high cost areas into a minimum performance standard that is well outside of what can reasonably be projected to be the norm in urban areas by 2014.

Indeed, the Akamai Technologies report on Internet access speeds for the third quarter of 2010 shows average download speeds nationwide of 5.0 Mbps.²²⁸ In urban areas, the Akamai report shows average connection speeds in the fastest urban areas ranging from 6.5 to 8.3 Mbps. This data suggests that the 4/1 standard is already obsolete, and will only reinforce a growing differential between rural and urban areas. A higher and evolving standard must be employed.

²²⁶ Id., ¶261.

²²⁷ *National Broadband Plan*, p. 9.

²²⁸ Akamai Technologies, “State of the Internet, 3rd Quarter 2010,” pp. 19-20.

The NPRM also raises the possibility of an “evolving speed requirement, post award, to account for changes in technology and consumer demand over time.”²²⁹ However, it is not clear how this requirement would relate to support granted under the Phase I CAF.²³⁰ If the Phase I CAF is a one-time grant, how would this dynamic be incorporated? With regard to recurring support, however, the objectives of the National Broadband Plan must be incorporated into the structure of recurring support. Recipients should be required to upgrade so as to increase speed over time if they are to continue to receive support; the initial requirement of “scalability” facilitates such upgrades.

Other service quality standards

The NPRM also raises the issue of whether there are performance dimensions beyond speed that should be addressed.²³¹ If broadband services are to be supported by public moneys, they must meet minimum service quality standards in addition to speed. Defining the broadband services to be provided under the CAF will require commitments by the supported carrier for technical specifications such as speed, latency, jitter, and service uptime. NASUCA submits that the Commission should adopt the following as a reasonable starting point for defining the service level on the supported broadband network:

- The portion of the network to which these standards will need to be applied is from the customer's premise and the closest peering point between broadband provider and public Internet for a given consumer connection.
- **Service Availability:** Service on the broadband network is guaranteed to be available 99.99% of the time.

²²⁹ NPRM, ¶312.

²³⁰ The NPRM raises this issue in the context of the Phase I CAF.

²³¹ Id., ¶105.

- Latency. The latency service level for the broadband network shall be 55 ms. Latency is measured as an average round-trip delay over a calendar month for traffic on the carrier broadband network between the customer premise and the point of interconnection to the Internet. Average latency is measured as the average of fifteen (15) minute samples taken throughout a calendar month.
- Packet Loss Service Level. The carrier broadband network is guaranteed to have a monthly average packet loss of no greater than 0.5% during any calendar month. Average packet loss is measured as the average of fifteen (15) minute samples across the carrier broadband network as taken throughout a calendar month.
- Network Jitter Service Level. The carrier broadband network is guaranteed to have a monthly average network jitter delay of no greater than one (1) millisecond during any calendar month.

These recommendations are based on a review of IP transit service level agreements (“SLAs”) from XO, Verizon, Comcast, and AT&T.²³² Not all SLAs specify the same level of performance across all areas, but they are similar. Although these SLAs are for IP transit on backbone networks, they provide a reasonable standard for the customer experience between the residential demarcation and the Internet gateway. If the IP backbone is delivering this level of performance, anything less from the last/middle mile will degrade the overall performance of the circuit and the customer’s use thereof.

Minimum Coverage

The NPRM states that the Commission does not intend to discourage providers from providing coverage beyond the minimum areas specified.²³³ The NPRM also asks whether a provider that commits to extend service beyond the minimum coverage

²³² See http://new.serviceguide.att.com/portals/sgportal.portal?_nfpb=true&_pageLabel=aps_page; <http://www.verizonbusiness.com/terms/us/products/advantage/voicequality/>; http://www.xo.com/SiteCollectionDocuments/information/TOS_SLA_Rates/sla/High_Speed_IP_Transit_Service_SLA.pdf; <http://www.comcast.com/dedicatedinternet/SLA/default.html>.

²³³ NPRM, ¶336.

requirement should receive additional support.²³⁴ NASUCA urges the Commission to proceed with caution on this issue. To the extent that the extension of coverage overlaps the service area of a supported ILEC, the Commission could be providing overlapping support, which would increase the overall cost of the program.

Deployment and Duration

The NPRM also asks about the appropriate term of these commitments.²³⁵ Some of the commitments will be met based on the engineering design specified in the bidding requirements. For example, serving all households in a specific geographic area can be counted as complete once it is confirmed that the buildout is finished. Other likely requirements may require ongoing benchmarking. For example, while a network capable of delivering “actual” 4/1 service has technical characteristics that are different than a network delivering 1.5 Mbps downstream and 384 kbps upstream, it is possible that the service provider can modify network performance in light of changes (e.g., an increase in the number of subscribers who compete for bandwidth on common portions of the network).

Thus, while the satisfaction of commitments such as the scope of a service area that are “hard wired” into a project can most likely be counted as satisfied at the project’s completion date, other commitments must be monitored for a reasonable period of time. With the Commission’s approach, the CAF will be supporting service that is likely to be provided on a monopoly basis, given the lack of a business case for unsupported deployment. Thus, it would appear that an extended performance commitment with

²³⁴ Id.

²³⁵ Id., ¶314.

regard to areas such as service quality and price would be appropriate, for at least five years.

The NPRM also asks, assuming that a different provider would ultimately receive long-term (Phase II) support for the service area of the Phase I CAF recipient, whether the requirements imposed on the Phase I CAF recipient should be phased out.²³⁶ The scenario envisioned by the NPRM is somewhat difficult to imagine, because the Phase I CAF is designed to bring service to currently unserved areas. The NPRM apparently assumes that there would be new entry in the formerly unserved area following the Phase I CAF grant.

If there is a new funding recipient that is under a similar set of public interest requirements associated with recurring funding, removing the public interest obligations on the Phase I CAF recipient should allow the full term of the Phase I CAF obligations to run their course. The Phase I grants are being made with the recipients full knowledge that there may be additional funding made available for recurring support in the near future.²³⁷ Thus, whatever time period associated with a Phase I grant should be allowed to run its course unaffected by the potential distribution of recurring support to another service provider.

I. Eligibility Requirements For Receipt Of The CAF

The NPRM seeks comment on whether the CAF recipient should be an ETC, and requests comment on a potential forbearance from ETC classification.²³⁸ NASUCA

²³⁶ Id., ¶314.

²³⁷ Id., ¶398.

²³⁸ Id., ¶318.

urges the Commission to continue to require that all USF recipients, for broadband and voice services (whether fixed or mobile), continue to be ETCs, with the full range of § 214 obligations.²³⁹

As discussed earlier, the NPRM's proposal to split-off voice service requirements from the Phase I CAF is ill-advised and takes universal service reform in the wrong direction. Ultimately, a single broadband network should provide all supported services; otherwise, duplicate support will result, raising the total cost of providing the supported services. There is every reason to continue to require ETC classification for providers of supported services in both Phase I and the "permanent" solution.

The NPRM raises additional questions associated with eligibility. It seems reasonable to require auction participants to have submitted all required data to the State Broadband Data and Deployment program.²⁴⁰ In addition, auction participants should be required to have all needed authorization to provide the required services prior to receiving support.²⁴¹ If the Commission does not impose such a requirement, the auction process could award support to entities that face entry barriers, which would hinder the deployment of the supported services.

One of the significant risks associated with the award of universal service support through an auction process is how the awards will be viewed by courts of competent jurisdiction – for example, bankruptcy courts. As the Commission learned through the

²³⁹ The NPRM raises the question of whether the Commission should forebear from the ETC requirements for CAF recipients. *Id.*, ¶ 89. As with the question of forbearance from the § 254 requirements in order to allow broadband funding in the first place (discussed in Part Three, *supra*), forbearance from the ETC requirements would create a gap that the Commission lacks the authority to fill.

²⁴⁰ NPRM, ¶322.

