

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

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

COMMENTS OF THE USA COALITION

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SUMMARY

The Universal Service for America Coalition applauds the efforts of the Federal Communications Commission (“Commission”) to increase the efficiency of the Universal Service Fund (“USF”) and facilitate broadband deployment. These efforts will be successful, however, only if the Commission both grounds reform squarely upon the requirements of the Communications Act of 1934, as amended, (the “Act”), and establishes clear, practical and measurable goals for the reformed USF system. Reform proposals designed to achieve lofty goals that are untethered from a practical and sustainable foundation would harm the public by wasting USF contributions and harming competition. Success will be possible only if the Commission focuses on efficiently eliminating, or at least reducing, the obstacles to service deployment and maintenance that all service providers face rather than making a series of proverbial “deals with the devil” to buy broadband deployment at the expense of creating additional entry barriers for other providers.

The Commission should increase efficiency by simplifying the distribution mechanism, which would improve both transparency and the flexibility to evolve quickly in response to future market developments. Simplification should begin with the articulation of clear and sustainable goals for the universal service program. Unfortunately, the goals that the Commission has announced, which are based on the National Broadband Plan (“NBP”), do not reflect the requirements of the Act. Specifically, the Commission’s goals focus almost exclusively on deploying and maintaining broadband services in areas where broadband services of 4 Mbps downstream and 1 Mbps upstream or greater currently are unavailable. The Act, by contrast, requires the Commission to focus on services that “have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.” Put simply, the Commission must target support based on the choices of a substantial majority of residential customers, although the Commission has rightly ruled that

support can -- and should -- be used for networks that provide both supported services and broadband services that exceed the speeds currently subscribed to by a substantial majority of residential customers.

Today, broadband services offering an actual 4 Mbps downstream and 1 Mbps upstream unquestionably have not been subscribed to by a substantial majority of residential customers. As such, the Commission's goal is to push the market to where the government believes it should be rather than following residential customers and providing funding where necessary to address market failures. The Act's structure of following residential customers is much more practical and affordable than the Commission's stated goal of leading the market, which would be so expensive that the Commission has proposed measures that would harm competition and create additional barriers to entry, which in turn would require more extensive regulation, merely to control costs. Accordingly, the USA Coalition respectfully urges the Commission to follow the Act's lead, not only because the law so demands but also because the Act's mandated structure is much more practical and affordable.

By focusing on services that have, through the operation of the market, been subscribed to by a substantial majority of residential customers (as opposed to some arbitrarily selected aspirational goal), the Commission will more easily be able to determine where support truly is necessary due to specific conditions in the local market. Moreover, the unavailability of such services at reasonably comparable rates (in the absence of support from the current fund) provides strong evidence of a market failure since the substantial majority of residential customers are already subscribing to the services in other markets. In these areas, the Act requires the Commission to provide support that is sufficient to permit carriers to offer reasonably comparable services at reasonably comparable rates.

In theory, reverse auctions represent an effective mechanism for determining the minimum amount of necessary support, but the harms that arise from the proposed single-winner reverse auctions are far too high to justify any potential benefit. Moreover, larger carriers can engage in cross-subsidization to facilitate lower bids merely to deprive smaller potential competitors -- such as regional and local carriers that focus solely on their local customers -- from the opportunity to compete on a level playing field. This destruction of the potential for competition would profoundly harm consumers and require intrusive regulation for decades to come.

Rather than relying on single-winner reverse auctions to pick specific winners and losers, the Commission instead should seek to make the market conditions in rural, insular and high cost areas reasonably comparable to those in the rest of the country. The best means for providing support where necessary without unnecessarily interfering with the market choices of residential customers would be to reimburse ETCs for a specified percentage of the costs they actually incur to serve the area, and the percentage should be the same for all ETCs who serve that area. The subsidized percentage could be identified by comparing costs in the supported area with those in other areas through any number of means (*e.g.*, cost models or the comparison of various cost inputs), and the percentage could be adjusted as necessary in response to future market conditions (*i.e.*, increased if not enough entry has occurred or decreased if too much entry has occurred). Importantly, providing subsidization for the same percentage of costs to all potential ETCs would ensure that the government does not change the competitive balances between technology types.

The Act also mandates that support be sufficient. However, any distribution mechanism that purports to identify a forward-looking per line cost would result in insufficient support if an ETC serves less than the number of lines assumed in the cost calculation or too much support if

it serves more than the assumed line count. For this reason, identification of the percentage of costs rather than an actual cost amount would be a much more efficient means for ensuring both that support is sufficient and that only the necessary amount of support is distributed.

The Commission should create a single replacement fund -- rather than multiple, piecemeal funds or funding components -- and provide a long and predictable glide path to ensure regulatory certainty through the transition period and beyond. The existing high-cost support fund is based on a tangle of support components that are in dire need of simplification. The last thing the Commission should do is replace one complicated support system with another, equally complicated system, by using an even more complicated transition scheme of program phase-downs, outright eliminations, and phase-ins. The Commission should establish a long-term vision for reform that accounts for the vital role played by wireless service providers and the need for ongoing operating expense support in order to ensure that existing networks are both preserved and advanced, as required by the Act. Once the replacement fund is adopted, the Commission should uniformly phase out all existing support for all carriers over a period of ten years.

The USA Coalition wholeheartedly supports the goal of ensuring that affordable broadband services are available throughout the United States. Rather than adopting measures that rest upon a shaky -- or non-existent -- legal foundation, the Commission should step back and consider different reform measures that actually reflect the requirements of the Act rather than only the NBP. The public interest would be better served by reform measures that deliver what the substantial majority of residential customers want by directly addressing market entry barriers than by superficially appealing programs that seemingly cost less over the short term but are far more costly over time both in terms of necessary support and harm to competition.

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COMMENTS OF THE USA COALITION

The Universal Service for America Coalition (“USA Coalition” or “Coalition”), by its attorneys, respectfully submits these comments on the issues raised by the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”) released by the Commission proposing reforms to the high-cost universal service fund (“USF”) and the existing intercarrier compensation (“ICC”) regime.¹ The Coalition urges the Commission to ensure universal service support is made available in a technologically and competitively neutral manner so that

¹ *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011).

technological innovation can be implemented into the communications network as rapidly and efficiently as possible, and submits these comments to explain how to do so.²

Allowing residents and businesses in rural, insular, and high-cost areas to select the services, technologies, and service providers of their choice is the best means for ensuring the vibrancy, robustness, and redundancy of the communications network.³ Importantly, it is also the best way to expedite the deployment of broadband -- both fixed and mobile -- throughout the United States without burdening consumers with excessive contribution burdens or robbing them of competitive choices.

Both the need for reform and the importance of broadband services share near unanimous support by all interested parties. The USA Coalition supports the Commission's reform efforts, but the proposed reforms do not address clear, practical, and measurable goals that are firmly grounded in the statutory mandates of the Communications Act of 1934, as amended (the "Act"). Instead, the Commission has structured its proposals around a series of ambitious, but impractical, broadband goals that do not reflect the Act's mandates.

² See *Preamble*, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, ¶ 7 (1996) ("By reforming the collection and distribution of universal service funds, the states and the Commission would ensure that the goals of affordable service and access to advances services are met by means that enhance, rather than distort, competition.") ("*Local Competition Order*"). The Senate Committee Report, which discusses the background and need for the Telecommunications Act of 1996, stated:

Changes in technology and consumer preferences have made the 1934 Act a historical anachronism ... Since the 1970s, when competition first began to emerge in the markets for telephone equipment, information services, and long distance services, the FCC has struggled to adopt rules that recognize a need to reduce regulatory burdens, especially on new entrants.

S. Rep. No. 104-23, at 5 (1995).

By focusing almost exclusively on the goal of filling in areas that are “unserved” at an arbitrarily defined broadband speed, the Commission has abandoned the framework and methodology mandated by the Act, which focuses on eliminating barriers to deployment that has already occurred in other parts of the country rather than on “pushing” the country to adopt broadband speeds that the Government deems necessary. Moreover, due to the enormous costs to fund its broadband ambitions, the Commission is willing to permanently sacrifice the potential for competition in favor of a world in which consumers in rural, insular and high cost areas will never have more than one choice for broadband services. The long-lasting harm that the proposals would cause if adopted -- particularly in light of continued consolidation within the industry -- would impact all users of telecommunications and information services, not just those who live and work in rural, insular and high cost areas. For this reason, the USA Coalition urges the Commission to ensure that the distribution mechanism does not create additional entry barriers in the name of bringing broadband to the most rural areas of America.

