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 an Unified Intercarrier 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

OPENING COMMENTS AND REPLY COMMENTS ON SECTION XV OF TIME WARNER CABLE INC.

Steven N. Teplitz
Terri Natoli
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

Matthew A. Brill
Amanda E. Potter
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Its Attorneys

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SUMMARY

Today's inefficient and unnecessarily complex intercarrier compensation ("ICC") system distorts competition and gives rise to arbitrage schemes and endless litigation. Likewise, the universal service fund ("USF") provides excessive subsidization and impedes efficient competition. The time has come for the Commission to impose rationality and discipline on these two systems. Indeed, the Commission's ability to achieve its goal of "[b]ringing robust, affordable broadband to all Americans," NPRM ¶ 1, will turn on these efforts.

The Commission should begin by overhauling the current antiquated and broken intercarrier compensation regime and replacing it with a unified, low default compensation rate for all carriers and all types of traffic, regardless of its jurisdictional or technological characteristics. Such reform would remove the incentives that exist in today's framework for carriers to try to game the system and will, in turn, eliminate carrier disputes and costly litigation that divert capital from broadband investment and other more productive endeavors. In addition, the Commission should insist on compelling evidence of need before creating a recovery mechanism to replace foregone intercarrier compensation revenues. In particular, given the emergence of new revenue opportunities for incumbent LECs and the fact that telephone rates in rural areas often are considerably *lower* than in urban areas, the Commission should be skeptical of unsupported claims of a need for revenue protection.

As an interim step toward long-term ICC reform, the Commission should clarify that traffic that originates or terminates in IP format is subject to the existing regime of access charges (for toll calls) and reciprocal compensation (for local calls). Any other decision would only exacerbate existing carrier disputes and arbitrage problems currently plaguing the intercarrier compensation system. Indeed, the initial comments submitted in response to Section XV of the NPRM demonstrate that creating a separate ICC regime for so-called "VoIP traffic"

would undermine efforts to harmonize disparate rate structures and require the Commission to establish burdensome new regulatory obligations to prevent and police new forms of arbitrage. Moreover, access rate parity for all voice traffic, regardless of format, is critical to the Commission's effort to encourage rural LECs to transition their networks to more efficient IP architecture.

In conjunction with its efforts to overhaul the current ICC system, the Commission should comprehensively reform the high-cost USF mechanisms. It is obvious to nearly everyone that the current bloated system of subsidies is not working as Congress intended in the 1996 Act. To the contrary, there is substantial evidence in the record that the current regime often imposes unwarranted burdens on consumers by subsidizing retail rates absent a demonstrable need. Accordingly, TWC endorses the Commission's near-term plans to stem the unrestricted growth of the high-cost program, eliminate waste from legacy mechanisms, and transition the savings to support broadband deployment in unserved areas.

TWC further urges the Commission to shed outdated practices and assumptions that violate concepts of competitive and technological neutrality. Accordingly, the Commission should not base funding eligibility on ETC status, as such a requirement disproportionately favors incumbent LECs. Relatedly, the Commission should begin to transition rate-of-return LECs to more efficient incentive-based forms of regulation. Although TWC does not believe that such support will be necessary in most instances, the Commission also should take steps to determine whether some particularly high-cost areas will require ongoing support for broadband services. To the extent the Commission identifies such a need, it should rely on reverse auctions or another market-based mechanism to ensure that any ongoing support is provided only to the extent *necessary* to yield affordable and reasonably comparable rates.

TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
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	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
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	)	
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	)	
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	)	
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	)	
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OPENING COMMENTS AND REPLY COMMENTS ON SECTION XV OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits this consolidated set of opening comments and reply comments in response to the issues raised in the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] TWC previously submitted comments on the interim proposals set forth in Section XV of the NPRM and focuses here primarily on the Commission's comprehensive reform proposals.

TWC applauds the Commission's efforts to overhaul its intercarrier compensation and universal service rules. TWC's provision of voice, broadband, and video services gives it a broad perspective on these issues, and a significant stake in the outcome. TWC is the nation's

1 *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.* (rel. Feb. 9, 2011) ("NPRM").

second-largest cable operator and serves more than 14 million customers in 28 different states—including more than 4 million customers who subscribe to one of TWC's interconnected Voice-over Internet Protocol ("VoIP") services. In addition, TWC's competitive local exchange carrier ("CLEC") entities provide exchange access services, among other telecommunications services.

DISCUSSION

Building on the proposals in the National Broadband Plan and the Commission's previous efforts to reform the existing intercarrier compensation and universal service support regimes, the NPRM offers a broad range of proposals to bring clarity and fiscal discipline to these broken and outdated mechanisms. The NPRM appropriately seeks to ensure that subsidies are transparent, genuinely need-based, and consistent with a competitive marketplace, and it proposes a framework for reorienting its rules from yesterday's narrowband public switched telephone network ("PSTN") to today's broadband communications networks. In particular, to guide the Commission's reform efforts, the NPRM identifies four broad principles: (1) modernizing universal service and intercarrier compensation to account for broadband networks and IP-enabled services; (2) promoting fiscal responsibility; (3) requiring greater accountability from subsidized providers; and (4) adopting market-driven and incentive-based policies.[2] TWC believes that these overarching principles lay the foundation for effective reform and therefore supports their adoption.

As discussed below, these principles support creation of a unified system of intercarrier compensation ("ICC") that eliminates artificial rate disparities based on obsolete jurisdictional distinctions and traffic categories. In addition, the Commission should rework high-cost universal service fund ("USF") support to focus on bringing broadband to truly unserved areas,

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[2] *Id.* ¶¶ 10, 490.

while significantly scaling back legacy support that cannot be justified in light of rural carriers' inflated cost structures and expanded revenue opportunities.

I. THE COMMISSION SHOULD PURSUE ITS GOAL OF HARMONIZING DISPARATE INTERCARRIER COMPENSATION RATES

A. The Commission Has Authority To Simplify and Unify Existing Intercarrier Rates.

The NPRM appropriately recognizes that "[t]he wildly varying and disparate rates within the intercarrier compensation system create arbitrage opportunities and introduce layers of regulatory complexity and associated costs, which hinder deployment of IP networks."[3] Indeed, the regulatory complexity is especially apparent at the state level, as each state has implemented its own separate rates for intrastate toll and local telecommunications traffic. Although the Commission has encouraged states to follow its lead by lowering access rates to eliminate implicit subsidies and adopting other reforms, many have declined to do so. As a result, intrastate access rates in most states remain set at levels that are significantly higher than interstate rates and well above carriers' incremental costs.

While the Commission could choose to limit the scope of its ICC reforms to interstate telecommunications traffic, TWC agrees with the NPRM's tentative conclusion that the Commission has authority to establish a federal intercarrier compensation regime that applies to both interstate and intrastate traffic.[4] Section 251(b)(5) imposes the duty on all local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*,"[5] a term that is defined broadly in the Act.[6] As the NPRM

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[3] *Id.* ¶ 496.

[4] *Id.* ¶¶ 512-13.

[5] 47 U.S.C. § 251(b)(5).

[6] *See id.* § 153(43).

notes, the Commission previously has determined that the term "telecommunications" "is not limited in geographic scope" or "confined to particular services."[7] Moreover, the Commission also has concluded that Section 251(b)(5) "is not limited to traffic exchanged between LECs; it applies to all traffic exchanged between a LEC and another carrier."[8] Consistent with this precedent, the Commission has ample authority to determine the methodology for intercarrier compensation not just for interstate traffic, but for *all* types of traffic.