²⁴¹ *Id.*, ¶320.

Nextwave debacle,²⁴² the auction process may invoke property rights that ultimately encumber the Commission’s ability to carry out its policy. Awarding support to an entity that has yet to secure the needed authorizations would open the door to disputes regarding the disposition of support. Any auction winner should be deemed a “conditional winner” until the winner can demonstrate that it has met all preliminary requirements for satisfying the obligations imposed by the Commission, including holding ETC status and having all other needed authorizations.

The NPRM raises the question of whether it would be advisable for “potential bidders to provide certification or documentation of whether the state in which the bid is associated has “undertaken intrastate access charge reform.”²⁴³ As discussed earlier, determining just what “intrastate access reform” is will be a complex undertaking. As a result, it must be the Commission that makes the determination, if it pursues such an ill-advised approach in the first place.

The NPRM also raises the issue of who should certify whether the self-selected geographic area associated with the bid is already receiving funding from other sources.²⁴⁴ Here again, such an important certification cannot be left to the bidders. As was discussed earlier, the Commission must work with states to coordinate broadband support, and if it is the Commission’s intention to have no overlapping support, the Commission must gather sufficient information to establish a database that identify which areas are already slated to receive support.

²⁴² See *FCC v. Nextwave Personal Communications Inc.*, 537 U.S. 293 (2003).

²⁴³ *Id.*, ¶321.

²⁴⁴ *Id.*, ¶323.

J. NASUCA’S Proposal For A Procurement Mechanism

As noted above, reverse auctions are fundamentally flawed and cannot ensure that competitive bids will even be received in any particular area. In addition, the Commission will not even know what is being offered until a long form application is filed. The better approach is NASUCA’s recommendation that the Commission should use established civilian agency procurement procedures set forth in the Federal Acquisition Regulations (“FAR”) to contract for the buildout of broadband networks in the unserved areas and for the operating of such networks.²⁴⁵ As the Commission has noted, the areas identified as unserved are unserved because these areas lack a business case for their development.

NASUCA recommends that the Commission use a request for proposal process to award contracts for each unserved area by soliciting proposals from satellite operators, wireline and wireless companies, electric companies (broadband over power lines), local governments, and other entities in accordance with the regulations set forth in 48 CFR Subpart 15.2. Section 15.203(a) authorizes the use of request for proposals (“RFPs”) for negotiated acquisitions and the RFP is the vehicle used to communicate the government’s requirements to prospective offerors. The Commission should request technical and cost proposals from potential offerors and make an award based upon the best value to the government based upon technical and cost factors.

The Commission should develop specifications around the performance requirements it deems necessary for the broadband networks in each unserved area, as

²⁴⁵ The applicable Federal Acquisition Regulations applicable to civilian agencies, including the Federal Communications Commission are set forth in Title 48 of the Code of Federal Regulations.

discussed here. The technical proposals would include the offeror's approach to meet the performance requirement for the buildout of the system along with how the network will be operated and maintained after it is built. Detailed cost proposals for the buildout and the operation of the system would be submitted and would be evaluated in accordance with Subpart 15.4 of the FAR. The buildout would be funded through the USF and the ongoing operation and maintenance would be funded by revenues derived from the services offered to households in the unserved area. If necessary, some ongoing support from USF could be made available for operation and maintenance.

The evaluation of proposals would use the source selection process described in Subpart 15.3 of the FAR. The Commission would select the most appropriate type of contract for each unserved area in accordance with the regulations set forth in Subpart 16 of the FAR.

The Commission should consider requiring each offeror to propose a standalone structurally separate entity for the buildout and operation and maintenance of the network. This will enable a thorough analysis of the actual costs for the network being contracted for, with minimal allocation of general and administrative costs.

PART SEVEN: ACCOUNTABILITY

The Commission correctly states that

[u]niversal service represents an investment overseen by the Commission on behalf of the public as a whole. As such, the Commission has an obligation to the public to ensure that the funds are spent appropriately and efficiently. To ensure that universal service funds are spent in a fiscally responsible manner, the Commission, and USAC, must have sufficient

insight into the operations and financial condition of fund recipients.²⁴⁶ On that basis, that Commission proposes that it should “require increased disclosures about the operating performance and financial condition of companies that receive universal service support.”²⁴⁷ NASUCA definitively agrees.

Opposition from the recipients is to be expected, however. (In that respect, NASUCA will keep this portion of these comments short, and will address the issues more fully in reply to the expected industry protestations.) Such opposition ignores the “public investment” nature of USF funding; the customers who pay for this support should have a right to know how their public dollars are being spent.

Thus to the extent possible, the increased disclosures to be required by the Commission should not be allowed to be filed as confidential or proprietary information. Otherwise, the public and its representatives – like the members of NASUCA – will be kept in the dark/

Imposing a requirement for increased disclosure is not enough, of course. The Commission and USAC must take an active role in monitoring the content of those disclosures, in order to ensure that the purposes of the funding are being met. There will also have to be review of the disclosures in order to determine whether they are accurate.

Consistent with NASUCA’s prior positions, part of that disclosure should be the reinstatement of the Automated Reporting Management Information System (“ARMIS”) reporting requirements that the FCC unwisely granted forbearance from.²⁴⁸ These

²⁴⁶ NPRM, ¶ 457.

²⁴⁷ Id.

²⁴⁸ See, e.g. *In the Matter of Modernizing FCC Form 477 Data Program*, WC Docket No. 10-11, Reply Comments of NASUCA and Rate Counsel (April 14, 2011) at 2-6.

provide fundamental information about the carriers and their services that is necessary to review the USF funding.

PART EIGHT: INTERCARRIER COMPENSATION

A. Introduction

The Commission states at the outset of this section, “[W]e seek comment on proposals to comprehensively reform intercarrier compensation to bring the benefits of broadband to all Americans.”²⁴⁹ The mantra of “the intercarrier compensation system is broken” resounds continually through the telecoms space. But in this as in most areas, it is necessary to ask some fundamental questions before implementing “comprehensive reform”:

- What are the problems caused by the current ICC system?
- What are the merits of the reform proposals?
- And what do those proposals really have to do with “bring[ing] the benefits of broadband to all Americans”?

The Commission correctly points out that there is a wide disparity among different ICC schemes:

As a result of this long history, today, there are two primary types of intercarrier compensation regulation: (1) access charges; and (2) reciprocal compensation. However, the rates that apply to traffic under these systems continue to depend on a number of factors including: (1) where the call begins and ends (interstate, intrastate, or “local”); (2) what types of carriers are involved (incumbent LECs, competitive LECs, interexchange carriers (IXCs), wireless); and (3) the type of traffic (wireline voice, wireless voice, ISP-bound, data). The resulting patchwork of rates and regulations is inefficient, wasteful and slowing the

²⁴⁹ NPRM, ¶ 490.

evolution to IP networks.²⁵⁰

What the Commission fails to recognize, however, is that some of these differences are driven by the law (i.e., the differences between intrastate and interstate access charges, and the differences between access charges and reciprocal compensation²⁵¹), but most of these differences are the result of regulatory action and inaction.

Notably, the NPRM is insupportably scant on details of how these differences are “inefficient” or “wasteful.” Perhaps this is conventional wisdom. It must be shown, however, how the conventional is wise. The NPRM does describe how industry changes have resulted in declining access revenues for many carriers.²⁵² The NPRM says that reform will bring “certainty.”²⁵³ But that certainty will apparently be the certainty of even-greater declines in access revenues.

With regard to “slowing the evolution to IP networks,” the NPRM asserts that “[e]vidence indicates that the current system is hindering progress to all IP networks.”²⁵⁴ The NPRM cites as one example that “the current regime creates the perverse incentive to maintain and invest in legacy, circuit-switched-based, time-division multiplexing (TDM) networks to collect intercarrier compensation revenue, hindering ‘the transformation of

²⁵⁰ Id., ¶ 502.