Rather than mandating broadband of a specific speed, the Commission should facilitate broadband by removing the obstacles to service deployments in a manner consistent with the Act. This requires the Commission to establish clearly defined goals for the reformed USF program. By adhering to the Act’s mandate of supporting only services that have been subscribed to by a substantial majority of residential consumers, the Commission will be more easily able to determine where support truly is necessary. Rather than focus on the false choice between “unserved” areas and areas that are “served” (which does not directly correlate with the need for support when the target speeds are higher than many in urban areas currently enjoy), the Commission should focus directly on the underlying obstacles that would cause some areas, absent support, from enjoying reasonably comparable services at reasonably comparable rates. The goal of the distribution mechanism should be to ensure that the market conditions in all areas

of the country are reasonably comparable, and then let the market decide the best means for serving rural, insular and high-cost.

I. USF REFORM MUST BE BASED SQUARELY UPON THE ACT

USF reform must “be guided in the first instance by the Act.”⁴ As Commissioner McDowell recently observed:

No matter how noble a policy goal may be, we have a steadfast obligation to respect the boundaries established by Congress through our authorizing statute. Appellate courts frequently remind us of this legal duty.⁵

The reforms proposed in the NPRM, unfortunately, are guided in the first instance by the *National Broadband Plan* (“NBP”) rather than the Act itself. The NBP was created in response to the American Recovery and Reinvestment Act of 2009, which directed the Commission to author a “national broadband plan” report to Congress but did not authorize the Commission to implement the NBP’s proposals.⁶ As such, even if the recommendations in the NBP reflect noble policy goals that should be implemented, the Commission can only do so if the recommendations are fully consistent with the letter and the spirit of the Act as it stands today.

A) The Act Requires the Commission to Focus on Market Failures Rather Than Pushing the Country Where the Commission Believes It Should Go

A vibrant, robust, and redundant communications network is essential to the economic strength of the United States and the public safety of its citizens. In order to ensure the strength of the communications network in rural, insular, and high-cost areas, service must be affordable to residents of those areas. In some rural, insular, and high-cost areas, however, service will be affordable only with support from the universal service fund. In recognition of the public interest

⁴ NPRM at ¶ 77.

⁵ Statement of Commissioner Robert McDowell, *Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265 (Apr. 7, 2011).

⁶ USA Coalition Comments, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 5-11 (filed July 12, 2010).

benefits that result from the universal availability of affordable service, Congress and the Commission created the universal service fund program, which supports the provision of services where they otherwise would not be available or affordable. Indeed, in the *Local Competition Order* that established the modern universal service system, the Commission specifically established the goals of the universal service program to ensure “***affordable service and access to advanced services are met by means that enhance, rather than distort, competition.***”⁷ This history and underlying purpose of the fund must be kept firmly in mind when considering how to reform the distribution mechanism. Otherwise, the Commission risks drifting away from the core mission of the fund and the requirements of the Act in a manner that would harm the public.

The Act is very specific about the services that should be supported. As an initial matter, the Act mandates that the Joint Board and Commission work together to establish and update the list of supported services.⁸ Indeed, the Commission cannot unilaterally modify the list of supported services based on goals set forth in the NBP or on a claim that the modification is consistent with past Joint Board findings that were made years earlier before the writing of the NBP and significant developments in the market.⁹ Both the Joint Board and the Commission must consider, in working together to establish and modify the list of supported services, “the extent to which such ***telecommunications services***:

- (A) are essential to education, public health, or public safety;

⁷ *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, 95-185, 11 FCC Rcd 15499, ¶ 7 (1996) (“*Local Competition Order*”) (emphasis added).

⁸ *See, e.g.*, 47 U.S.C. §254(c)(1).

⁹ *See, e.g.*, 47 U.S.C. §254(c)(2) (“The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms”).

(B) *have, through the operation of the market choices by customers, been subscribed to by a substantial majority of residential customers;*

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience and necessity.¹⁰

As the statute's framework makes clear, the Joint Board and the Commission must *follow* the market in identifying services to be supported rather than *push* the market towards an aspirational goal by mandating that ETCs provide services that have yet to be subscribed to by a substantial majority of residential customers in order to be eligible to receive any support at all.

All of the Commission's current proposals involve mandating that ETCs provide broadband services at actual speeds that have yet to be subscribed to by a substantial majority of residential customers. Regardless of the desirability of pushing the market where the Commission want it to go, this approach is flatly inconsistent with the requirements of the Act. Indeed, nowhere in the NPRM does the Commission undertake an analysis of whether such services have been sufficiently adopted to even qualify as a supported service. The only reference that the Commission has even considered this requirement refers to the Joint Board's 2007 recommendation that the Commission support broadband -- but that unadopted recommendation sought to add services capable of only 200 kbps download speeds, a radically different level of service than proposed here.¹¹ The Commission's own analysis, encapsulated in the recently released Internet Access Services report, clearly demonstrates that 60% of existing

¹⁰ 47 U.S.C. § 254(c)(1) (emphasis added).

¹¹ *High-Cost Universal Service, Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477, 20492, ¶ 44 (Joint Board 2007).

internet connections have download speeds of *under* 3 Mbps.¹² The Commission cannot ignore the statutory framework designed to add telecommunications services to the supported services list only after a particular service has been adopted by a substantial majority of residential consumers. Moreover, adding high-speed broadband to the list of supported services without undertaking the mandatory factual analysis would be a textbook example of arbitrary and capricious rulemaking. The Commission unquestionably had failed to do so here.

Even assuming the Commission could, consistent with the Act, mandate high-speed broadband, the proposed approach of pushing the market forward would be far more expensive than the approach mandated by the Act of following the market. Worse yet, the expense of pursuing such an effort has led the Commission to propose that support be limited to only one ETC in each market that is willing to provide high speed broadband. Under this proposal, the Commission would create additional barriers to entry and distort the market in a way that would fundamentally harm customers both in rural, insular and high cost areas as well as across the nation in manner that flies in the face of the universal service program's stated goal of providing access to advanced services in a manner that "enhances, rather than distorts, competition."¹³ The Commission should be particularly sensitive to reducing or eliminating market entry barriers in this age of industry consolidation where the top carriers are acquiring an ever greater market share through acquisitions. Rather than mandating broadband deployment, the Commission should facilitate broadband deployment by, for example, further clarifying and encouraging ETCs to use existing support to deploy advanced networks that are capable of providing both

¹² Federal Communications Commission, Industry Analysis and Technology Division Wireline Competition Bureau, *Internet Access Services Report* (rel. Mar. 2011).

¹³ *Local Competition Order*, ¶ 7.

services that are on the statutory list of supported services as well as broadband, even though supported services could be delivered using earlier technologies.¹⁴

The Telecommunications Act of 1996 mandates that universal service evolve over time with the changing needs of consumers. Evolution of the current universal service distribution mechanism is necessary to accomplish the goal of universal service. However, beneficial evolution of the universal service support mechanisms cannot occur if policymakers' efforts focus myopically on the mechanisms themselves (*i.e.*, reverse auctions) rather than the goals the mechanisms are meant to achieve, or if policymakers supplant the role of the market (*i.e.*, the demonstrated preferences of residential customers) in choosing the services that should be supported by themselves choosing what services residential customers should be purchasing.