The Commission possesses not only the requisite statutory authority, but a compelling policy rationale for exercising it. Today's communications marketplace is dominated by any-distance voice plans in which traditional jurisdictional distinctions are increasingly irrelevant. The regulatory framework should reflect that marketplace reality. Moreover, the Commission's desire to encourage the transition to all-IP networks underscores the need to act expeditiously to establish a single, unified intercarrier compensation regime for all carriers.[9] The current jurisdictional distinctions among traffic categories require carriers to maintain antiquated traffic tracking and billing systems, despite the distance-agnostic nature of IP networks. The sooner legacy networks are upgraded to all-IP architecture—a transition that the Commission can hasten by eliminating the perceived preference in its rules for time-division multiplexing ("TDM") traffic—the more quickly carriers can realize the cost savings associated with a streamlined ICC system and deploy their capital for more productive uses, including broadband deployment.

The alternatives to relying on Section 251(b)(5) to harmonize treatment of interstate and intrastate traffic also have been tried, to no avail. Indeed, establishing a unified federal system

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7 NPRM ¶ 513 (citing *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008)).

8 *Id.*

9 *Id.* ¶¶ 505-06.

plainly is the only realistic means of fixing the broken intercarrier compensation regime. As reflected in the Commission's previous attempts to prompt reform of intrastate access rates, the use of carrots and sticks has done little to convince many states to lower and harmonize ICC rates. There is no reason to believe that efforts to devise new carrots or new sticks would be any more successful.

The Commission should ensure that states are unable to use Section 251(f)(2) to circumvent its efforts to develop a unified federal regime.[10] As the NPRM explains, "[t]he suspension or modification provision in section 251(f)(2) could permit a state to suspend or modify the intercarrier compensation reform obligations for smaller carriers," presumably by exempting a rural LEC from mandated rate reductions.[11] Accordingly, to head off such evasion, TWC urges the Commission to adopt "substantive standards that state commissions must apply when evaluating requests pursuant to section 251(f)(2)."[12] Section 251(f)(2) requires that any relief advance the public interest,[13] and undermining a federal framework that promotes efficiency, competition, innovation, and other core public interest values could not be squared with that standard.

B. The Commission's Reforms Should Center on Unifying Intercarrier Compensation Rates for All Types of Traffic and Across All Jurisdictions.

An increasingly diverse array of stakeholders have recognized that the only long-term solution to the inefficiency and gaming associated with the existing ICC regime is to harmonize divergent rate structures and to treat all telecommunications traffic the same. While phase-ins

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[10] 47 U.S.C. § 251(f)(2).

[11] NPRM ¶ 519.

[12] *Id.* ¶ 520.

[13] 47 U.S.C. § 251(f)(2).

and transitions of course are necessary to avoid rate shock and other harms, the Commission should reject calls to perpetuate special ICC privileges for small rural LECs or other parties.

1. The Commission Should Promptly Commence a Transition Encompassing All Carriers.

The NPRM proposes to implement a staged approach to reducing and harmonizing ICC rates,[14] and TWC, like most parties, agrees that a reasonable transition is essential to allowing carriers to plan for and adjust to new rate structures. Abrupt changes to the existing regime could cause unnecessary disruption in the marketplace and risk impeding the Commission's objective of promoting greater broadband deployment. But the Commission should settle on the details of such a glide path as soon as possible, particularly given its intent to implement ICC reform before implementing long-term reforms of the USF.[15] TWC believes that the transition to low uniform ICC rates must be long enough to give rural carriers a sufficient opportunity to rebalance rates, cut costs, and make other adjustments—but not so long as to impede the goals that animate reform proposals in the first place.

Whatever the length of the transition, the Commission should ensure that it encompasses all types of telecommunications carriers and all categories of traffic. Creating carve-outs and thus preserving differential rate structures for certain carriers or traffic classes would torpedo the Commission's reforms. For example, if rate-of-return carriers were to transition away from the legacy ICC regime on a separate timeline from all other carriers,[16] then the incentives and opportunities driving problems such as phantom traffic and access stimulation would remain intact. The Commission's interim reform proposals may well mitigate those

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[14] NPRM ¶ 533 & n.797.

[15] *Id.* ¶¶ 491, 540.

[16] *Id.* ¶ 542 (proposing to "giv[e] rate-of-return carriers additional time" to reduce current intercarrier rates).

specific harms, but differential rate structures would make new forms of gaming and arbitrage inevitable. Indeed, the NPRM acknowledges that "the ability to shift the recovery of costs to competitors through intercarrier charges increasingly distorts the competitive process,"[17] particularly in circumstances where certain rate-of-return carriers have exploited their ability to set very high terminating access charges to generate windfall profits.[18] Rather than enabling such competitive distortions in the marketplace, the Commission should ensure that its plans to unify the ICC regime avoid ill-conceived exemptions.

As a first step toward harmonizing disparate rate structures, TWC agrees that it would be reasonable for the Commission to reduce intrastate access rates to interstate access levels.[19] The above-cost nature of intrastate access represents the most pressing flaw in the overall ICC regime. The Commission also should cap rate-of-return carriers' interstate access charge rates at existing levels so that, assuming a continued decline of interstate minutes of use, the rates they charge will not increase during the transition to new rate structures.[20] Indeed, allowing rate-of-return carriers to *increase* rates during the transition obviously would undercut the goal of establishing lower and more uniform rates. Relatedly, as discussed further below, the Commission also should modify the interstate subscriber line charge ("SLC") cap as one of its initial reforms so that carriers with particularly high costs can recoup them from end users to the extent necessary.

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[17] *Id.* ¶ 524.

[18] *See id.* ¶¶ 642-51 (explaining how certain rate-of-return carriers and competitive LECs (which tariff interstate access charges based on the rate charged by the incumbent LEC serving the same geographic area)—but not price cap carriers or CMRS providers—are able to stimulate high volumes of access traffic using schemes designed to generate inflated ICC revenues).

[19] *Id.* ¶ 552.

[20] *Id.* ¶ 557.

Following these preliminary steps in the transition, the Commission could then begin to harmonize intercarrier rates more generally by eliminating artificial rate distinctions between "local" and "toll" traffic. And the Commission should clarify what it believes to be the appropriate end point for the ICC regime—whether that consists of low per-minute rates for all traffic, bill-and-keep for all traffic, or some form of flat-rate intercarrier charges.[21] To the extent that the Commission can settle on such long-term details, carriers can begin to incorporate such considerations into their network planning and relationships with other carriers, thereby reducing the disruption that the transition could otherwise entail. In addition, such advance notice could prompt carriers to take steps to implement the transition and thus obviate the need for additional regulation or oversight by the Commission.

2. Recovery of Foregone ICC Revenues Through New Explicit Subsidies Should Be Available, if at All, Only Upon a Demonstration of Actual Need.