²⁵¹ Compare 47 U.S.C. § 252(d)(2), which describes a cost methodology for determining reciprocal compensation charges specifies, with the *CALLS Order*, which made no pretense of basing interstate access charges on cost. *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*”).

²⁵² NPRM, ¶ 504.

²⁵³ Id.

²⁵⁴ Id., ¶ 506.

America's networks to broadband.'"²⁵⁵ The citation for this "evidence" is to the National Broadband Plan, which in turn cited to various large carriers' comments.²⁵⁶ Notably, none of those comments actually provided any numbers to back up their theoretical allegations. But it is clear that the carriers accused of this "hindrance" are not the smaller carriers that have had higher access charges, but larger carriers like AT&T and Verizon that have low access charges – both interstate and interstate.²⁵⁷ And the allegations are belied by the fact that the smaller carriers have deployed broadband networks more consistently than the large carriers.²⁵⁸

Presumably, the distortion that the NPRM envisions is that under the current regime, certain recipients of access rates are being overcompensated, and thus these firms will have no incentive to invest in an IP-based platform. If there is proof for this proposition, the NPRM does not mention it. However, suppose that a small LEC serving a low-density high-cost area were to convert its network to IP-based technology. Following this conversion, certain facts do not change. For example, the small LEC would continue to face high costs of local (broadband) loops. If a long-distance voice service provider wanted to terminate its voice traffic on the small ILECs network, the small ILEC continues to have economic justification for charging terminating access (whether measured in MOU or megabytes does not matter). The small ILEC has incurred costs that are avoidable for the IXC. Unless the small LEC and IXC have some other

²⁵⁵ Id.

²⁵⁶ National Broadband Plan at 142, n.48.

²⁵⁷ See, e.g., GN Docket 09-47, et al. Cablevision Comments (December 22, 2009) at 5, n9; id., Sprint Nextel Comments (December 22, 2009) at 10.

²⁵⁸ WC Docket 10-90, Joint Reply Comments of NECA, et al. (August 12 2010) at 5, n14. This counters the allegations of Global Crossing, cited in the NBP, that carriers with higher access charges are reluctant to deploy IP networks. See 09-47, et al., Global Crossing Comments (December 7, 2009) at 6.

“trade” that will offset the IXC's avoidable costs, the small LEC is being economically reasonable to request compensation, and the IXC will be economically reasonable if it pays the small LEC for terminating its traffic (unless of course, the IXC can self-provide a connection to the end-user more cheaply than the charges proposed by the small LEC, or, alternatively, can convince a regulator that it should get something for nothing).

It is likely true that “the transition to IP can result in cost savings, including reductions in circuit costs, switch costs, space needs, and utility costs, as well as the elimination of other signaling overhead.”²⁵⁹ But it has not been shown that the transition is being stalled by the lack of ICC reform – in particular, not the form of reform outlined in the NPRM.

In a similar vein, the NPRM cites “increasing regulatory arbitrage, particularly from phantom traffic where carriers seek to avoid paying intercarrier charges, and access stimulation where carriers seek to inflate intercarrier revenues.”²⁶⁰ And the NPRM cites “regulatory uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic....”²⁶¹ Those subjects, of course, are discussed in Section XV of the NPRM, on which comments have already been filed and reply comments are due simultaneously with these comments. As discussed in NASUCA’s Section XV comments, correcting the phantom traffic and access stimulation problems, and ensuring that VoIP traffic pays ICC are things that can and should be done immediately, and need not be part of any long-range ICC reform. Global Crossing asserts that there are

²⁵⁹ NPRM, ¶ 506, citing Letter from Russell M. Blau, Counsel to Neutral Tandem, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, GN Docket No. 09-51 at 1-2, Attach. at 4, 6 (filed Oct. 22, 2010).

²⁶⁰ NPRM, ¶ 507.

²⁶¹ Id.

currently \$450M in industry ICC disputes annually.²⁶² The Global Crossing ex parte does not parse these disputes into their sources (what form of arbitrage? phantom traffic? VoIP ICC?), but that would be a valuable datum for the Commission to consider.

Indeed, it should be noted that phantom traffic and traffic pumping do not really represent regulatory arbitrage, where carriers seek to take advantage of regulatorily-created price differences: Carriers that seek to avoid making payment for their traffic by sending traffic with inadequate information will do so regardless of the level of ICC charges; and traffic pumping occurs not because of the level of the charges but because of the lag in how those charges are set. And while VoIP providers' avoidance of ICC is arbitrage of a sort – because the uncertainty created by the Commission has effectively made VoIP traffic's charges zero – the solution is not to buy into the VoIP providers' arguments by officially setting that rate at zero or close to it.

All of that said, it remains to examine the end-game of the NPRM, the proposal to reduce ICC across-the-board: “[W]e 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.”²⁶³ Of course, it should be obvious that reducing per-minute ICC charges does not necessarily imply eliminating ICC – per-minute charges could be replaced by some other form of charge. But it appears, instead, that the Commission's goal is to reduce ICC (interstate and intrastate access, reciprocal compensation, and all other forms) to

²⁶² See 01-92, Global Crossing ex parte (filed December 17, 2010).

²⁶³ NPRM, ¶ 40.

rates as low as possible, if not to zero – the rate implied by a bill and keep regime.²⁶⁴

We can examine the Commission’s central premise, that “[p]er-minute charges are inconsistent with peering and transport arrangements for IP networks, where traffic is not measured in minutes.”²⁶⁵ However, this argument shows that the Commission is being diverted from key factors of how IP networks operate now, and how a future “all-IP world” would function. While it certainly is the case that traffic exchange on pure IP-based networks is not based on per-minute charges, this does not mean that all traffic exchanged between commercial IP networks is on a peering (or bill-and-keep) basis, or that traffic exchanged between commercial IP networks should be a zero cost absent agreements between the networks.

IP network providers are well aware that unless traffic volumes exchanged between IP networks are in balance, the exchange of traffic will impose differential costs. If IP-based Carrier A terminates large volumes of traffic on IP-based Carrier B’s network, but not *vice versa*, then Carrier A gets something for nothing, and Carrier B will likely require that Carrier A pay IP transit charges. The NPRM appears to assume that once the transition to all IP networks takes place, there will be no need for any reciprocal compensation, as all IP-based carriers will happily accept one-another’s traffic on a bill-and-keep basis. Nothing can be further from the truth, as usage-based payments (perhaps not based on minutes of use) will continue to be a fact of life in an all-IP world. Thus, whether measured in MOU or megabytes, compensation for traffic exchange will continue.

²⁶⁴ See Part Eight (D), below for a separate discussion of bill-and-keep.

²⁶⁵ NPRM, ¶40.

Next, the Commission’s legal basis for authority to accomplish this end must be examined.

B. The Commission Does Not Have The Legal Authority To Impose A Unified ICC Regime.

The Commission introduces its discussion of its authority on ICC as follows:

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.²⁶⁶

Let us be honest: The apparent collegiality of this description of the choice for the states is misleading. The message here is that if the states do not act in lock-step with the Commission’s plans (the “first” approach), the Commission will preempt them and adopt its plans anyway, under the second approach.²⁶⁷

To begin, NASUCA will make clear its position, which has been consistently expressed: The Commission lacks the statutory authority to “unify” intrastate access charges with interstate access charges, or with reciprocal compensation charges.

²⁶⁶ Id., ¶ 42; see also id., ¶ 534.

²⁶⁷ See id. (in terms of “sequencing”): “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.” (Emphasis added.)

NASUCA expressed these views forcefully, including in 2005.²⁶⁸ The 1996 Telecom Act did not give the Commission the authority to override state authority with regard to intrastate exchange access.²⁶⁹

And even if the Commission had the authority to address intrastate access under the reciprocal compensation framework, that framework only allows the Commission to prescribe a methodology for the rate, which rates the **states** are responsible for setting.²⁷⁰ Thus the Commission lacks the authority to set that rate, or to assure that the rate is uniform nationwide.