B) The Proposed Single-Winner Distribution Mechanism Is Fundamentally Inconsistent with the Act And Would Create Additional Entry Barriers

Due to the enormous expense of providing the target level of broadband deployment the Commission has proposed measures to ensure that these ambitious proposals can be properly funded -- despite the fact that many of these measures are inconsistent with the Act and are also simply bad policy. Single winner reverse auctions represent a prime example of a measure that focuses on controlling fund size at the ultimate expense of consumers in rural and high cost areas as well as the several of the Act's universal service provisions.¹⁵ In light of the ability for large carriers to game the system to their advantage by relying on intra-company cross subsidization to bid support down to a level that provides them a competitive advantage over regional and local

¹⁴ *Accord Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, FCC 10-182, ¶ 37, n. 47 (2010) ("Mobility Fund NPRM") (explaining that universal service support may be provided for advanced technologies and need not be strictly limited to providing the particular services designated for support).

¹⁵ NPRM at ¶ 264 (proposing to limit Connect America Fund support to only one provider per unserved area).

carriers, it cannot be assumed that winning bids reflect the minimum amount necessary for an efficient carriers to serve the area.

As explained by the USA Coalition in past filings,¹⁶ single winner reverse auctions run afoul of several of the Act's requirements including the mandate of competitive neutrality that have been codified by the Commission as a principle of universal service under Section 254(b)(7) of the Act.¹⁷ It is insufficient to argue, as the Commission appears to contend in the NPRM,¹⁸ that the Commission possesses the authority to support only one provider per unserved area without addressing the question of whether any such proposal can be considered "competitively neutral."

Competitive neutrality is a crucial principle that is even more important in today's environment of industry consolidation, and universal service support mechanisms are forbidden from favoring one provider over another.¹⁹ Indeed, the Commission itself, when interpreting the competitive neutrality mandate, stated that the requirement precludes measures that would have a disparate impact upon different carriers, even though they would facially apply equally to all carriers.²⁰ In light of this requirement, the Commission's assumption that competitive neutrality is satisfied because "it will not unfairly advantage one provider over another or one technology over another" fails to pass a straight-face test.²¹ Any mechanism that precludes competition both

¹⁶ USA Coalition Comments, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 34-40 (filed July 12, 2010); USA Coalition Reply Comments at 15-19, WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, at 34-40 (filed Aug. 11, 2010)

¹⁷ *See Federal State Joint Board on Universal Service*, Report and Order 12 FCC Rcd 8776, ¶¶ 46-52 (1997) ("First Report and Order").

¹⁸ NPRM at ¶ 264.

¹⁹ First Report and Order at ¶ 47.

²⁰ *See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21724 (1999).

²¹ NPRM at ¶ 82.

within a given supported area, and among competing technologies, is the antithesis of the competitive neutrality requirement adopted by the Commission and should be rejected.

Implementation of single-winner reverse auctions to distribute funding would be a pyrrhic victory, as the winning carriers would have little incentive to improve service over a baseline level, consumers would have fewer choices and poorer service, and the Commission would be required to closely monitor the winning bidder and actively regulate in the area. Further, single winner reverse auctions would destroy not only existing competition in supported areas, but also limit the possibility of competitive entry to challenge the *de facto* monopolist, thereby denying the area's consumers the benefits of a competitive marketplace for the supported services. Moreover, because high-cost support would be withdrawn from all telecommunications services that do not meet the NBP speed target, existing networks that are sub-4 Mbps -- including those that offer up to 3 Mbps -- would lose funding that may still be needed in order to preserve current service coverage, destroying competition not only for the supported broadband service, but for a host of other services as well, including most wireless telecommunications services, thereby depriving the residents of supported areas the service options available to those in urban areas.²² Consequently, support in a single-winner reverse auction system likely would be necessary indefinitely, which would be far more expensive in aggregate than the savings realized over the short term.

In the absence of competition, there would be a significant incentive for bidding parties to engage in a "race to the bottom" in terms of service offerings, quality, and prices. This would require the Commission to extensively regulate the auction process and the subsequent levels of services and pricing offered by the winning monopolist in order to ensure that an acceptable

²² *Accord* Letter from Matthew F. Wood, Media Access Project and other Public Interest Representatives, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-208 (Jan. 6, 2011) ("changes to [the high-cost fund] must... no[t] improperly limit the choice and quality of services available to residents of unserved and underserved areas.").

baseline level of service is provided by the winning bidder. This expanded rulemaking and monitoring function would be necessary both during and after the single-winner reverse auction process in order to ensure that the minimum service, pricing, and quality commitments are met, which represents a significant expense to the Commission that must be considered as part of the cost-benefit analysis. Further, by artificially insulating the supported carrier from the salutary effects of competition, there would be little incentive for carriers to become more efficient over time. Taken together, these policies condemn areas that require support to a level of service that is as low as the regulated monopolist can permissibly offer, consistent with the Commission's prescriptive rules, and still win the reverse auction. In the absence of competition or a realistic threat of competitive entry, there is also little chance that the monopolist will improve its service quality over time.

Finally, looking beyond the supported area and at intercarrier competition generally, there is a substantial concern that larger carriers will utilize the reverse auction mechanism in order to bid support levels below cost, in effect cross-subsidizing from supported areas to non-supported areas as a means to drive potential competition out of the supported area. Indeed, the structure of the reverse auction mechanism produces incentives to engage in just this sort of bidding gamesmanship in order to capture the build-out subsidy and thereby block or deter potential competition in that particular area, strategically driving support levels below cost so that local and regional carriers who want to serve rural America are either driven out or are forced to bid lower than the appropriate level needed to provide high-quality service. This destruction of the potential for competition would profoundly harm consumers and require intrusive regulation for decades to come.

With a *de facto* ETC monopoly, members of rural communities will have few, if any, available options in terms of service providers, service plans, rate plans, technologies, and

devices, and the supported carrier, in the absence of competition, will have little incentive to improve service above the minimum requirements. Not only could the single-winner ETC monopolist price aggressively, knowing that no other carrier could profitably provide service in a supported area, but the monopolist could also continue raising the prices rural consumers must pay until the price point at which *unsupported* carriers could enter the market profitably or its total profit declines because enough consumers choose not to purchase service at all. The award of support through a reverse auction thus most likely would result in higher retail prices for consumers in rural areas than they would experience if multiple ETCs were permitted to compete for “portable” support on an ongoing basis. Although the Commission could mandate a maximum price at which supported services could be offered, this would require the agency again to engage in burdensome rate regulation, and the agency would be forced to monitor and adjust rates over time in order to protect consumers.

The pricing power enjoyed by the winner of a single-winner reverse auction is best illustrated with an example. For the purposes of this example, assume that carriers A, B, C, and D are all ETCs providing supported services in a rural high-cost service area. Within the area, there currently are 1,000 USF supported lines. Carrier D, the ILEC in the region, serves 500 lines at a total cost of \$7,500, resulting in a per-line cost of \$15. Under the current identical support rule, each of the three remaining ETCs receive \$15 in support for each line they serve in the area. As such, the fund currently provides a total of \$15,000 in support for the area (\$7,500 in ILEC costs plus 500 lines x \$15 per line). For the sake of simplicity, this example assumes that competition has driven all of the ETCs to charge a monthly rate of \$1. The current per-line support level of \$15 suggests a reasonable “reserve price” for any reverse auction.

- **Under a single winner reverse auction, only the winning bidder -- Carrier A in this example -- is eligible for support.** Bidding begins at the reserve price of \$15, and concludes at the end of all bidding rounds (using \$1 bid increments) with Carrier

A's final bid of \$10. For this example, assume that the final bids of Carriers B, C, and D were \$11, \$12 and \$15 per line, respectively.²³

- **Carriers B, C, and D now must increase the prices they charge consumers to uncompetitive levels or cease providing service altogether.** Denied support, Carriers B, C, and D must pass on their full costs to consumers, and they are no longer competitive with winning Carrier A, which receives \$10 support for each line served.
- **Carrier A can now charge customers up to \$11, reaping almost \$5 more per line than under the current system.** Carrier A can increase its price to maximize its profit potential (regardless of the consumers served)²⁴ up to \$11, which represents the next lowest bidder's costs (*i.e.*, Carrier B, which determined that it needed \$11 of support to serve the area, will enter the market and provide service at \$12).²⁵

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

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

²³ The final bids reflect each carrier's best estimate of the minimum amount of support necessary for them to serve the auction area.