While government-guaranteed revenue protection (such as in the form of a "Recovery Fund") may be an article of faith among rural LECs, TWC submits that further subsidies should be unnecessary absent extraordinary circumstances. Given various changes in the marketplace—including the emergence of new services that greatly expand incumbent LECs' revenue opportunities and regulatory relief that affords them greater pricing flexibility—there is simply no basis to presume a need for new explicit subsidies. To the contrary, as TWC has shown elsewhere and discusses further below, existing high-cost support generally lacks any empirical foundation, and the last thing the Commission should do is extend additional subsidies reflexively in the absence of a data-driven basis. Particularly because subsidizing incumbent carriers (but not competitive carriers) based on declining access revenues would exacerbate

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21 *See id.* ¶¶ 529-32.

existing competitive distortions caused by the USF program, the Commission should not only insist on compelling evidence of need but limit the duration of any "Recovery Fund" support to a maximum of three years.

Among the various factors that undermine the case for any access-replacement mechanism for incumbent LECs ("ILECs"), "an adequate opportunity for recovery already exists given the variety of regulated and non-regulated services provided over multi-purpose networks."[22] As TWC has explained in advocating USF reform, ILECs today receive revenues not only from local telephone services, but from interexchange service, broadband Internet access, and, in some cases, multichannel video programming services.[23] Yet existing subsidies and arguments for new ones focus solely on voice revenues. It makes no sense to evaluate a carrier's purported need for support based on a subset of its overall revenue opportunities arising from shared infrastructure. When TWC evaluates the business case for serving a particular rural area, it takes into account its *total* costs and total revenue opportunities, and there is no reason why ILECs should be exempt from such a commonsense and fiscally responsible analysis when they claim a need for new subsidies.

Even apart from accounting for non-voice revenues, the Commission cannot meaningfully evaluate whether an access-replacement mechanism is necessary without scrutinizing ILECs' existing retail rates for local telephone service. As the Government Accountability Office ("GAO") found in the course of documenting flaws in the high-cost USF

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22 *Id.* ¶ 568.

23 *See, e.g.*, Comments of Time Warner Cable Inc., WC Docket No. 10-90 *et al.*, at 6, 14 (filed July 12, 2010) ("TWC USF NOI/NPRM Comments"); Comments of Time Warner Cable Inc., RM-11584, GN Docket No. 09-51 *et al.*, at 3 (filed Jan. 7, 2010) ("TWC NCTA Petition Comments"); Comments of Time Warner Cable Inc., GN Docket No. 09-47 *et al.*, at 4, 10-11 (filed Dec. 7, 2009) ("TWC National Broadband Plan Comments"); Reply Comments of Time Warner Cable Inc., WC Docket No. 05-337 *et al.*, at 6 (filed May 16, 2008) ("TWC High-Cost USF Reply Comments").

programs, telephone rates in rural areas are often considerably *lower* than in urban areas, suggesting that existing support is excessive even without accounting for new revenue streams (*e.g.*, from broadband and video services) available to incumbent LECs.[24] Rural carriers can hardly show that the affordability and reasonable comparability of rates is in peril when their rates are well below those charged in urban areas. Thus, rather than layering new subsidies on top of an already-overburdened USF program, the Commission should authorize incumbent LECs to increase their SLCs to the extent necessary to offset declining access revenues.[25] The Commission also should encourage states to deregulate (or at least adjust) local rates. If the Commission does not deregulate SLCs altogether, it at least should increase the cap and require carriers to increase their SLCs to the capped level before they could become eligible to recoup foregone ICC revenues through a recovery mechanism or the Connect America Fund ("CAF").[26]

While these factors suggest that arguments for revenue-replacement subsidies are simply misplaced, the Commission at a minimum should collect and analyze cost and revenue data from incumbent LECs that are current net recipients of intercarrier compensation *before* developing any recovery mechanism.[27] Taking such steps also will help ensure that providers receive no

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24 *See* U.S. General Accounting Office, TELECOMMUNICATIONS: FEDERAL AND STATE UNIVERSAL SERVICE PROGRAMS AND CHALLENGES TO FUNDING, at 15 & App. IV (GAO-02-187, Feb. 4, 2002), http://www.gao.gov/new.items/d02187.pdf ("GAO Report"); *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-249 ¶¶ 56-57, App. C (rel. Oct. 27, 2003). *See also* NPRM ¶ 172.

25 NPRM ¶ 579. *See also id.* ¶ 588 ("We also propose that a provider first seek recovery through reasonable end-user charges, if adopted, before receiving support under the CAF.").

26 *Id.* ¶ 580.

27 *See id.* ¶ 572 ("To support our consideration of a revenue recovery mechanism, the Commission requests data to analyze existing revenues, assess the magnitude of revenue reductions resulting from the proposed reforms, and determine the appropriate size and scope of a recovery mechanism. … Additionally, we request total regulated revenue and

more support than is necessary for any recovery mechanism that ultimately may be established. Indeed, the Commission's long-term vision for the CAF, which includes a competitive auction mechanism through which providers would receive "*all* explicit universal service support necessary to provide affordable service in a particular geographic area,"[28] necessarily would require that a provider consider all available revenue streams to determine exactly how much federal support would be required to deploy and maintain new services and facilities. The same market-driven considerations should determine the availability and extent of support irrespective of whether auctions or some other mechanism is utilized.

Consistent with TWC's recommendations regarding the timing of access rate reductions, TWC opposes creation of a special recovery mechanism for rate-of-return carriers.[29] Such carriers, like price-cap incumbent LECs, receive access revenues and USF support beyond any level that has been shown necessary to ensure affordable and reasonably comparable rates. Indeed, the inefficiencies of rate-of-return regulation are well documented in the record.[30] Absent a demonstration of actual need—focusing on *consumer* welfare, rather than provider welfare—the Commission should reject calls to establish an ICC revenue recovery mechanism, regardless of the regulatory method used to govern access charges. Tellingly, the Iowa Utilities Board recently undertook an examination of rural LECs' claimed need for such a mechanism,

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total revenue to understand the significance of intercarrier compensation revenue as a percent of total regulated revenue and total revenue."); *id.* ¶ 561 (seeking comment on the appropriate framework for a recovery mechanism, "including the data necessary to meaningfully develop and analyze such recovery mechanisms"); *id.* ¶ 492.

28 *Id.* ¶ 592 (emphasis added).

29 *See id.* ¶ 595.

30 *See, e.g., id.* ¶¶ 597, 171-73.

and it found that they were unable (or unwilling) to supply evidentiary support for the requested subsidies.[31] The Commission should apply a similarly skeptical and data-driven analysis.

C. The Commission Should Establish Competitively Neutral Interconnection Rules.

In addition to reforming intercarrier compensation *rates*, the Commission should clarify its rules governing the manner in which carriers exchange traffic. In particular, TWC believes that any interconnection rules applicable to the exchange of traditional circuit-switched voice traffic under Section 251 should be harmonized with any new rules that the Commission may adopt to govern the exchange of IP voice traffic. Just as so-called "VoIP traffic" should be treated the same as traffic that originates or terminates in a TDM format from a compensation standpoint,[32] interconnection arrangements that take advantage of IP technology should be subject to the same rules and processes as TDM-based interconnection. The choice of any particular technology in no way diminishes the need for basic interconnection and the exchange of traffic, and such building blocks remain necessary even where competition is robust.[33] Moreover, adopting separate regimes could disadvantage a particular provider or a particular type of technology, which could lead to market distortions or unnecessary disputes much like the existing ICC system. Indeed, far from exempting IP-based interconnection from existing rules

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[31] *See id.* ¶ 543 & n.818 (citing orders of the Iowa Utilities Board and noting that "no recovery mechanism was established in the [Iowa intercarrier compensation reform] proceeding because affected LECs did not provide cost data to substantiate the need for recovery").