That said, the Commission's expressed basis for the capability to preempt state authority first, over intrastate access and second, over reciprocal compensation ratesetting at capability must be closely examined. Such examination shows that the claimed basis is virtually identical to that claimed in Chairman Martin's Proposal in 2008.²⁷¹ The Commission has come up with no new arguments this time around. Thus it seems appropriate in this context to quote NASUCA's reply comments on Chairman Martin's Proposal:

NASUCA's initial comments relied on filings by NARUC to show that the FCC lacked the power to impose a ratemaking regime on state ICC charges. We are happy to do so again:

²⁶⁸ 01-92, NASUCA 5/23/05 Comments at 40-43; id., NASUCA 7/20/05 Reply Comments at 14-20.

²⁶⁹ Under even the 1934 Telecommunications Act, the FCC had authority over interstate access charges, which continues under that 1996 Act. Thus the Commission can do what it will with interstate access – as it has in the past – but that will not involve questions of intrastate revenue recovery. The Commission can also do what it will with wireless termination charges. See NPRM, ¶ 511.

²⁷⁰ 47 U.S.C. § 252(d)(2)(A).

²⁷¹ Compare NPRM, ¶ 513-517 to 2008 *Order and ICC/USF FNPRM*, Appendix A (“Chairman Martin’s Proposal”) at ¶¶ 215-226. Indeed, Chairman Martin’s Proposal controversially addressed head-on the issue of the classification (information service or telecommunications service?) of IP traffic, which the current NPRM does not address.

NARUC's comments are a succinct summary of how ... the proposed orders ... virtually rewrite key sections of the Statute -- overriding literally decades of case law, ignoring express reservations of State authority, and redefining statutory terms in a manner that Congress could never have intended -- to, among other things:

...unlawfully constrain State retail rate design by preempting intrastate access charges, building on the flawed legal rationale of the Core Remand order....

And NARUC's comments are backed up by those of Broadview, et al.; BSP; CityNet, et al.; COMPTTEL; Embarq; MA DTC; NECA; NTCA; NY PSC; PUCO; and NJ Rate Counsel, among others. Such preemption is neither lawful nor appropriate. As NARUC states, "Not one of these proposals is likely to survive judicial review."²⁷²

It should also be recalled that the D.C. Circuit's decision upholding the actual order in 08-286, that being the Commission's treatment of dial-up ISP bound traffic, did not address the Commission's more general assertions of authority, and was limited to the specific nature of dial-up ISP-bound traffic.²⁷³

Given those flaws in the legal support for the Commission's proposals, NASUCA will not comment further on the "sequencing" or the "timing" that would follow from acceptance of the proposal. We must, however, continue to express dismay at the premise of the proposal, that "reform" of ICC inevitably means reduction – and perhaps elimination – of intercarrier charges. That premise is bound up in the notions that incremental cost, on the one hand, and bill-and-keep, on the other, are the appropriate methods for determining ICC charges. These comments next focus on those subjects.

²⁷² 01-92, NASUCA Reply Comments (December 23, 2008) at 12-13 (footnotes omitted).

²⁷³ *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), cert. denied, 131 S.Ct. 597, 626 (2010). In particular, the Court did not reach the question of whether the Commission could set a rate, rather than establish a methodology for, reciprocal compensation. See 592 F.3d at 144-145.

C. The Commission Should Not Use Incremental Costs As The Basis For ICC.

Similar to the last time a “global” proposal was made, this proposal – like Chairman Martin’s Proposal – adopts a uniform costing standard for all ICC, that being “incremental cost.”²⁷⁴ This standard would replace the current total element long run incremental cost (“TELRIC”) standard that has applied to reciprocal compensation since the time of the *Local Competition First Report and Order* issued in 1996.²⁷⁵ It would also replace the current non-cost-based standard for interstate access charges, and the often similarly non-cost-based standard for intrastate access charges, with an incremental cost standard.

The proposed incremental-cost standard for determining intercarrier compensation rates is unreasonable, unfair and inconsistent with competitive market practices. One of the goals of utility ratemaking is to establish rates that are consistent with the rates that would be set in a competitive market. The proposed rule relies on the standard criterion for economic efficiency in a competitive market, that price should be set equal to the marginal cost of producing the service or commodity.

But the general rule that price should equal marginal cost is reasonable for industries that produce single products or multiple products with separable cost functions and where incremental cost is positively related to the quantity produced. **These conditions do not exist in the telecommunications industry.**

²⁷⁴ NPRM, ¶ 495; Chairman Martin’s Proposal, ¶ 236.

²⁷⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 at 15515, 15844-96, ¶¶ 29, 672-732 (1996) (subsequent history omitted) (“*Local Competition First Report and Order*”).

Instead, the telephone industry is characterized by firms that have relatively high network costs, non-separable cost functions, extremely low and declining incremental service cost, and substantial common costs that make up a large proportion of total costs. In such circumstances, it is not possible to set all prices equal to incremental cost. For example, one leading economist has stated,

[M]any important industries involve technologies that exhibit increasing returns to scale, large fixed and sunk costs, and significant economies of scope. Two important examples of such industries are telecommunications services and information services. In each of these cases the relevant technologies involve high fixed costs, significant joint costs and low, or even zero, marginal costs. Setting prices equal to marginal cost will generally not recoup sufficient revenues to cover the fixed cost and the standard economic recommendation of ‘price at marginal cost’ is not economically viable.²⁷⁶

Other leading analysts have stated that:

Since marginal cost is the added (variable) cost incurred by the supply of one additional unit of output, then by definition marginal costs does not include fixed or sunk costs, because neither of these costs is variable. Hence, a price equal to marginal cost covers only variable and makes absolutely no contribution to recovery of either fixed or sunk costs. Such a price clearly is a recipe for insolvency.”²⁷⁷

Those analysts further stated that if a firm decided to price all goods at marginal cost, it would be committing “voluntary suicide.”²⁷⁸

These conclusions, while stated in terms of “marginal” cost, are not impacted by the use of marginal cost versus an “incremental” cost standard, or a short-run versus a long-run cost approach. **Rather, they are dependent on the existence of substantial**

²⁷⁶ Hal Varian, *Differential Pricing and Efficiency*, First Monday (1996), available at <http://www.firmonday.dk/issues/issue2/different>; also quoted in the direct testimony of Dr. Jeffrey A. Eisenbach on behalf of Verizon Maryland in the Maryland Public Service Commission, Case No. 9133, filed July 8, 2008.

²⁷⁷ William J. Baumol and Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 *Antitrust Law Journal*, 2003, page 5.

²⁷⁸ *Id.*

common costs.

The Commission has itself long recognized that telecommunications networks are characterized by relatively high common costs. For example, the Commission stated that “the costs of local loops and their associated line cards in local switches, for example, are common with respect to interstate access service and local exchange service, because once these are installed to provide one service they are able to provide the other at no additional cost.”²⁷⁹ Chairman Martin’s Proposal recognized the existence of these relatively high common costs when it stated:

For example, a copper loop can be used to provide analog voice service as well as data service using DSL technology. The cost of the loop is therefore common to both voice and DSL services. The incremental cost of voice service, assuming that DSL is already provided, therefore does not include any of the long run incremental cost of the loop itself. Similarly, the incremental cost of DSL, assuming voice is already provided, includes only that portion that may be required to condition the loop to meet the higher quality standards that may be required for the data transmission.²⁸⁰

If the Commission uses its incremental-cost standard to set regulated rates for ICC, then the rates for the SLC/EUCL should also be based on incremental cost and would also decrease to a number approaching zero.²⁸¹ Moreover, if rates for intercarrier services and SLCs (indeed for all other services) are set using the incremental-cost standard, then every carrier would face mandated rather than voluntary suicide.