²⁴ Some consumers may choose to forgo service at the rates that Carrier A will charge. If enough consumers choose to forgo the \$11 service rate that Carrier A's profits begin to decline, Carrier A will reduce its rate to the point that its profits are maximized.

²⁵ Carrier B's minimum service price can be calculated by adding the \$1 charged the end user with the subsidy (\$11) necessary to provide service.

The potential for harm from single-winner reverse auctions should be particularly concerning to the Commission in this age of massive reconsolidation in the communications industry. As a smaller and smaller group of carriers are able to consolidate more and more market share through acquisition, any mechanism that makes it far easier for larger carriers to gain an even greater competitive advantage -- like single-winner reverse auctions -- should be rejected outright. Indeed, as the Commission has recognized, a less-competitive marketplace is likely to produce negative effects, including higher prices, service quality degradation, and less innovation, consequences that highlight the importance of ensuring that Commission policies and regulations do not stifle competition.²⁶ The Commission should heed the lessons of its own regulatory experience that competition, not monopolistic regulation, will propel the affordability and innovation of wireless services in high cost areas. Therefore, the Commission should ensure that any support distribution mechanism facilitates competition by refusing to limit support to a single provider.

C) The Commission’s Proposal for Radically Different Transition Periods Based On Carrier Type Cannot Be Justified

In the NPRM, the Commission continues to propose to phase-out support to competitive ETCs (“CETCs”) over five years, but incumbent local exchange carriers (“ILECs”) would be phased-out over a longer timeline, if at all.²⁷ It is difficult to imagine any scenario in which a five-year transition period for CETCs would be appropriate when a longer transition period is

²⁶ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 09-66, ¶ 74.

²⁷ NPRM, ¶ 242 (seeking comment on redirecting all available competitive ETC funding, over five years); cf. NPRM, ¶ 431 (seeking comment on offering the current COLR in a given area a right of first refusal on voice and broadband subsidies); *accord High-Cost Universal Service Support*, WC Docket No. 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd 6657, ¶ 60 (2010) (“*USF Reform NOI/NPRM*”).

being considered for other carrier types, especially in light of the Act's technological and competitive neutrality mandates.²⁸

The Commission must weigh the mandate of competitive neutrality -- as a statutory principle adopted by the Commission under Section 254(b)(7) of the Act -- against the other statutory universal service principles when formulating policy. As the United States Circuit Court of Appeals has made abundantly clear, the Commission may *balance* the principles enumerated and adopted under Section 254(b), but may not depart from any of the principles altogether in order to achieve some other goal.²⁹ The radically different treatment proposed for CETCs and ILECs could not be more inconsistent with the mandate that universal service support not unfairly advantage one provider over another or one technology over another.

The Commission's radically different transition timelines have no basis in law or in fact. The Act requires the Commission to ensure that the universal service support distribution mechanism is "specific, predictable and sufficient."³⁰ The Commission has failed to articulate a legal standard, or conduct any factual studies, that could justify radically different transition periods for ILECs and CETCs. The Commission has concluded that the current distribution mechanism -- the identical support rule -- is the legal means by which the agency is satisfying the statutory mandate that support be "specific, predictable and sufficient."³¹ While the

²⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at 8801, ¶¶ 46-49 (1997) (federal support mechanisms should be competitively neutral, neither unfairly advantaging nor disadvantaging particular service providers or technologies); *accord* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the Act is "to promote and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications customers and encourage rapid deployment of new telecommunications technologies.").

²⁹ *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102-03 (D.C. Cir. 2009); *accord Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001).

³⁰ 47 U.S.C. § 254(b)(5).

³¹ *See, e.g.*, 47 C.F.R. § 307.

Commission has proposed to *eventually* do so in the instant NPRM,³² the Commission has yet to adopt a replacement for the identical support rule in order to determine whether support in any given study area is sufficient.

Aside from applying the identical support rule, the Commission currently has no way of knowing whether any given geographic area is “sufficiently” funded, over-funded, or under-funded. Absent a legal standard with which to gauge the so-called “rationalization” of CETC support,³³ there can be no reasoned basis to phase down CETC support on a more aggressive timeline than that of the entire industry. Indeed, only after the Commission has adopted a specific and predictable replacement distribution mechanism will the agency be able to: (1) identify which facts are relevant for determining the necessary level of support to satisfy the Act’s “sufficiency” mandate and (2) analyze those key facts on a study area-by-study area basis to determine whether the current level of support needs to be increased or reduced over a rational period of time to meet the level of support that is “sufficient” under the new distribution mechanism. To begin phasing down CETC support on an aggressive timeline based upon the mere assumption that CETCs may remain viable without such support is the antithesis of reasoned rulemaking and should be rejected outright.

D) The FCC Lacks the Authority to Pay For the CAF by “Reserving” Funds Captured From Other, Existing Universal Service Programs

The Commission proposes to pay for its new distribution mechanism by “phasing down” several other existing forms of support and holding those funds in “reserve” in order to distribute them, *via* a series of reverse auction mechanisms, to broadband service providers offering service

³² NPRM, ¶ 160 (proposing the elimination of the identical support rule “no later than 2016”).

³³ NPRM, ¶ 21.

to unserved areas, as first proposed in the NBP.³⁴ As argued by the USA Coalition and SouthernLINC Wireless in their joint Petition for Reconsideration of the *Corr Wireless Order and NPRM* (“Petition for Reconsideration”),³⁵ and in the recently-filed Petition for Review of the same order made by the USA Coalition and the Rural Cellular Association in the United States Court of Appeals for the District of Columbia Circuit (“Petition for Review”),³⁶ the Commission lacks the authority to establish a pool of funds to be used for unspecified purposes as an undetermined point in the future.

For the sake of brevity, the USA Coalition’s argument, which is laid out more fully in the Petition for Reconsideration, is not repeated at length here. However, it bears repeating that the reason the universal service system is structured the way that it is, with the Universal Service Administrative Company directed to use all funds collected in order to match the expenses associated with the USF programs, serves the critical function of ensuring that the universal service fund is consistent with the requirements of the Act and the Origination and Taxing Clauses of the United States Constitution. Specifically, these rules ensure that the mandatory contribution requirement is a fee, rather than a measure to raise revenues or a tax, by ensuring that the universal service contribution and disbursement mechanisms function as a “pass-through” system, whereby contributions are expressly tied to expenses of particular programs, and any excess funds collected on an incidental basis are used to reduce the next quarter’s

³⁴ NPRM at ¶ 276 (“We propose to fund the CAF with savings that we expect to realize from our existing high-cost support programs.”); *accord* NBP at 147-148.

³⁵ Petition for Partial Reconsideration of the USA Coalition and SouthernLINC Wireless, WC Docket No. 05-337, CC Docket No. 96-45 (filed Sept. 30, 2010).

³⁶ Petition for Review of the Rural Cellular Association and the Universal Service for America Coalition, *Rural Cellular Ass’n et al. v. FCC*, No. 11-1094 (D.C. Cir. March 28, 2011).

contributions, rather than “held in reserve” for use at some unspecified future time for whatever program the Commission deems worthy of funding.³⁷

Before creating the CAF or any other reformed contribution mechanism, the Commission must address the serious questions raised by the USA Coalition regarding the Commission’s authority to fund any program with universal service funds “reserved” from other forms of support. Otherwise, the Commission risks undermining its own efforts to implement sustainable universal service reform and risks inciting contentious litigation that would slow broadband network deployment by creating unnecessary and avoidable regulatory uncertainty.

II. THE DISTRIBUTION MECHANISM SHOULD BE DESIGNED TO EFFICIENTLY ACHIEVE THE UNIVERSAL SERVICE GOALS OF THE ACT

Support must be allocated and distributed in the manner that best facilitates the preservation and advancement of universal availability of affordable communications services.³⁸ This goal requires the Commission to focus primarily upon the consumer, rather than upon the service provider as the NPRM . Consumers want, and need, the ability to choose among various types of affordable services, service providers, and technologies. The support distribution methodology should neither encourage nor require any carrier to become more inefficient or to comply with unnecessarily burdensome requirements, merely to receive universal service support. At a minimum, mandated inefficiency increases the cost of providing service, which will cause the fund to grow unnecessarily. In a worst case scenario, carriers would choose to forgo support and not offer service, which would limit the options available to consumers in rural, insular, and high cost areas where support is necessary to ensure the availability of affordable services.