[32] Time Warner Cable Inc., WC Docket No. 10-90 *et al.*, at 5-8 (filed Apr. 1, 2011) ("TWC Section XV Comments"); Section I.D. *infra*.

[33] *See Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 ¶ 64 (2008) (declining to grant Qwest's request to forbear from "regulations that apply generally to nondominant telecommunications carriers and to LECs," including Section 251 interconnection and exchange of traffic obligations).

and processes, the Commission should rely on its Section 251 authority to mandate acceptance of traffic in an IP format within a reasonable period of time.[34]

D. The Initial Comments on the NPRM's Interim Proposals Confirm That Subjecting So-Called "VoIP Traffic" to Differential Treatment Would Perpetuate Arbitrage and Detract from the Commission's Efforts to Implement Long-Term Reforms.

The opening comments submitted in response to Section XV of the NPRM reflect broad consensus in support of comprehensive action to reform the broken ICC system. Many commenters agree with TWC that the fundamental goal of intercarrier compensation reform must be to harmonize and simplify the current system in a manner that is competitively and technologically neutral. For example, a coalition of small and rural telecommunications companies, including NECA and NTCA, stated that the Commission should "mov[e] toward unification of rates for *all* traffic – including VoIP traffic – at a pace to be determined by policymakers."[35] Comcast similarly noted that "the optimal approach would involve the prompt implementation of a plan that would produce substantial reductions in current access charges and the integration of VoIP traffic into a single compensation regime that treats all traffic in a uniform way."[36]

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[34] TWC Section XV Comments at 11.

[35] Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; Eastern Rural Telecom Association; The Rural Alliance; and The Rural Broadband Alliance, WC Docket No. 10-90 *et al.*, at 15 (filed Apr. 1, 2011) ("NECA *et al.* Comments").

[36] Comments of Comcast Corporation, WC Docket No. 10-90 *et al.*, at 3-4 (filed Apr. 1, 2011) ("Comcast Comments"); *see also* Comments of T-Mobile USA, Inc., WC Docket No. 10-90 *et al.*, at 2 (filed Apr. 1, 2011) ("T-Mobile Comments") (advocating a bill-and-keep regime for all intercarrier compensation); NECA *et al.* Comments at 14-15.

Despite widespread agreement that harmonizing ICC rates represents the appropriate blueprint for long-term reform, a number of commenters argue for introducing greater *dis*harmony in the near term by establishing special rules for so-called "VoIP traffic."[37] As TWC explained in its initial comments,[38] and as many other commenters recognize,[39] such an approach would be wholly counterproductive and would engender even more arbitrage opportunities and intercarrier disputes than the existing regime. The most sensible way to begin the process of unifying ICC rates is to clarify that the existing framework of access charges (for toll calls) and reciprocal compensation (for local calls) applies to IP-originated or -terminated calls to the same extent as it applies to other telecommunications traffic. Only in doing so can the Commission apply a common set of rules in a competitively and technologically neutral manner.

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[37] As TWC explained in its April 1 comments, a LEC that provides exchange access to an interexchange carrier is providing a telecommunications service irrespective of whether the traffic it receives originated on a VoIP provider's network or eventually will be delivered to a VoIP provider for termination to the end user. Regardless of the classification of retail VoIP service, the nature of that service has no bearing on the appropriate treatment of a traditional exchange access service. TWC Section XV Comments at 5-8.

[38] *Id.* at 9-11 (stating that, "as long as there is a potential opportunity to reduce or avoid the obligation to pay access charges by exploiting artificial distinctions in traffic or an ambiguity in the Commission's rules, some carriers will do so" and that "[t]he NPRM's proposed 'VoIP traffic' classification would only further enable such behavior").

[39] *See, e.g.*, Comments of Windstream Communications, Inc. on Section XV, WC Docket No. 10-90 *et al.*, at 6-7 (filed Apr. 1, 2011); NECA *et al.* Comments at 5-6; Comments of CenturyLink, WC Docket No. 10-90 *et al.*, at 7-8 (filed Apr. 1, 2011); Comments Submitted on Behalf of the Public Utilities Commission of Ohio, WC Docket No. 10-90 *et al.*, at 7 (filed Apr. 1, 2011); Comments of Cablevision Systems Corporation and Charter Communications, WC Docket No. 10-90 *et al.*, at 2-3 (filed Apr. 1, 2011) ("Cablevision/Charter Comments"); Comments of Cox Communications, Inc., WC Docket No. 10-90 *et al.*, at 5-7 (filed Apr. 1, 2011).

TWC thus disagrees with the claim that "[a]pplying access charges to VoIP would be a counter-productive step backwards."[40] To the contrary, far from "reduc[ing] and eventually eliminat[ing] opportunities and incentives for arbitrage,"[41] a new artificial traffic classification for so-called "VoIP traffic" would merely encourage some carriers to declare that all of the traffic they hand off for termination to be subject to the lower rate. TWC agrees with NECA that creating a new artificial traffic classification would "effectively cede[] the ICC reform field to the arbitrageurs" and that, "in the wake of any such ruling, nearly every minute of traffic on the PSTN would undoubtedly be asserted as 'VoIP,' and thus claimed as subject to the lower (or zeroed-out) rates."[42]

Furthermore, those commenters that advocate for a special rate for traffic that originates or terminates in IP format acknowledge—either explicitly or implicitly—that a separate ICC regime for so-called "VoIP traffic" would inevitably create even more carrier disputes and arbitrage problems, when the Commission should be moving to eliminate such resource drains. These commenters thus are forced to recommend that the Commission establish new burdensome regulatory obligations to remedy such problems. For example, recognizing that its bill-and-keep proposal would create the "potential for providers to falsely claim that telecommunications service is VoIP to avoid intercarrier compensation requirements," Vonage recommends adoption of additional signaling rules to address the issue.[43] Similarly, XO proposes a complicated new system whereby providers would be required to designate their

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40 Comments of Sprint Nextel Corporation, WC Docket No. 10-90 *et al.*, at 6 (filed Apr. 1, 2011).

41 NPRM ¶ 603.

42 NECA *et al.* Comments at 5.

43 Comments of Vonage Holdings Corp., WC Docket No. 10-90 *et al.*, at ii (filed Apr. 1, 2011); *id.* at 13-14 ("Vonage is aware of the arbitrage opportunities the Commission and others have identified exist in the current intercarrier compensation rules.").

traffic as VoIP and terminating carriers would have the right to verify such designations.[44] XO does not address how a carrier may fulfill its obligation to identify traffic as VoIP "upfront" when the traffic, rather than originating on a VoIP network, will *terminate* to an interconnected VoIP provider.[45] But XO suggests that "[i]f a VoIP provider does not adhere to these procedures, then terminating LECs should be permitted to regard and bill VoIP traffic as subject to switched access charges if the call detail indicates that the traffic is interexchange."[46] In addition, XO recommends creating a burdensome new audit regime that apparently would apply to all carriers and would give terminating carriers "the right to audit and verify the originating carrier's designation of VoIP traffic."[47]

The complexity of these suggested safeguards illustrates precisely why the Commission should focus on moving toward long-term uniformity for ICC, rather than diverting attention and resources to an interim regime that would multiply the number of existing disputes and foster greater uncertainty. Past regimes involving reliance on self-certifications and audit rights, such as payphone compensation and eligibility for enhanced extended links ("EELs"), show that such processes can quickly devolve into a litigation quagmire. The Commission should avoid establishing a whole new interim regulatory regime founded on new traffic distinctions, only to focus on eliminating such distinctions (and, presumably, the interim rules) in short order thereafter.