The fact of these common costs mean that they must be shared among the services

²⁷⁹ *Local Competition First Report and Order*, ¶ 678.

²⁸⁰ Chairman Martin’s Proposal, Appendix A, ¶ 247.

²⁸¹ In IP networks, primarily designed to provide broadband service, the incremental cost of retail voice service, which uses a relatively minuscule amount of capacity, approaches zero. This is another demonstration of the unreasonableness of proposals intended to guarantee carrier revenue through shifting cost recovery to basic voice service.

that are provided over the common facilities. It is a fundamental error to treat any one of those services – such as basic local exchange service – as the “cause” of those costs.²⁸²

Given the impossibility of applying the incremental-cost standard to every rate, it is necessary to determine why it should be applied to any rate. Clearly, it is necessary for the carrier to recover its common costs in order to maintain financial viability. The proposed incremental-cost standard mandates that common costs are recovered from all other services and not from intercarrier services.

One defense for such a rule is that it is better to recover costs from your own customers than from other carriers. This argument ignores the fact that other carriers are also “customers.” They are simply wholesale customers rather than retail customers. Wholesale customers use facilities and equipment just like retail customers.

There is no economic theory that supports price discrimination in favor of wholesale customers over retail customers, especially with regard to recovery of common costs. The implication of driving wholesale prices toward zero is meaningless for industries such as the steel industry where almost every sale is wholesale to an automobile company or a construction company or an appliance company. This designation of good and bad customers to charge places an entirely new slant on the saying “I can get it for you wholesale” because getting it for wholesale is getting the service almost free.

It must also be recognized that for unbundled network elements the loop is not treated as a joint or common cost – because the loop is a separate UNE of its own. For non-local access by carriers that are not using their own local networks, such as that

²⁸² Roycroft Ohio Reply Affidavit at 3-4.

provided for access charges, it is important to include a contribution to the cost of the loop.

In addition, at the time of Chairman Martin's Proposal, it was asserted that it was necessary to reduce the intercarrier rate to the incremental-cost standard in order to eliminate the opportunities for regulatory arbitrage associated with ISP and CLEC strategies. Chairman Martin's Proposal noted that TELRIC-based reciprocal compensation rates led certain carriers to design their

business plans to take advantage of above-cost reciprocal compensation payments by becoming a net recipient of local traffic. The most prevalent example of regulatory arbitrage for reciprocal compensation is ISP-bound traffic where the Commission found evidence that "CLECs appear to have targeted customers that primarily or solely receive traffic, particularly ISPs, in order to become net recipients" of reciprocal compensation payments."²⁸³

Of course, the desire to become a net recipient of traffic depends on the reciprocal compensation rate being above the recipient carrier's cost -- and in many cases the CLECs' rates were based on the ILECs' costs. And the ILECs wanted to ensure that their reciprocal compensation rates were high, **in order to avoid the situation where CLECs**

²⁸³ 16 FCC Rcd at 9616, ¶ 11. The ISP strategy generates profits for an ISP and CLEC when the ISP locates in or near the central office of the CLEC. The ISP receives significantly more terminating traffic than originating, allowing the CLEC to earn substantial profits based on receiving more reciprocal compensation from the ILEC than it pays to the ILEC. However, this strategy relies on dial-up Internet traffic that no longer exists, except for some rural carriers. See 01-92, et al., CenturyTel ex parte (September 19, 2008) at 7. The majority of Internet users have switched to DSL or cable modem service. Many of the dial-up ISPs went bankrupt and no longer exist. This market is now too small to have a significant impact on the industry. Thus this source of arbitrage has gone away. The other CLEC strategy was for each CLEC to establish its own terminating rate for interexchange access. The CLEC could maintain excessive terminating charges because if a interexchange carrier wished to complete a call to a CLEC's customers it had to pay the terminating charge to the CLEC. However, the Commission eliminated this abuse of terminating monopoly power by requiring CLECs to charge terminating access charges that are no higher than the ILEC in whose territory the CLEC was operating. Thus, it is no longer necessary to reduce the intercarrier rate to incremental cost to offset these regulatory arbitrage strategies conducted by a CLEC alone or by a CLEC in conjunction with an ISP.

would dump traffic onto the ILECs' networks.²⁸⁴ That will be precisely the result if the cost of access is reduced to zero, or near-zero; carriers will have every incentive to dump traffic on to other carriers' networks, and likewise, carriers will have every incentive to keep traffic from terminating on their networks.

In the end, it makes no sense to apply the incremental-cost standard just to termination and transport of traffic under 47 U.S.C. 251(b)(5). But if the standard were applied to other access charges, such as subscriber line charges and special access services, or to other wholesale rates, or to retail rates, this would lead to carrier bankruptcies. **Instead, any costing standard adopted by the Commission must allow for a reasonable recovery of common cost from all customer groups -- both retail and wholesale, and both end-users and carriers.** The current TELRIC standard would meet that goal.

This review of the proposed incremental-cost standard highlights the fact that the incremental-cost standard is an extreme proposal. It is inconsistent with competitive outcomes. It is not required to prevent regulatory arbitrage. And it requires high rates for other services – especially, as proposed, the basic services as to which the Commission should be making every effort to maintain affordability – in order to allow the carrier to recover common costs.

The ILECs have also consistently argued that TELRIC costing yielded rates that were too low, allowing the use of their network elements at “subsidized” rates.²⁸⁵ If the ILECs were correct, then the current proposal, like Chairman Martin’s Proposal,

²⁸⁴ Indeed, that was the reason behind the ILECs’ strong original opposition to bill-and-keep mechanisms. See NASUCA 11/5/01 Reply Comments at 20-25.

²⁸⁵ See, e.g., *Verizon Communications v. FCC*, 535 U.S. 467, 498, 501-504 (2002).

compounds that problem by forcing ICC rates even lower and creating an even greater subsidy. Importantly, the crucial difference between TELRIC and the incremental-cost standard proposed by the NPRM and Chairman Martin's Proposal is that the incremental-cost standard includes none of the joint or common costs of the firm.²⁸⁶

Chairman Martin's Proposal adopted the incremental-cost standard only for intercarrier compensation, leaving TELRIC as the cost standard in place for all of the other rates required by 47 USC § 251. The rationale was that "excessive" reciprocal compensation rates allowed carriers to game the system.²⁸⁷ Yet as explained above, this was an artifact of the ratesetting process rather than a flaw of the standard under which the rates were set. And the other reason is that TELRIC, but not incremental cost, includes joint and common costs.²⁸⁸ Thus using incremental cost allows intercarrier services to avoid absorbing any of those costs, without justification.

It must be recalled that the Faulhaber paper,²⁸⁹ on which Chairman Martin's Proposal relied, was intended to identify the situation where a product or service was being subsidized: If it was priced below incremental cost, then it was being subsidized.²⁹⁰ A firm that provides all of its services at incremental costs would not recover any of its joint or common costs, and would (presumably quickly) go out of business. And if a service is priced at incremental cost, this means that one or more of

²⁸⁶ Chairman Martin's Proposal, ¶ 251.

²⁸⁷ *Id.*, ¶ 265.

²⁸⁸ *Id.*, ¶ 266.

²⁸⁹ Faulhaber, G. "Cross Subsidization: Pricing in Public Enterprises," *American Economic Review*, Vol. 65, No. 5, (Dec. 1975), pp. 966-977.

²⁹⁰ Correspondingly, according to Faulhaber, it can only be definitively said that a service is providing a subsidy when it is priced above its stand-alone cost. That condition is not met for ICC. See Roycroft Ohio Reply Affidavit at 16-17.

the firm's other services must make the contribution to joint and common costs that the incremental-cost-priced service would otherwise be making.²⁹¹

Interestingly, despite his prominence in Chairman Martin's Proposal, Dr. Faulhaber is mentioned only once in the current NPRM, in a quotation from Sprint's previous comments supporting the use of the incremental cost standard.²⁹² And despite a fairly consistent reference to the incremental cost standard,²⁹³ it is consistently addressed in reference to prices being significantly above incremental cost.²⁹⁴ There does not seem to be a glimmer of recognition of the many problems – demonstrated here – that would result from using incremental cost as the standard for pricing ICC.