³⁷ See 47 C.F.R. § 54.709(a)(2).

³⁸ 47 U.S.C. § 254(b).

The best way to ensure that the fund as a whole is no larger than necessary is to ensure that the distribution, and contribution, mechanisms are as efficient as possible. For the reasons set forth above, the Commission must adopt clear, practical and measurable goals that are consistent with the Act's requirements before the potential efficiency of various proposals can be compared and judged.

First and foremost, support must be sufficient to achieve the articulated goals. Otherwise, the support will have been wasted altogether because the goals cannot be achieved. Accordingly, the primary goal of reform cannot be reduction of fund size, or else the Commission will adopt proposals that waste the millions of dollars that remain in the fund and harm consumers without achieving the universal service goals mandated by the Act. Rather, the goals must be articulated in practical and measurable terms that reflect the statutory requirement of universal access to reasonably comparable services at reasonably comparable rates.

Second, any set of universal service goals that is consistent with the Act's requirements must facilitate and encourage wise expenditures by ETCs, including capital expense support for deployment where necessary and operating expense support in all supported areas. A necessary predicate for wise expenditures is regulatory transparency, predictability and stability. Simplicity is the foundation for transparency, predictability and stability.

With its laser-like focus on implementing on the NBP's recommendations, the Commission turns a blind eye to viable policy alternatives unless the parties who identify the alternatives to the Commission's flawed proposals can provide a comprehensive data analysis to support the alternative, even when the parties -- unlike the Commission -- lack access to the relevant data and the necessary resources (*e.g.*, small and regional carriers serving rural, insular and high-cost areas where universal support is necessary) to demonstrate that the alternative

framework is superior to the Commission’s proposals, which are inconsistent with the Act.³⁹ For example, the Commission has proposed to “phase-down” CETC support over five years to be “redirected” towards broadband subsidies, but the agency has completely failed to analyze whether stripping away existing support will result in funding being sufficient to preserve existing networks, as required by the Act. Rather than wrestle with this reality, the Commission merely notes that such an outcome is possible, but places the responsibility of developing alternative strategies to counter this likely outcome squarely upon industry.

The Commission simply cannot abdicate its duty to perform the reasoned factual analysis required of it under the Act by steadfastly refusing to consider or independently analyze any alternatives unless the party identifying the alternative is able, on its own, to perform a comprehensive data analysis. Not only does the Commission have far greater access to the cost data required to undertake such an analysis, especially when compared to the limited resources of most smaller and regional carriers, but the agency is in a far better position to analyze whether the situation of any one carrier providing such data is considered typical or constitutes a deviation from the norm. This much is clear: the FCC cannot fail to perform the analysis required of it under the Act to determine whether the withdrawal of support would result in “insufficient” support in rural areas. Not only that, but it is even more unacceptable for the Commission to point to the fact that no CETC has offered a sufficient alternative strategy, complete with detailed data-driven analysis, as a reason to adopt its own flawed proposal that itself is not supported by any analysis of the relevant data.

³⁹ NPRM, ¶ 251 (seeking alternative proposals to the CETC phase-down, but insisting upon the “submission of detailed data and analysis to support such contentions.”).

A) The Proposed CAF Structure and Transition Plan Is Far Too Complex To Be Efficient or Competitively Neutral

As the Commission correctly notes, the existing high-cost support fund is based on a tangle of unpredictable and constantly changing support components that are in dire need of simplification.⁴⁰ However, the last thing the Commission should do is replace one complicated support system with another, equally complicated system, by using an even more complicated transition scheme of program phase-downs, outright eliminations, and phase-ins. The Commission instead should adopt a single replacement fund that reflects the requirements of the Act with a level glide path from the current levels of support to the new level of support available under the replacement fund over a ten-year period. The Commission should not waste time and money, and thereby cause carriers and customers to waste time and money, by creating and implementing multiple replacement funds like the Mobility Fund, the CAF Phase I, and the CAF Phase II with complicated adjustments to existing support elements.

Focusing on eliminating individual support mechanisms, to be phased down on different timeframes, and replaced by multiple funds to be installed at varying times and under different parameters is unnecessarily complicated and fragmented. Indeed, the Commission offers a range of timelines concerning the phase-downs and ramp-ups of supported services, with some much more certain than others. Some phase-downs are targeted to begin in the “near term” and include entire services but also subsets of services (such as capping reasonable capital and operating costs) and “would commence in 2012, although they could be phased in over a period of time.”⁴¹ Other new programs, such as Phase One of the Connect America Fund may begin in 2012 and “potentially again in 2014.”⁴² CETC support would be phased out over give years but with

⁴⁰ NPRM, ¶ 15 (“the USF and ICC regimes will benefit from simplification and unification”).

⁴¹ NPRM, ¶ 158.

⁴² NPRM, ¶ 160.

certain possible exemptions.⁴³ Some programs are called for outright elimination, such as IAS,⁴⁴ while other programs, like LSS, are targeted for cuts but may also be rolled into other support measures.⁴⁵ The tangled web of proposals woven by the Commission as it focuses on individual supported services the Commission loses the forest for the trees and creates more complications and ambiguity that it resolves.

These complicated proposals have an adverse impact upon the telecommunications industry. Currently, little certainty exists because of the number of reform proposals that have been floated and constant discussion of major overhauls. Carriers do not know what the Commission intends to do, when it intends to do it, or if it will even follow through on its commitment to meet its own phase-down, phase-up schedules. The regulatory uncertainty inherent in the Commission's proposals make rational investment analysis nearly impossible, hindering additional investment and making basic network maintenance decisions a matter of guesswork. The best way to create the regulatory certainty necessary to avoid unnecessarily deterring investment during the transition period would be to create a single support mechanism that addresses market failure and targets support to areas that need it, and transition to that mechanism, not on a service-by-service basis, but *via* a phase down of all support to *all* ETCs over a period of ten years.

B) The Focus of the Fund Should Not Be Making Intercarrier Compensation Reform Revenue-Neutral for Certain Carriers

The “keep-whole” proposals of the NPRM make no sense in terms of keeping fund size at a constant level or transitioning to a transparent mechanism that is tied directly to cost.⁴⁶ Indeed, keep-whole measures only mask problems in existing carriers’ cost structures and kicks

⁴³ NPRM, ¶¶ 160, 248, 276.

⁴⁴ NPRM, ¶ 160.

⁴⁵ NPRM, ¶ 186.

⁴⁶ NPRM, ¶ 25.

the reform can down the road. These measures also put upward pressure on fund size without any corresponding benefit of additional broadband deployment, which is fundamentally inconsistent with the Commission’s stated objective of “controlling the size of USF as it transitions to support broadband.”⁴⁷ The Commission cannot justify keeping a certain class of carriers “whole” during ICC reform in light of the statutory goals for the universal service program, including competitive neutrality.

The Act mandates that the Commission eliminate implicit subsidies and, where necessary, provide explicit subsidies through the universal service fund to all ETCs on a competitively neutral basis. Accordingly, the Commission should adopt a single universal service replacement fund that makes support available on a competitively-neutral basis in areas where customers otherwise would not have reasonably comparable access to reasonably comparable services and reasonable rates, and then transition all carriers from their current levels of supports to whatever level of support they are eligible to receive from the new fund over a ten-year period with equal reductions each year. So long as the Commission properly designs the replacement fund, the replacement fund should provide any support necessary to any ETC, and thus no ETC would be denied necessary support.

By phasing slowly and steadily down, or up, from the current support level to the new support level over a ten-year period, the Commission will ensure that the market is not unduly harmed by the transition.⁴⁸ To the extent any carrier is unable to continue providing service under the replacement fund, the replacement fund should be adjusted or the carrier should cease providing service. In no event, however, should funds be allocated to propping up any specific class of carriers to the expense of other types of carriers. Not only is this prohibited by the Act, it

⁴⁷ NPRM at ¶ 10.