The record also shows that clarifying the application of existing ICC rules to so-called "VoIP traffic" will encourage incumbent LECs to transition to all-IP networks. While some

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44 Comments of XO Communications, WC Docket No. 10-90 *et al.*, at 31-34 (filed Apr. 1, 2011) ("XO Comments").

45 *Id.* at 33.

46 *Id.* at 33-34.

47 *Id.* at 34.

assert that creating a special classification for so-called "VoIP traffic" would incentivize "voice service providers to upgrade their local networks to IP-based broadband facilities," and in turn "would enable providers to originate voice traffic in IP, thereby reducing the charges they incur to have their traffic terminated on another providers' network,"[48] these commenters overlook the fact that such incentives would exist only to the extent the carrier is a *net payer* of intercarrier compensation. But it is the *net recipients* of ICC that have yet to upgrade their networks to IP.[49] For those carriers—including many small rate-of-return ILECs—a low interim rate for terminating VoIP calls (or a bill-and-keep regime) would only *reduce* their existing intercarrier compensation revenue stream. It would therefore make no sense for these carriers to upgrade to IP architecture or accept traffic in an IP format if doing so would result in significantly reducing or eliminating their remaining terminating access revenues. Indeed, as Cablevision and Charter observe: "If ILECs and their affiliates can maintain these TDM interconnection arrangements and lower the access charges they pay when they exchange VoIP traffic over TDM trunks, they [will] have *no* incentive whatsoever to move to IP interconnection."[50]

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[48] Comcast Comments at 5. *See also* T-Mobile Comments at 12; Comments of CTIA-The Wireless Association, WC Docket No. 10-90 *et al.*, at 12 (filed Apr. 1, 2011); XO Comments at 32; Comments of Google Inc., WC Docket No. 10-90 *et al.*, at 8 (filed Apr. 1, 2011).

[49] *See* Cablevision/Charter Comments at 6 n.7 ("While some have argued that lowering VoIP rates vis-à-vis circuit-switched rates would encourage carriers to move to IP, that is decidedly untrue for LECs, which are net recipients of access charges. At most, this argument would apply only to IXCs that are net payers of access charges. IXCs, however, have already widely adopted IP for transporting traffic." (internal citations omitted)).

[50] *Id.*

II. COMPREHENSIVE USF REFORM SHOULD BE GUIDED BY THE COMMISSION'S GOALS OF PROMOTING BROADBAND DEPLOYMENT AND RATIONALIZING AND STABILIZING HIGH-COST FUNDING

In conjunction with its efforts to fix the broken ICC system, the Commission should overhaul the high-cost USF mechanisms based on similar overarching principles. TWC believes that the key to resolving issues stemming from the USF's outdated assumptions and runaway growth lies in the adoption of reforms that promote a competitive marketplace and do not favor one type of provider or technology over another. TWC therefore appreciates the NPRM's stated preference for market-based support mechanisms among its guiding principles for reform.[51] Unfortunately, while this preference is reflected in some of the proposals set forth in the NPRM, such as in the initial phase of implementing the CAF, it is notably absent in others, including proposals that would give ILECs a right of first refusal for ongoing support under the CAF and allow certain ILECs to continue operating under rate-of-return regulation.

Moreover, as TWC has argued in previous reform proceedings, a primary flaw in the current high-cost support mechanism is its *presumption* of need for subsidies rather than any factual showing that support is necessary to preserve affordable and reasonably comparable rates.[52] As noted above, the GAO has found that the relationship between high-cost areas and retail rates is often inverted, as local telephone rates in rural areas are often considerably *lower* than in urban areas, underscoring the need for more targeted and empirically justified support.[53]

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[51] NPRM ¶ 10 (stating the Commission's intention to "[t]ransition to market-driven and incentive-based policies that encourage technologies and services that maximize the value of scarce program resources and the benefits to all consumers").

[52] *See, e.g.*, Comments of TWC USF NOI/NPRM Comments at 6; TWC NCTA Petition Comments at 3; TWC National Broadband Plan Comments at 4, 10-11; TWC High-Cost USF Reply Comments at 6.

[53] *See* GAO Report at 15 & App. IV; *see also Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum

While the NPRM's core principles implicitly acknowledge the fact that the current USF system is built on untested assumptions, its proposals sometimes waver in their commitment to shedding those assumptions in favor of sound, data-driven policy decisions. TWC thus urges the Commission to adhere to its principles and adopt the recommendations set forth below to achieve its long-term vision for a sustainable universal service fund.

A. The Status Quo Is Untenable.

As the NPRM appropriately acknowledges, there is an urgent need to reform the existing USF system "to eliminate waste and inefficiency, improve incentives for rational investment and operation by companies operating in rural areas, and set rate-of-return companies on the path to incentive-based regulation."[54] TWC could not agree more. Indeed, the bloated nature of existing support mechanisms, caused by excessive subsidization,[55] imposes significant and unwarranted burdens on consumers and has fueled a nearly unanimous cry for reform. As noted above, a fundamental problem with the existing high-cost mechanism is that funding is not based on any remote showing of need. Support payments instead are based on inflated measures of cost and have no clear relationship to the rates actually charged for supported services.

Making matters worse, USF disbursements have continued to increase even as ILECs have expanded their lines of business and thereby obtained new revenue streams. The vast majority of incumbents currently receiving high-cost support provide broadband Internet access and interexchange services, and many provide multichannel video programming services as

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Opinion and Order, CC Docket No. 96-45, FCC 03-249 ¶¶ 56-57, App. C (rel. Oct. 27, 2003).

54 NPRM ¶ 157.

55 *Alenco Communications v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (noting that "excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market").

well.[56] While these additional revenue streams undercut the rationale for federal subsidies in many areas, the current regime simply ignores their existence. By the same token, the fact that new entrants like TWC are able to offer voice services on an unsubsidized basis further calls into question the need for continuing high-cost support in many areas. TWC thus has supported proposals that would reduce or eliminate USF support in those areas of the country where extensive, unsubsidized facilities-based voice competition exists.[57]

High-cost support also has never become "portable," as the Commission first envisioned USF funding would be following the 1996 Act.[58] When an incumbent LEC loses a customer to a competitive provider such as TWC, such loss does nothing to diminish the ILEC's support and, in fact, such loss may actually increase per-line support.[59] Whereas competitors' support is pegged to the number of customers they actually serve, incumbents' support is not. As a result, not only does the current USF regime undermine incentives for subsidized carriers to compete in

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[56] *See, e.g.*, NTCA 2010 Broadband/Internet Availability Survey Report (Jan. 2011), http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2010_NTCA_Broadband_Survey_Report.pdf.

[57] *See National Cable & Telecommunications Association Petition for Rulemaking to Reduce Universal Serv. High-Cost Support Provided to Carriers in Areas Where There Is Extensive Unsubsidized Facilities-Based Voice Competition*, Comments of Time Warner Cable Inc., RM-11584, GN Docket No. 09-51, WC Docket No. 05-337 (filed Jan. 7, 2010).