C. Bill-And-Keep Should Not Be A Mandated Form Of ICC

As the FCC describes it,

At a high level, under a bill-and-keep methodology, carriers would not impose charges on other service providers to recover the costs of transporting telephone calls from a specified point in the network or for originating or terminating those calls. Instead, they would recover such costs from their own end users.... This is roughly akin to the manner in which wireless providers already operate today.²⁹⁵

It first must be recognized that the “manner in which wireless providers ... operate today” is not a market-based choice; rather it is a regulatory choice.²⁹⁶

As stated by Dr. Trevor Roycroft in a state access charge “reform” docket,

²⁹¹ See 01-92, Broadview Networks, et al. ex parte (October 27, 2008) at 2-3 (quoting RBOC condemnations of incremental cost pricing).

²⁹² NPRM, ¶ 506, n.729.

²⁹³ E.g., id., ¶¶ 40, 495, 524.

²⁹⁴ Id.

²⁹⁵ NPRM, ¶ 530 (footnotes omitted).

²⁹⁶ Id., n.787.

T-Mobile offers a variation on the theme that interconnecting carriers should be allowed to pay as little as possible for terminating traffic – bill and keep. While T-Mobile claims that such an arrangement will prevent “gaming” of traffic flows, the T-Mobile proposal simply shifts all the gaming up front. Under a bill and keep arrangement each carrier is responsible for the costs of originating and terminating traffic to end-users on their network. Bill and keep seems like a simple solution, and it is, as long as carriers have similar cost structures and exchange similar traffic volumes. Under a bill and keep arrangement, IXCs that have no end user facilities get the best deal as they are freed from contributing to last mile facilities on either end of their customers call. Similarly, wireless carriers like T-Mobile also benefit as they can avoid any contribution to the costs of terminating traffic on wireline networks. Wireless carriers do not provide ubiquitous service, especially in high cost areas, but wireless callers receive the benefits of being able to reach wireline subscribers served by ILECs in high-cost areas. T-Mobile’s proposal allows it to ride for free on all terminations. Unfortunately, bill and keep ultimately results in a solution that, like Sprint’s incremental cost proposal, unfairly shifts all joint and common cost recovery to end-users. Cost-based interconnection rates that address the joint and common cost issue provide a solution superior to the approach identified by T-Mobile.²⁹⁷

The Commission notes that it “previously sought comment on forms of bill-and-keep methodologies.”²⁹⁸ That is true; and the fact that the Commission did not adopt a bill-and-keep methodology says as much about the problems inherent in such methodologies as it does about the Commission’s tendency towards inaction. But NASUCA will point the Commission to NASUCA’s comments on the 2001 *Intercarrier Compensation NPRM* to demonstrate those problems.²⁹⁹

The Commission in a single paragraph also resurrects the notion that because “both parties generally benefit from participating in a call ... both parties should share the

²⁹⁷ Roycroft Ohio Reply Affidavit at 8 (footnotes omitted).

²⁹⁸ NPRM, ¶ 530.

²⁹⁹ NASUCA 5/23/05 Comments at 25, 35-36, responding to Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (“*Intercarrier Compensation NPRM*”); 01-92, NASUCA Reply Comments (July 20, 2005) at 9-14. NASUCA also commented on bill-and-keep in 2001; those comments remain relevant today as well. See 01-92, NASUCA Comments (August 21, 2001) (“NASUCA 8/21/01 Comments”) at 3-5; id., NASUCA Reply Comments (November 5, 2001) (“NASUCA 11/5/01 Reply Comments”) at 10, 17-18.

cost of the call.”³⁰⁰ This supposedly implies that bill-and-keep is a reasonable way to manage traffic. But as NASUCA stated almost six years ago,

[The] notion of assigning or dividing the benefit of a call actually misses the point. Almost without exception, it is the calling party – and the calling party’s network – that **causes** the call. The called party may benefit from the call – as in the case of the notification of a family event – or may not benefit – as in the case of an annoying telemarketing call. This cannot obscure the fact that the calling party first picked up the telephone and dialed the called party’s number.³⁰¹

As indicated in Part One of these comments, if carriers want to agree on a bill-and-keep methodology, that should be their choice. One suspects, however, that most such arrangements will include an “out” to address the situation where traffic becomes far out-of-balance. Such out-of-balance traffic flows were the reason the ILECs originally opposed a bill-and-keep regime for reciprocal compensation.³⁰²

In the end, the central problem with bill-and-keep is as stated in the Joint Board White Paper on ICC:

A “bill and keep” access regime would reduce the incentive to engage in traffic pumping strategies. But the reduction would not be caused by setting maximum terminating rates at zero. Rather, the effect occurs because the allowed terminating rate is below the cost of terminating calls for all carriers. Under this situation every carrier would have incentive to reduce its terminating traffic. **This would be the antithesis of reasonable communications policy, which is normally designed to encourage the use of the network.**³⁰³

It is perhaps too much to hope that with this NPRM the idea of an imposed bill-and-keep regime will die a well-deserved death.

³⁰⁰ NPRM, ¶ 525.

³⁰¹ NASUCA 5/23/05 Comments at 26 (emphasis in original); NASUCA 11/5/01 Reply Comments at 18-19.

³⁰² See NASUCA 11/5/01 Reply Comments at 20-25.

³⁰³ See <http://www.naruc.org/special/Intercarrier%20Compensation%20White%20Paper%202011%2002%2007.pdf>, at 3.

D. Intercarrier Compensation For All-IP Networks And VOIP

As should be clear from the above discussion, NASUCA’s position is that compensation for all-IP networks (if those ever happen) should not be bill-and-keep, unless carriers mutually agree to such a policy. It may be that capacity payments will someday replace per-minute charges, but that day is not yet here, and the discussion of how such payments would work has been scant.

But as long as there are pieces of the PSTN being used, there should continue to be per-minute compensation for network use. That includes use by VoIP traffic, as explained in NASUCA’s Section XV comments. The Commission seeks 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.³⁰⁴

As indicated in its Section XV comments, NASUCA supports “requiring VoIP calls to pay all existing ICC charges.” Equally importantly, NASUCA supports allowing existing commercial arrangements that address compensation for VoIP traffic in some other fashion to continue.

E. The Path To Modernize Existing Rules And Advance IP Networks Is Not To Be Found In The NPRM.

In introducing the two options for “how to begin the transition away from the current per-minute intercarrier compensation rates to facilitate carriers’ movement to IP networks”³⁰⁵— either relying on the existing framework, or preempting state regulation of

³⁰⁴ NPRM, ¶ 38.

³⁰⁵ Id., ¶ 533.

both intrastate access and implementation of reciprocal compensation rates – the Commission asks

commenters to discuss how particular approaches balance several potentially competing considerations: (a) harmonizing rates and otherwise reducing arbitrage opportunities; (b) minimizing disruption to service providers, including litigation and revenue uncertainty; and (c) minimizing the impact on consumers and on the Commission’s ability to control the size of the universal service fund.³⁰⁶

Of course, the presumption of the necessity for this transition frames the discussion.

Having challenged the necessity (and the legality) of the transition, NASUCA must once again assert, quoting the Commission, that, in order to “minimize[e] disruption to service providers, including litigation and revenue uncertainty; and ... minimize[e] the impact on consumers and on the Commission’s ability to control the size of the universal service fund...” the Commission should recognize the lesser priority of “harmonizing rates and otherwise reducing arbitrage opportunities....” As stated by NASUCA from the outset, the interim ICC measures discussed in the Section VX comments, and the interim USF measures discussed in Part Five, are the fixes that need to be done first.