⁴⁸ *Accord* NPRM, ¶ 12 (acknowledging the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption).

also creates incentives for the protected class of carriers to be inefficient and slows the deployment of new, more efficient technologies by all carriers.

C) Distribution Mechanisms That Rely On A Calculated Per-Line Amount For Support -- Whether Portable or Not -- Would Not Be Efficient

The Commission as well as several interested parties have, in the course of earlier proceedings, suggested that support be distributed using a forward-looking cost model to determine the “appropriate” level of support as calculated on a per-line basis.⁴⁹ The instant NPRM resurrects the cost model proposals in a modified form here to develop a per-line amount of support, albeit in a more limited role.⁵⁰ Using forward-looking per-line cost models to calculate per-line amounts of support is inefficient because it necessarily results in excessive support in some areas and insufficient support in others. Specifically, the calculation of support on a per-line basis requires the use of an assumed line count: the total forward-looking costs for providing service in the supported area are divided by an assumed line cost to develop a per-line support amount. However, if an ETC serves fewer lines than the amount assumed for calculation of per-line support, then support would be insufficient, which violates the Act. By contrast, if an ETC serves more lines than the amount assumed for calculation of per-line support, then support would be excessive. Unless the ETC by coincidence serves exactly the amount of lines assumed for the calculation, the distribution mechanism would not be efficient.

With respect to using a cost model to develop a per-line support amount, it is also difficult to imagine how (i) a single cost-model could accurately reflect all potential technologies, (ii) multiple cost-models could be competitively neutral, or (iii) any type of model could be updated on a timely basis to reflect technological change. By contrast, cost-models

⁴⁹ See *USF NOI/NPRM*, ¶¶ 17, 25.

⁵⁰ NPRM at ¶ 399 (proposing to use a model to distribute funds to existing carriers of last resort in the event that no firm is willing to provide service in a particular area); *id.* at ¶ 405 (proposing the use of a cost model to estimate support for wireless carriers if wireless carriers are to be supported at all).

could form useful tools for determining reasonable comparability rather than per-line support. Indeed, the Commission has previously recognized that the type of cost models that would be used to determine high cost support have been incapable of modeling the low density areas that would be the focus of support here.⁵¹ The Commission has also experimented with the use of cost models to determine universal service support in the past, but has failed to maintain the model despite over a decade of technological change.⁵²

Assuming that the Commission nonetheless moves forward with a model, it is essential that the Commission sustain that model, because the harms that can arise from the inherent limitations of modeling can be minimized if the model is kept up to date. For example, the Commission's *Ninth Report and Order*, adopted on October 21, 1999, established a federal high-cost universal service support mechanism for non-rural carriers based on forward-looking economic costs.⁵³ Since that time, the Commission has failed to maintain the model adequately,

⁵¹ First Report and Order, ¶ 291.

⁵² *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, ¶ 2 (1999) *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

⁵³ *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20439, ¶ 2 (1999) (“*Ninth Report and Order*”) *remanded*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). With the *Ninth Report and Order*, the Commission sought to “adopt a new specific and predictable forward-looking mechanism that will provide sufficient support to enable affordable, reasonably comparable intrastate rates for customers served by non-rural carriers.” *Id.* at 20451, ¶ 34. The forward-looking mechanism implemented in the *Ninth Report and Order* determines the amount of federal support to be provided to non-rural carriers in each state by comparing the statewide average cost per line for non-rural carriers, as estimated by the Commission's cost model, to a nationwide cost benchmark. The cost model estimates the forward-looking costs of providing supported services for non-rural carriers. The Commission selected input values for the model in the *Tenth Report and Order*, and found the model provides reasonably accurate cost estimates. *Federal-State Joint Board on Universal Service, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, Tenth Report and Order, 14 FCC Rcd 20156 (1999), *affirmed*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). The non-rural mechanism provides support for the percentage of the costs per line allocated to the intrastate jurisdiction that exceed a national average cost benchmark of 135%. *Ninth Report and Order*, 14 FCC Rcd at 20441, ¶ 63. The Commission concluded in the *Ninth Report and Order* that a benchmark of 135% of the national average cost balanced various goals under the statute, including sufficiency and the need to achieve rate comparability. *Id.* at 20464, ¶ 55.

and thus there is nearly universal agreement that the model no longer calculates accurate costs.⁵⁴ The Commission's inability to sustain the non-rural cost model raises serious doubt as to whether the Commission would be able to develop and maintain a much more complex model or set of models for the distribution of support throughout rural areas. Therefore, the Commission must consider whether it is committed to spending significant time and resources on the development and maintenance of a model for a limited purpose, when there may be easier ways in which to arrive at a similar end.

III. THE BEST WAY TO FACILITATE BROADBAND DEPLOYMENT CONSISTENT WITH THE ACT IS TO ELIMINATE, OR AT LEAST REDUCE, OBSTACLES TO DEPLOYMENT

Funding should not be the sole focus of the Joint Board and the Commission, because lack of funding is not the sole obstacle to universal services. Nonetheless, support must be available where needed to achieve or maintain universal service. In these areas, the support mechanisms should facilitate growth and maintenance of the network -- including facilities that can be used to provide broadband services that are faster than the speeds subscribed to by the substantial majority of residential customers -- rather than create additional obstacles to distributing or accessing support.⁵⁵ Ensuring that support is both available where needed and used properly to achieve the goals of universal service is far more important than the precise manner by which funds are distributed.

The best way to facilitate broadband deployment and achieve universal service consistent with the Act is to focus on removing the obstacles that service providers face. The Commission must ask why certain areas are unserved or underserved and identify the specific obstacles to

⁵⁴ See, e.g., *USF NOI/NPRM* at ¶ 7; *Qwest Corp. v. FCC*, 258 F.3d 1191, 1205–06 (10th Cir. 2001).

⁵⁵ *Accord* Mobility Fund NPRM, ¶ 37, n. 47 (explaining that universal service support may be provided for advanced technologies and need not be strictly limited to providing the particular services designated for support).

serving those areas. Obstacles to universal wireless service in unserved or underserved areas can include:

- Unavailability of sufficient spectrum;
- Lack of sufficient funding for capital expenditures (*e.g.*, cell site equipment, significant backhaul or transport costs) due to low population density and/or extraordinarily high cost of service in the area;
- Lack of sufficient funding for operational expenditures due to low population density and/or extraordinarily high cost of service in the area;
- Burdensome, costly, lengthy, discriminatory, vague, or arbitrary regulatory requirements;
- Unavailability or incompatibility of handsets or equipment (*e.g.*, 4G handsets); and
- Lack of sufficient access to necessary rights of way or slow and costly permit approval procedures.

Once the obstacles to universal service have been identified, those obstacles should be eliminated to the greatest extent possible. Under no circumstances should government rules and policies create additional obstacles to service deployment. For this reason, the distribution mechanism should explicitly encourage ETCs to deploy fast broadband networks that are capable of providing the supported services rather than deny support to all but one ETC that must provide an arbitrarily defined level of broadband services.

In evaluating potential distribution mechanisms, the Commission should seek to ensure that the replacement mechanism:

- **Promotes Consumer Choice** -- Support should be distributed in a manner so that consumers who value different types of services have legitimate and affordable choices, regardless of the technological platform they ultimately choose.
- **Fosters Competitive Markets** – Carriers and services should succeed and fail based on consumer demand; support should not interfere with the functioning of a competitive market. This is particularly important in this period of industry consolidation.
- **Ensures Simplicity and Predictability** – Carriers should know how much support they will receive and how it can be used; regulators should be able to audit a carrier’s use of funds without incurring significant expenses.
- **Ensures Neutrality** – USF support recipients should be treated identically, regardless of whether the recipient is an incumbent carrier or competitive carrier, wireline or wireless.

- **Does Not Create Unnecessary Divisions Within the Industry** – The system, once implemented, should avoid necessitating funding decisions that pit members of the industry against one another. A carrier should not be able to manipulate USF policy to harm its competitors.