[58] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶¶ 286-90 (1997) (stating the Commission's intent to transfer high-cost support to competitive eligible telecommunications carriers ("CETCs") when a formerly ILEC customer transfers service to a new entrant "[i]n order not to discourage competition in high cost areas"); NPRM ¶ 243 n.388 (stating that "the Commission concluded that high-cost support should be portable – *i.e.*, that support would follow the customer to the new LEC when the customer switched service providers").

[59] *See Federal-State Board on Universal Service*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244 ¶ 125 (2001) ("If the incumbent's lines decreased while its fixed costs remained roughly the same, its per-line costs would increase. Consequently, the incumbent would be entitled to higher support per line.").

high-cost areas, it also unfairly skews the competitive landscape against new entrants in those areas.

B. The Commission Should Implement the First Phase of the CAF in a Manner Consistent with Its Overarching Goals for Reform.

The NPRM proposes to begin implementation of the CAF in 2012 by phasing out certain aspects of the existing USF mechanisms and utilizing reverse auctions to repurpose this legacy support for broadband deployment in unserved areas.[60] TWC supports this framework for implementing the first phase of the CAF and believes that the Commission's proposals represent a substantial first step toward achieving the Commission's long-term USF reform goals. Indeed, many of these near-term reform proposals mirror the strategic priorities that TWC previously has advanced in the context of high-cost USF reform, including: (i) funding broadband through phased-in reductions of existing high-cost mechanisms; (ii) targeting support to unserved areas; and (iii) allocating grants for construction costs while limiting eligibility for ongoing support to those providers that have a demonstrated need.[61] As discussed below, the Commission likely has sufficient authority to establish a broadband-focused support mechanism, but it should proceed with caution, ensuring that funding remains appropriately targeted and free of the excesses that plague the existing regime.

1. The Commission Appears to Have Authority To Modernize and Repurpose USF To Support Deployment of Broadband to Unserved Areas.

Although the Communications Act does not expressly authorize high-cost support for broadband Internet access services, the NPRM advances reasonable bases on which the Commission could rely to provide targeted funding. Notably, Section 254 directs the

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60 *See generally* NPRM at Section VI.

61 *See, e.g.*, TWC USF NOI/NPRM Comments at 9-12; TWC National Broadband Plan Comments at 7-9.

Commission to develop universal service policies that promote "[a]ccess to advanced telecommunications and information services … in all regions of the Nation,"[62] including in particular in "rural, insular, and high cost areas."[63] Moreover, Section 706(b) requires the Commission to "take immediate action to accelerate deployment of [advanced telecommunications] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market"[64] in the event that the Commission finds, as it did last year,[65] that such services are not "being deployed to all Americans in a reasonable and timely fashion."[66] The NPRM also suggests that broadband support could be tied to the Commission's authority over telecommunications services, by conditioning universal service support on a recipient's commitment to offer broadband service alongside supported telecommunications services.[67]

Whatever jurisdictional hook the Commission invokes, it should not limit funding eligibility under the CAF to eligible telecommunications carriers ("ETCs"). Notably, despite being the nation's leading providers of broadband services, very few cable operators are ETCs. This is due in large part to the extraordinary amount of time and resources involved in the process and the systematic biases in favor of incumbent LECs. Indeed, ILECs routinely object to further ETC designations, and state commissions adjudicating applications from competitive

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62 47 U.S.C. § 254(b)(2).

63 *Id.* § 254(b)(3).

64 *Id.* § 1302(b).

65 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, GN Docket Nos. 09-137, 09-51, FCC 10-129 (rel. July 20, 2010).

66 47 U.S.C. § 1302(b).

67 NPRM ¶¶ 70-71.

providers are not subject to statutory deadlines. Further, Section 214(e) defines a CETC's "service area" in relation to the incumbent's study area.[68] Cable operators, however, often are unable to serve the entirety of the study area, which would either deny them support or require costly and time-consuming proceedings at the state and federal levels to modify service-area boundaries.[69]

To the extent necessary, TWC urges the Commission to use its Section 10 forbearance authority to ensure that ETC status is not made a prerequisite for broadband funding eligibility.[70] After all, because broadband Internet access is an information service, it makes no sense to require designation as an eligible *telecommunications* carrier. Forbearing from ETC requirements in the broadband context also would be consistent with Congress's mandate in Section 706 to "encourage the deployment … of advanced telecommunications capability to all Americans … by utilizing … regulatory forbearance" and other tools that promote competition and remove barriers to entry.[71] As discussed in more detail below, the Commission instead should adopt specific public interest obligations for CAF recipients that are analogous to those imposed on ETCs today.

Moreover, contrary to the NPRM's suggestion, it is not necessary to assign a regulatory classification to interconnected VoIP services to "enable the Commission to support networks used to provide interconnected VoIP."[72] Indeed, as the NPRM acknowledges, the Commission

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[68] 47 U.S.C. § 214(e).

[69] As discussed below, *see* Section II.C. *infra*, TWC supports the Commission's proposals to redraw study areas and require incumbent LECs to disaggregate support so that truly high-cost areas can be identified and targeted for support. *See* NPRM ¶¶ 372-88.

[70] 47 U.S.C. § 160; *see also* NPRM ¶ 72.

[71] 47 U.S.C. § 1302(a).

[72] NPRM ¶ 73.

already has determined that interconnected VoIP providers must *contribute* to federal universal service mechanisms, as well as comply with a number of other regulatory obligations, without need to classify the end-user service.[73] Making VoIP providers eligible to receive support is no different—and, as a matter of fundamental fairness, should go hand in hand with the Commission's decision to require such entities to contribute. To whatever extent the Commission has authority to support broadband outside the existing ETC process, it should rely on the same authority to support VoIP (as long as voice services remain separately eligible for support).

2. Controlling the Size of the CAF

While TWC supports repurposing high-cost universal service support to cover broadband infrastructure and services, it opposes any proposal that would simply layer new broadband support mechanisms on top of existing mechanisms. TWC, like many stakeholders, believes that the explosive growth of the USF, particularly in high-cost support, has pushed the current regime to a point of crisis. The Commission has required little convincing of that fact; indeed, the Commission has repeatedly recognized over the past decade the tremendous strain on existing funding mechanisms.[74]

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73 *Id.* (listing "local number portability, 911 emergency calling capability, … CPNI protection, disability access and TRS contribution requirements, and section 214 discontinuance" as obligations with which interconnected VoIP providers must comply (internal citations omitted)).