And then there are the timing issues. The Commission states, with regard to the first option,

The overall timing for the Commission to reduce those rates subject to its jurisdiction could be structured in various ways, as well. We propose completing the transition away from the current per-minute framework before the Commission implements its long-term vision for CAF reform. We believe doing so is in the public interest because it will remove implicit subsidies from the current intercarrier compensation system consistent with the transition to explicit support provided under the CAF mechanisms proposed in this Notice.³⁰⁷

Of course, given the uncertainties that should be attendant on the long-term CAF – only

³⁰⁶ Id., ¶ 535.

³⁰⁷ Id., ¶ 169.

some of which have been addressed in these comments – it would be good to postpone decisions on the long term. But far more importantly, the flaws in the Commission’s assumptions that there is an intractable problem with per-minute ICC, that the current interstate ICC regime³⁰⁸ contains implicit subsidies, and (apparently) that the CAF provides sufficient explicit support, shows that these proposals also need to be corrected as soon as possible.

And then there are the issues regarding “incentives” for states to take action on intrastate access charges. The Commission discusses the Nebraska experience,³⁰⁹ which, like those in many states, confused universal service with lost access revenue recovery.³¹⁰ This shows the complexity of the answer to the question of “how should the Commission determine if a state has undertaken intrastate access reform?”³¹¹ As mentioned above, the level of “access reform,” which carriers have been subject to that “reform,” and the states’ responses to that “reform” all vary tremendously state-to-state. This also shows the inappropriateness of the Commission’s suggestion to use CAF funds as an incentive for this “reform.”³¹² It assumes a far-more-than-deserved link between access charges and the transition to providing broadband than has been shown here. It will also deprive the consumers in those states of broadband opportunities based on this ideological presumption.

³⁰⁸ Both interstate access rates and reciprocal compensation rates, whether the Commission determines the methodology or the actual rate.

³⁰⁹ *Id.*, ¶ 543.

³¹⁰ See Bluhm, Peter, et al., “State High Cost Funds: Purposes, Design and Evaluation,” NRRI 1-004 (January 19, 2010) at 10-13.

³¹¹ NPRM, ¶ 544.

³¹² *Id.*, ¶¶ 544-545.

The Commission also provides a little more detail on its theory that it has the ability to regulate all ICC based on the 1996 Act.³¹³ NASUCA’s views on this subject were adequately expressed in Section B of this Part, above.

PART NINE: RECOVERY OF LOST ICC REVENUES

Just as the NPRM presumes that ICC must be reduced to as low as possible (including to zero³¹⁴), there is an equivalent or subsequent presumption that carriers whose ICC revenues are reduced should be able to recover those lost revenues.³¹⁵ NASUCA must note, however, some gratification that the assumption of complete revenue recovery is tempered by questions of necessity.³¹⁶ But it seems likely that the carriers themselves will not raise those questions.

The key “threshold issue[]”³¹⁷ should be, “Why should there be recovery of lost ICC revenue?” The NPRM does not pretend to address that issue.

If we were in a rate-of-return environment (for both intrastate and interstate jurisdictions, or if there were no jurisdictional issues), then if a carrier lost revenue it could apply to the regulator for an increase in rates. Or the carrier could have recourse to the courts if the loss of revenue were so large as to be confiscatory.³¹⁸

³¹³ Id., ¶¶ 550-555.

³¹⁴ Perhaps consumers should be grateful that the Commission has not, for example, required LECs to compensate IXCs for the privilege of terminating the IXCs’ traffic.

³¹⁵ Id., ¶¶ 43, 559.

³¹⁶ Id., ¶ 43 (“[W]e propose to adopt a mechanism for recovery, where necessary....”); id., ¶ 559 (seeking comment on, *inter alia*, “how to evaluate the need for recovery of reduced intercarrier compensation...”).

³¹⁷ Id., ¶ 560.

³¹⁸ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310, 109 S. Ct. 609, 102 L.Ed.2d 646 (1989).

But we are not in a rate-of-return environment. Not on the intrastate side, where states are increasingly deregulating retail rates for carriers large and small. And not on the intrastate side, where even the ostensibly “rate-of-return” regulated carriers are operating under the antique and entirely unrealistic FCC-authorized return of 11.25%.³¹⁹

Then there is that pesky jurisdictional issue. The FCC proposes to use federal (interstate) mechanisms to permit recovery of lost intrastate revenues. This will be done, of course, in the context of intrastate/interstate separations factors and regulated/non-regulated allocations that have been frozen for more than ten years, in the face of tectonic shifts in the use of total plant; the Commission is now proposing to extend that freeze for another year.³²⁰

The Commission seeks comment on “the objectives for any recovery mechanism and, relatedly, any Commission obligations with regard to recovery from both a legal and policy perspective. Specifically, what are the Commission’s legal obligations with regard to recovery?”³²¹ NASUCA must point out again that the Commission has no obligation to reform ICC; the need for recovery does, of course, thus “vary depending on the reform approach ultimately adopted....”³²²

Those who say that revenue recovery is required most often do so by claiming that the loss of revenue precludes cost recovery.³²³ But most of them do so without even trying to classify or identify which costs will not be recovered. Yet, as discussed above,

³¹⁹ Id., ¶ 165.

³²⁰ *In the Matter of Federal-State Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 11-34 (rel. March 1, 2011).

³²¹ NPRM, ¶ 562.

³²² Id.

³²³ See id., ¶¶ 564-566.

ICC should be priced in excess of the incremental cost of terminating traffic.³²⁴

The Commission opens its discussion of revenue recovery as follows:

Existing intercarrier compensation revenues may represent 10-30 percent of some carriers' **regulated revenues**. Such revenues may exceed the costs, however defined, of providing origination, transport, and termination functions.³²⁵

Returning to the Faulhaber definition of subsidy,³²⁶ it seems clear that ICC rates generally exceed the incremental cost of those services, and thus they are not being subsidized.

But it is not clear that – even at 10-30% of regulated revenues – those services are priced above their stand-alone cost, and hence are not, under Faulhaber's definition, **providing a subsidy**.³²⁷ **Similarly, and contrary to the Commission's – and much of the industry's – loose use of the concept, residential rates are not *being* subsidized.**³²⁸

As the Commission itself acknowledges, the reference to “regulated revenues” in this context is questionable:

[T]he Commission could evaluate total company regulated and non-regulated revenues. Under our “no barriers” policy, a significant portion of rate-of-return carriers' costs, including costs of upgrading the network with fiber for broadband, is allocated to regulated services, even though non-regulated services increasingly have been provided using that same network, and have accounted for an increasing percentage of revenue. As a policy matter, when evaluating recovery in the context of intercarrier compensation reform, it is unclear why the Commission would simply

³²⁴ See Part Eight(C), *supra*.

³²⁵ NPRM, ¶ 567 (footnote omitted; emphasis added).

³²⁶ See Part Eight(C), *supra*.

³²⁷ Roycroft Ohio Reply Affidavit at 16-17. Thus NASUCA challenges the Commission's statement that “ICC revenues today remain an implicit subsidy for certain carriers....” (NPRM, ¶ 43; see also *id.*, ¶ 586); the number of such carriers is very limited (Roycroft Ohio Reply Affidavit at 16-17). And even for those carriers, the courts have determined that 1996 Act did not require elimination of intrastate implicit support. *Qwest I*, 258 F.3d at 1203-1204.