The letter and the spirit of the Act, as well as the Commission’s own precedent, mandate that the universal service distribution mechanism be designed to reflect these each of these factors.⁵⁶

Unfortunately, the proposals currently under consideration are fundamentally inconsistent with each and every one of them. For example, the pending proposals would: (i) reduce or eliminate consumer choice by funding a single ETC; (ii) create additional barriers to entry and provide winning bidders with an unfair competitive advantage; (iii) replace one Byzantine support system with another; and (iv) harm neutrality by funding only one provider in each area and create incentives for carriers to manipulate the system to gain an unfair advantage over their competitors. In short, the Commission cannot implement the proposals based on the recommendations of the NBP without further legislation by Congress.

IV. THE COMMISSION CAN FACILITATE BROADBAND DEPLOYMENT IN A MANNER THAT FULLY REFLECTS THE ACT’S MANDATES

The USA Coalition wholeheartedly agrees with the Commission’s stated goals of preserving and advancing voice service, increasing deployment of modern networks, ensuring rates for broadband and voice services are reasonably comparable throughout the nation, and limiting the contribution burden on households.⁵⁷ Unfortunately, the reform measures proposed by the Commission, which reflect a willingness to sacrifice several universal service principles in the name of achieving an aspirational broadband goal without significantly increasing fund

⁵⁶ See e.g., *Local Competition Order*, ¶ 7 (“Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition.”).

⁵⁷ NPRM at ¶ 482.

size,⁵⁸ would not achieve these goals. Moreover, the measures are fundamentally inconsistent with the Act.

Fortunately, the Commission can reform the distribution mechanism and facilitate broadband deployment in a manner that is consistent with the requirements of the Act. In past filings, the USA Coalition has set forth a proposed framework that would not only accomplish the Commission's underlying objectives of promoting the deployment of modern communications networks,⁵⁹ but do so in a manner that is fully consistent with the Act. Not only that, but the proposed framework demonstrates that by targeting support specifically to those areas in which support is defined as necessary, the Commission may well find that fewer areas needing support (or less support to any currently supported area) than if support is targeted to those areas currently "unserved" by an arbitrarily selected service speed. The USA Coalition's approach (the "New Approach") demonstrates that the Commission can achieve its broadband objectives without harming competition by making the market conditions in rural, insular, and high cost areas more similar to the rest of the country. The appropriate means to achieve this end state is to focus on addressing the obstacles to service deployment, rather than "push" a given technology at significant expense to all consumers in contravention of the Act and to the detriment of competition in supported areas.

A) The FCC Should Identify Areas Eligible For Support Based on a Comparison Between Services Currently Available in Urban Areas With Services Available In the Rest of the Country

In order to comply with the Act, and achieve the Commission's stated goal of preserving and advancing both voice and broadband services at reasonably comparable rates, the

⁵⁸ Cf. NPRM at ¶ 483 (arguing that the Commission "anticipate that our proposals to rationalize investment in modern communications and to better target support will enable the program to meet this goal" but without offering specific factual support for that claim.).

⁵⁹ See USA Coalition Proposal, attached.

Commission must first determine where support is necessary to achieve those ends. Under the NPRM's vision, only areas that are currently "unserved" by broadband services delivering 4 Mbps download speeds and 1 Mbps upload speeds would receive support under the proposed Connect America Fund. However admirable it may be to propose universalizing NBP-level broadband, this proposal cannot be squared with the Act since that level of service is currently not even eligible to be considered a "supported service" under the Act.⁶⁰ Further, subsidizing only areas that are "unserved" by broadband risks seriously damaging existing communications networks that require support in order to remain viable.

Instead, the Act requires that support be sufficient to ensure that consumers in all areas enjoy reasonably comparable services as those in urban areas at reasonably comparable rates. The Commission has a statutory procedure by which supported services are added to a list of services that all ETCs must provide under Section 214(e). Voice telephony service currently meets the definition of a supported service, and should, in accordance with the Act's requirements, continue to be a supported service that ETCs are required to provide.⁶¹ By contrast, broadband, especially high-speed broadband, is currently not a supported service. As explained above, the Act establishes a procedure pursuant to which the Joint Board and the Commission can amend the list. The Joint Board and the Commission should undertake the statutorily mandated procedure of examining, based on data, which services have been subscribed to by the substantial majority of residential customers. Adding services that do not meet this and the other criteria set forth in Section 254(c)(1), particularly when the Joint Board and Commission have failed altogether to examine the statutorily mandated factors to add such a service, would be arbitrary and capricious and otherwise inconsistent with the Act. Although

⁶⁰ See *supra* Section I.A (discussing the FCC's Internet Access Services report finding that 60% of existing internet connections are at download speeds of under 3 Mbps).

⁶¹ See 47 C.F.R. § 54.101(a); NPRM at ¶ 98.

these broadband services do not meet the criteria to be added to the list of supported services, the USA Coalition strongly supports the Commission's past rulings that ETCs can use support to fund facilities that are used to provide both supported services and broadband services that are far faster than those subscribed to by the substantial majority of residential customers.

Once the Joint Board and the Commission have added a service to the list of supported services, the Act requires the Commission to ensure that access to that service is available to all regions of the country at reasonably comparable rates.⁶² Accordingly, the Commission must undertake an analysis of the facts on the ground to identify the services provided, rates of service, and availability of service providers in each given area and compare those characteristics that that of an average urban market, as defined by the Commission. In making that determination, support would be necessary, from the consumer's perspective, in areas where a consumer in that area lacks access to reasonably comparable services options at reasonably comparable rates from those available in urban areas. To the extent that any one of the identified characteristics of the average urban area are not reasonably comparable in a given area, the Commission should designate that area as a "Supported Area."⁶³

In order to accomplish this goal, the USA Coalition urges the Commission to divide the country into technologically neutral and publicly established "USF Areas" (*e.g.*, counties, zip codes, census blocks or islands). The Commission should identify and quantify the characteristics of an average urban market from the perspective of the retail consumer. The Commission would compare the characteristics of each USF Area with the characteristics of the Average Urban Area. A USF Area would be designated as a "Supported Area" if the

⁶² 47 U.S.C. § 254(b).

⁶³ By defining support requirements with reference to an average urban area, this approach accounts for the Commission's concern regarding the comparison of "voice and broadband offerings across regions that may include many pricing and service-quality variations." NPRM at ¶ 145.

characteristics of the area are not “reasonably comparable” to any one of the identified characteristics of the Average Urban Area.

The Commission should revisit the list of Supported Areas on a regular interval (*e.g.*, every five years) in order to determine whether support continues to be necessary. By identifying supported areas in this manner, and supporting only a limited number of services that pass the Act’s “substantial majority” adoption test, the Commission is likely to find that support is necessary in fewer areas than if the Commission were to mandate broadband at significant expense rather than facilitate its natural evolution by removing the barriers to deployment.

B) The Amount of Support Should Be Based On The Amount Necessary To Make Market Conditions In the Supported Area Reasonably Comparable To Those In the Average Urban Area.

One of the Commission’s stated goals for USF reform is the simplification of the current Byzantine system as well as increased transparency and accountability from funding recipients.⁶⁴ The USA Coalition believes that goal of universal service support distribution should be simple – to level the playing field between urban markets and markets in rural, insular, and high-cost areas by making a particular carrier’s service cost per potential subscriber reasonably comparable to the same carrier’s service cost per potential subscriber in an average urban market.

The universal service provisions of the Act require the Commission to ensure that Americans living in “rural, insular and high-cost areas” have service options “reasonably comparable” to those available in “urban areas.” The best way to achieve universal service and to foster the deployment of the fastest and most efficient services is to focus on removing the obstacles that service providers face in unserved and underserved areas. Two primary obstacles impact all types of technologies – apart from satellite – and all types of competitors – ILECs and CETCs (collectively, “ETCs”), regardless of data transfer rates:

⁶⁴ NPRM at ¶¶ 9, 15.