74 *See, e.g.*, *id.* ¶ 243; Omnibus Broadband Initiative, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 141-42 (2010) ("NATIONAL BROADBAND PLAN") (stating that the "High-Cost program is not designed to universalize broadband" and that, without reform, the current system "will not" enable households in high-cost areas to have access to affordable broadband); *High-Cost Universal Service Support*, Order, 23 FCC Rcd 8834 ¶ 5 (2008) (stating that "the rapid growth of high-cost support … threatens the sustainability of the universal service fund"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 17 (2006)

TWC thus welcomes the near-term reform proposals in the NPRM to control the size of the USF during the transition. In particular, TWC supports the Commission's near-term proposals to avoid excessive funding, including by eliminating local switching support,[75] capping total per-line high-cost support,[76] and limiting USF reimbursement of certain corporate expenses.[77] TWC also supports the NPRM's proposal to eliminate interstate access support ("IAS") beginning in 2012.[78] As the NPRM recognizes, there is no evidence that "IAS continues to be necessary to address its original intended purpose of maintaining affordable voice service, or that IAS is an efficient, effective, or accountable mechanism for advancing broadband in high-cost areas."[79] To the contrary, as explained in the National Broadband Plan, eliminating this legacy program could yield up to $4 billion in savings over the next decade.[80]

3. Ensuring Efficient Support Through Reverse Auctions

The proposed reforms to legacy support mechanisms will free up a significant amount of funding that can be directed to supporting the first phase of the CAF and the transition to a more

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("There is widespread agreement that the Fund is currently under significant strain."); *Schools and Libraries Universal Service Support Mechanism,* First Report and Order, 17 FCC Rcd 11521 ¶ 2 (2002) ("Over the past several years …, we have witnessed increasing upward pressure on contributions caused by a variety of events, including declining interstate revenues coupled with increased demand for universal service support."); *see also High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Recommended Decision, WC Docket No. 05-337 *et al.*, FCC 07J-1, 22 FCC Rcd 8998 ¶¶ 1, 4 (rel. May 1, 2007) (recognizing that the USF program has been plagued by "explosive growth in high-cost universal service support disbursements," and, as a result, "is in dire jeopardy of becoming unsustainable").

75 NPRM ¶ 186.

76 *Id.* ¶ 208.

77 *Id.* ¶¶ 194, 201 (proposing to "reduce or eliminate universal support for corporate overhead expenses" and "establish benchmarks for reimbursable operating and capital costs for rate-of-return companies").

78 *Id.* ¶ 228.

79 *Id.* ¶ 232.

80 NATIONAL BROADBAND PLAN at 147.

efficient distribution mechanism, such as reverse auctions. TWC has long been a proponent of reverse auctions as a means of distributing universal service support.[81] Reverse auctions harness market forces to determine efficient levels of support in a competitively and technologically neutral manner. By awarding support to the lowest bidder in a particular geographic area and subsidizing only one provider in each area, the Commission can eliminate the waste that is built into the existing high-cost program. Indeed, use of a competitive bidding system to allocate CAF support will ensure the fiscal integrity of the funding mechanism by providing no more support than is necessary for a given build-out project. Moreover, the statutory interest in ensuring the availability of quality services at affordable and reasonably comparable rates—while minimizing the financial burden on consumers—is best served through a market-based approach.

Further, TWC agrees with the NPRM's proposal to structure a two-step auction process that includes a pre-auction short-form application and a post-auction long-form application.[82] Such a process would enable the Commission to efficiently identify those parties interested in participating in the auction—by requiring bidders to certify their eligibility and compliance with applicable Commission rules—as well as the areas they may bid to serve.[83] Moreover, in the event that any winning bidders fail to submit their post-auction long-form application, a two-step auction process would enable the Commission to quickly restore the funds to the initial bidding

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81 *See, e.g.*, TWC USF NOI/NPRM Comments at 9-12; TWC High-Cost Reply Comments at 8-13; TWC National Broadband Plan Comments at 8-9.

82 *See* NPRM ¶ 326.

83 *Id.* ¶¶ 327-30.

pool and award them "to bidders that, but for the failed winning bid, would have themselves won support through the auction."[84]

4. Adopting Public Interest Obligations Applicable to All CAF Recipients

Relatedly, TWC agrees that build-out funds disbursed through the CAF should be conditioned on the recipients' agreement to deliver on their promises to deploy high-quality and affordable broadband services. Thus, it is important for the Commission to adopt and enforce specific public interest obligations applicable to all CAF recipients. As noted above, TWC believes that these obligations should be imposed outside of the existing ETC framework to ensure that funding is awarded on a competitively neutral basis.[85] Instead, to avoid the significant delay and uncertainty that competitive providers face when applying to become an ETC—and the resulting preferences favoring incumbent LECs—the Commission should impose specific obligations that are similar to those currently imposed on competitive ETCs. These obligations could include requiring the funding applicant to: (a) serve the entirety of a particular service area; (b) advertise the availability of service; and (c) develop a plan for using universal service funds to expand the network coverage and/or improve service quality.[86]

In addition, TWC agrees that it is appropriate for the Commission to impose service, coverage, and deployment requirements that will ensure that funding awards are used to maximize broadband availability within a designated area. In this regard, TWC supports requiring an auction winner (or recipient of model-based support) to commit to providing service

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[84] *Id.* ¶ 349.

[85] *See* Section II.B.1. *supra*.

[86] *See* 47 C.F.R. §§ 54.201-02.

throughout a defined coverage area in the same manner currently required of CETCs.[87] In addition, TWC believes the Commission should set a specific, measurable minimum coverage threshold[88] and should require auction winners to provide service at speeds that meet or exceed minimum requirements.[89]

The adoption of speed and geographic coverage obligations as a condition of receiving CAF support also is consistent with the Commission's intention to award funding for build-out on a competitively and technologically neutral basis. In particular, in order to make funding awards using a competitive mechanism, the Commission will need the ability to perform an apples-to-apples comparison of bids. Given the Commission's plan to compare *all* bids submitted in the first auction round to one another—across all geographic areas—the adoption of objective evaluation criteria will be particularly important so that the Commission can fairly benchmark competing applications against one another.[90]

C. Likewise, the Commission Should Adopt a Long-Term Vision for the CAF that Relies on Market-Based Distribution Mechanisms and Is Competitively and Technologically Neutral.

Following the initial round of auctions to support broadband deployment in unserved areas, and as the Commission begins to consider the long-term structure for the CAF to support broadband services in high-cost areas, it is imperative that the Commission ensure that funding allocated through the CAF is justified by an empirical demonstration of need. As an initial

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[87] *See id.* § 54.202(a); NPRM ¶ 125. *See also* NPRM ¶ 313 (proposing that "recipients of support during the first phase of the CAF build out within three years of their initial receipt of funding, and that obligations continue for a defined period, such as five years, following completion of the build out by the provider").

[88] *See* NPRM ¶¶ 129-30, 310.

[89] *Id.* ¶ 109 (noting the National Broadband Plan's "initial target of 4 Mbps actual download/1 Mbps actual upload for universal service" (internal citations omitted)); *id.* ¶ 311.

[90] *Id.* ¶¶ 267, 284-86.

matter, the Commission should not assume the need for high-cost broadband support. New competitors such as TWC have shown that broadband can be deployed in high-cost areas using private capital. As TWC explained previously, as long as middle-mile transport is available and construction costs receive adequate support in currently unserved areas, permanent subsidies for broadband access providers often will be unnecessary.[91]

Accordingly, unlike the way legacy high-cost support currently is allocated, the Commission should ensure that any ongoing support is provided only to the extent *necessary* to yield affordable and reasonably comparable rates. Billions of dollars should not continue to flow to incumbent providers based on mere presumptions of need, particularly when those presumptions are easily rebutted—as the record before the Commission so clearly demonstrates. The Commission has not examined whether or to what extent rates would increase if support were withdrawn or reduced—much less whether any such increases would be unaffordable—despite dramatic changes in the marketplace in recent years, including new revenue streams available to incumbent LECs in a marketplace increasingly dominated by bundled service offerings.