³²⁸ See, e.g., NPRM, ¶ 574. For data demonstrating this proposition, see Roycroft Ohio Reply Affidavit at 13-16.

ignore all revenues earned from such services.³²⁹ This situation is not limited to rate-of-return carriers. Indeed, as NASUCA and the New Jersey Division of Rate Counsel have argued, the current separations and allocation factors are skewed “to the tune of **\$2-6 billion against ... ratepayers.**”³³⁰ Thus any revenue recovery that is considered must be based on an up-to-date separation/allocation policy, and/or must consider all of a carrier’s revenues in determining whether recovery of lost ICC revenues is needed. This is particularly true if the recovery is to come from the customers of other carriers – whether through SLC increases or the USF or CAF.³³¹

Further, any possible revenue recovery must be offset by reductions in **cost** that result from ICC reductions. For example, large carriers that lose revenue will also see reductions in the access charges they have to pay for the long-distance traffic they carry and terminate on the networks of other carriers, especially the smaller rural carriers.

As mentioned above, NASUCA is gratified that the Commission appears to have rejected the idea of revenue neutrality. The Commission states, “As we evaluate revenue recovery, we do not believe that recovery needs to be revenue neutral given that carriers have a variety of regulated (e.g., not only switched but also special access) and non-regulated revenues.”³³² Not only must “carriers seeking recovery be required to file data with the Commission or USAC” showing their total revenues,³³³ but it should be an explicit requirement of any recovery mechanism that is adopted that the carrier be

³²⁹ NPRM, ¶ 569.

³³⁰ 80-286, Comments of NASUCA and Rate Counsel (March 28, 2011) at 3.

³³¹ These two possibilities for recovery mechanisms are discussed below.

³³² NPRM, ¶ 568.

³³³ *Id.*, ¶ 569.

required to demonstrate the impact of the loss of revenue, and its inability to maintain reasonable levels of service absent some amount of extra-company recovery.

This is especially true with regard to interstate access revenues, which, as the Commission acknowledges, have been on a significant decline over the past few years – not as result of decreases in rates such as the Commission plans, but as the result of the decline in usage.³³⁴ This, in turn, has resulted from a decline in access lines.³³⁵ There is no legal or policy basis for carriers to be protected from these shifts in the market.³³⁶

One possible exception to this principle would be if the carriers' **customers** were threatened, as a result of this revenue loss, with basic service rate increases that would make their rates no longer affordable, or no longer reasonably comparable to the rates paid in urban areas.³³⁷ If the loss of revenues caused basic rates to exceed these levels, the carrier should be eligible for USF funding – just as they should be under the current HCF. Indeed, the loss of access charge revenues as a result of “reform” should not be treated any differently for USF purposes than any other phenomenon that would affect basic rates.³³⁸

For USF purposes, there should be a rate benchmark for basic service.³³⁹ In

³³⁴ Id. Figure 13; see also NECA 4/11/11 ex parte at 3. This also shows significant declines – a national decrease of 17% – in “intrastate MOUs” (although there is no explanation of the difference between “access MOUs” and ordinary “MOUs”). Id. at 2. The extreme anomaly of Ohio (which shows a 51% increase in intrastate MOUs) calls this data somewhat into question, however.

³³⁵ FCC Wireline Competition Bureau, Industry and Technology Analysis Division, Trends in Telephone Service (September 2010), Table 7-1.

³³⁶ See NPRM, ¶ 570.

³³⁷ 47 U.S.C. § 254(b)(1), (b)(3).

³³⁸ On this basis, NASUCA will not discuss the other criteria for recovery from the CAF discussed in the NPRM (NPRM, ¶¶ 585-594) or the framework for calculating payments set forth in Appendix D to the NPRM.

³³⁹ Id., ¶ 575. NASUCA disagrees that this benchmark should “gradually increase[] over time from a

addition, in considering revenue recovery as a result of reductions in access charges, the Commission should adopt a revenue benchmark – like the average revenue per user (“ARPU”) seen in the wireless industry. Under this approach, only if the carrier’s ARPU were reduced below the benchmark – meaning that the carrier was receiving, overall, inadequate revenues – should the Commission consider replacing those revenues.³⁴⁰

On the non-USF, but still federal, side, the Commission asks for comment on increasing the SLC.³⁴¹ If this revenue recovery is designed to recover lost revenues from decreased in intrastate access charges (or, indeed reciprocal compensation) NASUCA vehemently objects to such proposals, because of the inappropriate mixing of jurisdictions.³⁴² More importantly, even the Commission acknowledges that the SLC “is a flat-rated charge that recovers some or all of the interstate portion of the local loop....”³⁴³ The idea of using the SLC as a mechanism as a means of recovering lost ICC revenues makes no sense. This is especially true for the revenues that represent carriers’ contribution to the common or joint cost of the loop; replacing those revenues through the SLC represents improperly absolving carriers from that obligation, as discussed in Part Eight above.³⁴⁴ But the Commission has no idea what portion of carriers’ ICC revenues represent such contributions.

benchmark for voice services to a benchmark for voice and broadband services. (id., ¶ 577) because, as the Commission notes, “not all consumers do or will subscribe to broadband.” Id.

³⁴⁰ An ARPU that included broadband revenues would take into account the increasing number of customers subscribing to broadband. Id.

³⁴¹ Id., ¶¶ 579-584.

³⁴² An update of separations – as consistently recommended by NASUCA – might justify part of this change.

³⁴³ Id., ¶ 579.

³⁴⁴ Not to mention whether the current SLC **over-recovers** the interstate portion of the cost of the loop, as argued by NASUCA.

The Commission notes that “[m]ost commenters supported the *2008 Order and ICC/USF FNPRM* proposal to increase the residential SLC by \$1.50 and a multiline business increase of \$2.30, and some parties have urged a residential SLC increase of up to \$4.00 depending in part on the operation of a benchmark mechanism.”³⁴⁵ Again, these proposals – from industry commenters that would be able to take advantage of the higher SLC caps – utterly confuse the purpose of the SLC, instead viewing it as a less-bypassable source of revenues for ILECs.

A similar confusion is shown by the proposals “to deregulate SLC caps in areas where states have deregulated local service rates.”³⁴⁶ On top of the conceptual issues, this would mean that consumers in these states would be hit with a double whammy: increases in the SLC **and** substantial increases in local rates.

Which brings up another issue regarding SLC increases as a means of lost ICC revenue: Only if the increases are limited to areas and carriers where there have actually been lost ICC revenues – as would presumably be the case if the recovery were through the USF/CAF – would there be an assurance that the carriers were actually recovering those lost revenues. The idea of increasing (or deregulating) the SLC for carriers that currently have low inter- and intrastate access charges would add insult to injury for the customers of those carriers.

In summary, NASUCA does not believe that it is necessary to adopt special mechanisms for carrier recovery of revenues lost as a result of the Commission’s action

³⁴⁵ NPRM, ¶ 582 (citations omitted).

³⁴⁶ NPRM, ¶ 583, citing National Broadband Plan at 148.

to reduce ICC rates that are within its jurisdiction.³⁴⁷ Especially, it should not be necessary to adopt recovery mechanisms for any wireless carrier or competitive local exchange carrier that is impacted by ICC revenue reductions.

For the ILECs that have carrier-of-last resort obligations, there may be a need for additional funding through the USF if the lost revenues put their basic service rates at risk. But on no account should increases in the SLC be used: Such increases mistake the purpose of the SLC, and risk allowing recovery from ILECs that are not really impacted by ICC reductions.

II. CONCLUSION

The Commission should abandon its ill-advised attempt to adopt a comprehensive solution for issues regarding the USF, broadband deployment, and ICC. Instead, the Commission should undertake the short-term reforms for the USF and ICC discussed in Section XV of the NPRM and here, and then address the longer-term issues. In the long (or the short) term, the Commission should not have as its goal the reduction or elimination of ICC. In addition, the Commission should not adopt the so-called “reverse auction” process for bringing broadband to unserved areas.

³⁴⁷ If the Commission is able to adopt rules that reduce intrastate access charges, reciprocal compensation rates **and** interstate access charges – which it should not – then there will be a need for a recovery mechanism.

Respectfully submitted,

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