- Low population density (*i.e.*, fewer subscribers from whom to recover costs)
- Higher cost of service due to harsh terrain (e.g., mountains, swamps, volcanic rock, tundra, lack of access), population distribution issues (e.g., longer and more expensive backhaul) and other issues

The New Approach framework addresses these two primary obstacles directly so that universal service support funding will be more effective by addressing the primary obstacles directly, the new approach eliminates artificial distinctions based on technology (*e.g.*, wireline or wireless), competitive status (*e.g.*, ILEC or CETC), or current speed of service (*e.g.*, “broadband” or “narrowband”) By contrast, setting arbitrary requirements with respect to speed or type of service will only inhibit the deployment of both broadband and voice services in rural areas.

In each area where the Commission has determined that support is necessary from the perspective of the consumer (“Supported Areas”), the agency would calculate the amount of necessary support by calculating a “Reimbursement Percentage.” The Reimbursement Percentage for each area would reflect the percentage by which the cost to serve each potential subscriber in the Supported Area exceeds the cost to serve each potential subscriber in an Average Urban Area. ETCs would be reimbursed for all eligible expenditures (*i.e.*, CapEx & OpEx) made to serve the Supported Area based upon the Reimbursement Percentage for the Supported Area.

The goal of the Reimbursement Percentage is to determine the amount of support necessary to make the service cost per potential subscriber in a Supported Area “reasonably comparable” to the service cost per potential subscriber in an “average urban area,” so ETCs would be allowed to recover

- the percentage of costs incurred to serve a Supported Area equal to the percentage by which the average cost to serve the Supported Area exceeds the average cost to serve the Average Urban Area (the “Cost Factor”); plus
- the percentage of the remaining costs equal to the percentage by which the population density of the Average Urban Area exceeds the population density of the Supported Area (the “Population Density Factor”).

The Commission would calculate the amount of support an ETC receives by multiplying the eligible expenses incurred by the ETC to serve a Supported Area by the Reimbursement Percentage for that Supported Area.

The Commission would calculate a single Reimbursement Percentage for each Supported Area, which would reflect the combination of the Cost Factor with the Population Density Factor. The cost factor for each Supported Area would reflect the percentage, on average, that the cost (CapEx & OpEx) to serve a particular Supported Area exceeds the cost to serve the Average Urban Area. The goal for the Cost Factor is to determine the percentage by which the total cost a particular service provider would incur to serve the Supported Area exceeds the total cost that same provider would incur to serve the Average Urban Area (assuming equal population densities). Rather than attempting to determine the actual cost to serve, the Commission instead would seek only to determine the relative differences in costs to serve. The Commission could achieve this by comparing specific cost proxies (e.g., relative cost of backhaul) or using a forward-looking cost model. The Population Density Factor for each Supported Area would reflect the percentage by which the Supported Area has a lower population density than the Average Urban Area, because as population density decreases, the cost to serve potential subscribers increases because there are fewer potential subscribers across whom to distribute costs. The Commission would determine the population density in the Average Urban Area, and then calculate a single Population Density Factor for each Supported Area based upon publicly available census data

By reimbursing carriers with support sufficient to offset the percentage to which the cost to serve a Supported Area exceed an average urban market the Commission would create the same incentives and disincentives for carriers serving rural, insular and high cost areas that they would face in urban areas, thereby encouraging service deployment without distorting the market

by insulating any ETC from competition (because every ETC would face competition, or at least the threat of competitive entry) or creating incentives for too many carriers to enter the market (because ETCs would be reimbursed for only a portion of their actual expenditures). Further, this approach moves carriers away from historical or projected costs and reimburses carriers based on actual, incurred costs. By only funding eligible expenditures that ETCs have incurred to serve areas where universal service support is *necessary*, the new mechanism should naturally lead to decreases in fund size over time as the universal service goals are met, which stands in stark contrast to the single-winner reverse auction proposal, which will ensure that support is needed indefinitely.

Under the USA Coalition's proposal, incumbents and competitors would compete for subscribers on a level playing field and would succeed or fail based upon consumer demand for their products and services, in turn, facilitating consumer choice. Support would be distributed based upon the costs that the incumbent and competitive LECs *actually* incur, with every ETC serving a particular supported area being eligible for reimbursement of an identical percentage of the eligible costs it incurs. Moreover, because no ETC would receive reimbursement for all of its expenses, each ETC would have the incentive to make wise decisions with respect to expenditures because the ETC would have to recover the unreimbursed portion of those expense from customers, which in turn would create incentives for ETCs to implement the most efficient technology available in order to reduce the costs that it must recover from the customers.

By clearly defining which costs were eligible for reimbursement -- a list that could be expanded to include broadband services in addition to voice services -- the increased transparency at the beginning of the process would improve the ability of carriers to predict their support levels before distribution and reduce the need for complex and burdensome audits after support had been distributed. Indeed, since both incumbent LECs and competitive ETCs would

know exactly how much support they would receive before they make a decision regarding network or service expansion, which would facilitate the type of economically rational decision-making that improves the efficiency of USF support. Further, eligible costs would also be easily auditable, thereby furthering the Commission's stated goal of increased accountability for USF funds. In addition, this new approach would provide support for all types of service and service providers, regardless of technology, speed, or provider type. This new USF approach thus avoids picking winners and losers among technologies and providers, which ultimately will benefit all consumers.

In short, the Commission's approach should address market failure -- defined in reference to the Act's requirement that services be reasonably comparable to those enjoyed in urban areas - - wherever such failure occurs, and not simply in those areas that are "unserved" by a given service like broadband. By place each individual ETC serving a Supported Area in a position that is reasonably comparable to what it would encounter if serving an average urban area, the Commission would facilitate competitive entry which will drive down the level of support required over time.

The USA Coalition's New Approach would not result in the radical growth in fund size that the Commission's proposed approach would necessarily produce. By the Commission's own estimates, deploying NBP-level broadband services to only those areas currently "unserved" by those services would cost approximately \$23.5 billion.⁶⁵ It should also be noted that the Commission's analysis assumes that existing networks would remain viable despite the withdrawal of support from currently supported areas and fails to calculate the costs necessary to provide support sufficient to preserve existing coverage or the additional cost of administering, regulating, and enforcing a monopoly system in regulated areas. Even without considering these

⁶⁵ Federal Communications Commission, Omnibus Broadband Initiative, *The Broadband Availability Gap: OBI Technical Paper No. 1* at 3 (2010).

substantial expenses, the estimated cost to mandate broadband constitutes nearly two-thirds of the entire amount disbursed to ETCs over the life of the current high-cost program.

By contrast, the New Approach focuses on removing the barriers to entry, rather than the universal deployment of a single service, and is likely to amount to lower total expenses over the long run. Importantly, the New Approach would reimburse ETCs for only a portion of their costs: each ETC would be forced to make wise decisions about expenditures because the remaining portion of costs would still have to be recovered from customers in the supported area. History teaches, and the record in this proceeding confirms, that in a competitive environment carriers will naturally seek to provide consumers with the fastest service possible in order to gain an advantage in the marketplace. By reimbursing only carrier expenses to the extent that they exceed the cost to serve and Average Urban Area, carriers -- the parties most likely to understand the economics of the area targeted for expanded service -- will have sufficient "skin in the game" to ensure that wise investment decisions are made with support funds. The net effect of these individual investment decisions will be to build out networks where they are most likely to be self-sustaining, thereby driving down support requirements over time.

Importantly, the New Approach would provide support for all types of service and service providers, regardless of technology, speed, or provider type. The New Approach thus avoids picking winners and losers among technologies and providers, which ultimately will benefit all consumers. Support distribution mechanisms that target market failure would foster a competitive market while mitigating the effects of high-costs and low population density in rural areas will reduce the total amount of support necessary over time, thereby achieving the Commission's goals of modernizing the USF system, controlling the size of the fund, increasing accountability, and moving towards market-driven policies.

CONCLUSION

For the reasons set forth above, the USA Coalition urges the Commission to base any of its reforms upon the requirements of the Act and pursue rational and sustainable universal service reform that operates on a fair and technologically neutral basis in order to ensure that people throughout the United States will have access to reasonably comparable telecommunications and information services at reasonably comparable rates. Reform that reflects the requirements of the Act would better ensure that all consumers benefit from broadband and technological advances, regardless of where they live and work, than the proposals currently being considered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Todd D. Daubert', with a long horizontal flourish extending to the right.

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