The Commission should independently assess the funding needed to support broadband services, without regard to legacy support payments for traditional services. TWC believes that requiring rural carriers to disaggregate support within their study areas and, separately, beginning the process of redrawing study areas are important first steps in this effort.[92] Moreover, TWC agrees that the Commission should address these issues in advance of making any ongoing

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[91] *See, e.g.*, TWC National Broadband Plan Comments at 2, 8; *see also* TWC USF NOI/NPRM Comments at 12.

[92] *See* NPRM ¶¶ 372-88.

support through the CAF available.[93] For similar reasons, as explained above, TWC disagrees with the NPRM's suggestion that a portion of the savings realized through near-term USF reforms should be used "to help offset proposed reductions in access charges and/or for other potential support mechanisms."[94] As discussed above, the implicit subsidies provided to LECs through the existing intercarrier compensation regime, like legacy high-cost support, often are excessive and should not be carried over reflexively in the form of an access recovery mechanism. The Commission should therefore resist diverting scarce resources that would be better allocated to competitively neutral broadband support.

Consistent with the Commission's proposal to use reverse auctions to award support for broadband build-out in unserved areas, the Commission also should allocate ongoing support for voice and broadband networks, to the extent the Commission determines (based on the assessment recommended above) that such support is necessary, using mechanisms that are consistent with a competitive marketplace. Accordingly, TWC urges the Commission to closely monitor the auctions planned for 2012 with an eye towards adapting the procedure for the provision of future support.

TWC believes that awarding support to the lowest bidder in a particular geographic area is the most efficient way to determine the appropriate level of support and eliminate the substantial waste built into the existing high-cost program. TWC therefore emphatically opposes the proposal to give rights of first refusal to ILECs.[95] Such an approach would grant subsidies to LECs regardless of whether another carrier or an alternative technology would make better use of scarce funds. Indeed, creating a right of first refusal for incumbent providers would elevate

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93 *See id.* ¶ 384.

94 *Id.* ¶¶ 278, 160.

95 *See id.* ¶ 431.

the interests of particular competitors over those of consumers. Furthermore, the NPRM recognizes that legacy support mechanisms presently subsidize some carriers at inappropriate levels and in ways that incentivize inefficient spending.[96] In light of this fact, it would make no sense for the Commission to use the current and/or previous receipt of USF subsidies as the basis for continued receipt of such funding, particularly when there is no evidence that support is necessary to allow the incumbent LEC to recover its costs. The Commission has stated its intention to shed such outdated assumptions in implementing the first phase of the CAF; it should do the same as it considers rules and policies governing other facets of the support mechanism.

While an auction mechanism would obviate most of these concerns—as the bidding process should preclude excessive support and would take into account applicable costs *and* available revenues—any alternative (such as model-based support) must address this vital shortcoming of today's regime. In particular, the Commission should consider the relevance of providers' costs *and* revenues, as the NPRM suggests, not only from voice and broadband services but all lines of business that utilize network facilities.[97] In addition, the Commission should be careful not to subsidize rates that already are at or below competitive levels. Accordingly, the Commission also would need to index support to retail rates. In areas where rates already are *below* market, the need for support must be examined with skepticism.

If the Commission ultimately concludes that auctions are unworkable or otherwise inappropriate, it should consider awarding support based on a forward-looking, technology-neutral cost model and making such support genuinely portable. As explained above, today's

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[96] *See id.* ¶¶ 171-73.

[97] *See id.* ¶ 392 (stating the need to ensure that USF support does not "excessively subsidiz[e] carriers that have the ability to recover additional non-regulated revenues as a result of their deployment of subsidized local loops").

support mechanisms accord significant competitive advantages to rural ILECs by effectively holding them harmless against line losses, while forcing competitors to win a customer to become eligible for the associated per-line support. A more sensible approach (assuming auctions are not employed) would be to make all carriers compete for support on equal footing. The Joint Board previously recommended such a "primary line" approach, and it warrants further consideration.[98]

The Commission also should begin transitioning rate-of-return carriers to market-based incentive regulation. As the NPRM acknowledges, rate-of-return regulation produces inefficiencies that are largely to blame for pushing USF to the breaking point.[99] And although the NPRM states the Commission's intention of "set[ting] rate-of-return companies on the path to incentive-based regulation,"[100] the NPRM later raises the prospect of "an alternative path for rate-of-return territories that would provide ongoing support based on reasonable actual investment."[101] Indeed, the NPRM proposes to evaluate the success of the Commission's near-term USF reforms to determine whether "the reforms have adequately improved the incentives for investment and operation by small, rural companies" such that "support for these [rate-of-return] carriers should remain based on reasonable actual investment, rather than a cost model or auction."[102]

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98 *See Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 04J-1, 19 FCC Rcd 4257 ¶¶ 56, 67 (rel. Feb. 27, 2004) (concluding that pegging support to an individual customer "would send more appropriate entry signals in rural and high-cost areas … would be competitively neutral … [and] would protect fund sustainability").

99 *See* NPRM ¶¶ 171-73, 165-66; *see also id.* ¶ 21.

100 *Id.* ¶ 157.

101 *Id.* ¶ 449.

102 *Id.* ¶ 448.

TWC believes that transitioning carriers away from rate-of-return regulation is the only way to ensure a fiscally sound and sustainable USF system. Indeed, as the NPRM acknowledges, the current high-cost mechanism leaves incumbents "free to use high-cost support to deploy broadband networks to areas where there is an unsubsidized competitor, such as a cable company, as well as to areas where satellite service would be a significantly less expensive option."[103] Any proposal that would continue to provide ongoing support to rate-of-return carriers would merely prop up entrenched incumbents at the expense of new entrants, greater efficiency, and competition. Comprehensive reform that pushes ILECs toward incentive-based regulation therefore is critical to eliminating these and other perverse incentives inherent to rate-of-return regulation.

Finally, to the extent the Commission awards ongoing support from the CAF to an ILEC serving a particular area, it should condition such funding on the ILEC's agreement to interconnect with competitive LECs pursuant to its obligations under Section 251 and not to pursue suspension or modification of those obligations under Section 251(f)(2). Without such a condition, a subsidized incumbent could rely on funds contributed by new competitive providers while thwarting their ability to compete. A basic public interest prerequisite to obtaining high-cost subsidies should be refraining from anticompetitive tactics that prevent the sort of entry that can render further subsidies unnecessary.

CONCLUSION

Comprehensive reform of the USF and ICC regimes has tremendous potential to accelerate the pace of investment in broadband networks—not just in high-cost areas but in communities throughout the United States. But it must be done right. Those submitting

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[103] *Id.* ¶ 171.

comments in response to the Commission's near-term intercarrier compensation reform provided substantial documentation of the current problems plaguing that antiquated system. And the record is replete with evidence of the inefficiencies and competitive distortions currently caused by the dysfunctional high-cost USF mechanism. The Commission thus has abundant proof that the current systems are not working. TWC believes that the key to successful reform of intercarrier compensation and USF lies in a market-based approach that conforms to Congress's stated preference for competition in the 1996 Act. TWC therefore urges the Commission to adopt reforms that are consistent with—and promote—a robust competitive marketplace for voice and broadband services and to shed outdated preferences for certain types of providers and technologies.

Respectfully submitted,

TIME WARNER CABLE INC.

/s/ Matthew A. Brill

Matthew A. Brill
Amanda E. Potter
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Its Attorneys

Steven N. Teplitz
Terri Natoli
TIME WARNER CABLE INC.
901 F Street, NW
Suite 800
Washington, DC 20004

Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

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