

**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

**COMMENTS  
of  
MTPCS, LLC, d/b/a CELLULAR ONE  
and  
N.E. COLORADO CELLULAR, INC., d/b/a VIAERO WIRELESS**

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## SUMMARY

Although the Commission should be credited for its commitment to continue the process of implementing the National Broadband Plan by proposing to overhaul its outdated universal service and intercarrier compensation systems, the Connect America Fund *Notice* falls short in an important respect: The *Notice* does not propose an effective and suitable framework for ensuring that consumers in rural America will be provided with sufficient access to mobile broadband networks.

### **Competitive Neutrality**

A key reason for this failure is the Commission's apparent decision to leave behind its principle of competitive neutrality. Notwithstanding the fact that President Obama and the Commission itself have underscored the important role that mobile broadband increasingly plays in benefiting consumers and as an integral component of the national economy, the *Notice* has put forward a number of proposals that would not effectively promote—or, worse, would actually impair—mobile broadband deployment in rural and high-cost areas.

Three of these proposals illustrate that the design of competitively neutral transition plans and CAF funding mechanisms was not a priority in the *Notice*. First, the single-winner reverse auction mechanism—which is the centerpiece of the Commission's proposed CAF support mechanisms—is not competitively neutral because, for example, it would preclude, rather than promote, competition in areas receiving CAF support.

Second, the proposed phase-down of competitive eligible telecommunications carriers' current, capped high-cost support is not competitively neutral because the Commission does not propose any sufficient mechanisms to avoid disruptions in the provision of support to competitive ETCs during the transition to the new CAF funding mechanisms, while at the same time

proposing several mechanisms that would afford rural incumbent local exchange carriers the opportunity to exercise options that would preserve uninterrupted universal service support.

And, third, the Commission seeks comment on whether it should immediately reduce current high-cost support received by competitive ETCs by declaring that multiple-line family plans provided to customers will be treated as single-line plans for purposes of disbursing high-cost support. There is no basis for such a declaration, and such an action by the Commission would not be competitively neutral because it would impose an unjustified and unfair competitive disadvantage on competitive ETCs.

### **Steps Toward a Better Approach**

The Joint Commenters suggest several adjustments to the proposals made in the *Notice*, with a view toward reforming the existing universal service system in a manner that would provide greater assurance that mobile broadband deployment will be accomplished throughout rural America.

***The Reverse Auction Mechanism.***—If the Commission decides to adopt its reverse auction proposal, it should make several modifications, including the following: First, it should provide support for more than one carrier in a service area. In contrast to the Commission’s proposal, this would be competitively neutral. Further, providing support to more than one carrier would be consistent with the Commission’s goal of reforming universal service in a fiscally responsible manner, because, so long as support is made fully portable among service providers, disbursing support to more than one carrier would not place any upward pressure on the size of CAF funding mechanisms.

Second, the Commission should exempt small businesses from the reverse auction process, instead permitting them to continue receiving support at current funding levels (adjusted

for inflation and changes in line counts). These smaller carriers, for whom universal service funding is critical in enabling them to continue deploying their networks and to meet ETC obligations in their states, would be placed at risk by the Commission’s reverse auction proposal because these carriers generally lack the financial resources that would lessen the impact on their business plans and their operations that likely would be caused by the Commission’s CAF mechanisms.

And, third, the Commission also should provide that carriers serving areas with low population densities and low income levels should be exempt from the reverse auction funding mechanism, and should instead be permitted to continue receiving high-cost support at existing levels (adjusted for inflation and line count changes). Such an exemption would ensure that CAF funding is not drawn away from areas that currently do not have sufficient access to voice and broadband services. The continuation of funding at current levels is critically important to ensure that mobile broadband deployment continues unabated in these sparsely populated and economically disadvantaged areas.

***Funding for Tribal Lands.***—In order to ensure that the Commission’s new support mechanisms give sufficient priority to funding broadband deployment on Tribal lands, the Commission should exempt competitive ETCs serving Tribal lands from any phase-down of existing high-cost support that may be imposed generally upon competitive ETCs. In addition, the Commission should adopt a “grandfather” exemption under which competitive ETCs serving Tribal lands could elect to continue receiving high-cost support at current levels (as a baseline, and subject to adjustment for inflation and line count changes), so long as the qualifying carriers continue to meet their ETC obligations.

*Support Mechanisms for Rate-of-Return Incumbents.*—The Commission should not permit rural incumbent LECs to avoid the reverse auction mechanism, and instead continue receiving universal service support based on their embedded costs. Such an approach would not be competitively neutral, nor would it be consistent with the Commission’s commitment to fiscal responsibility, since it would continue to award rural incumbent LECs that have an incentive to inflate costs and engage in inefficient business operations.

*Identifying Unserved Areas.*—The Commission should not define unserved areas on the basis of whether the areas receive “broadband” at advertised speeds of 768 kbps downstream and 200 kbps upstream. The effect of using such an approach would be to disqualify many areas from receiving any support during the first phase of CAF. The Commission should instead set an initial cut-off point between served and unserved areas at speeds of 4 Mbps (download) and 1 Mbps (upload).

### **Cost Model vs. Reverse Auctions**

Although the Joint Commenters suggest steps that could be taken to improve a reverse auction mechanism, and to avoid its most problematic results, the Joint Commenters’ first preference is for the Commission to discard its reverse auction proposal, and instead use a forward-looking economic cost model to provide ongoing CAF support.

In addition to its being completely untested in the context of universal service support, there are numerous policy disadvantages associated with a single-winner reverse auction that compel a conclusion that it would be a mistake to employ such a device for the disbursement of CAF support. More fundamentally, any attempt by the Commission to implement a reverse auction mechanism would founder on the threshold problem that the Commission lacks statutory authority to adopt such a mechanism.

In contrast, the Commission has long acknowledged the advantages of a cost model that would drive support mechanisms and enable them to successfully match support with the cost of providing the supported services, and that would preserve and advance universal service and encourage efficient carrier operations.

### **USF Reforms Should Work in Harmony with the Marketplace**

Several proposals made in the *Notice*, such as continued rate-of-return regulation and enabling rural incumbent LECs to avoid reverse auctions by exercising a right of first refusal option, would result in subsidizing inefficient operations. These subsidies to other carriers would make it more difficult for competitive ETCs to proceed with their efforts to deploy mobile broadband networks in rural and high-cost areas, and could also slow down the workings of the marketplace.

Ultimately, however, consumers and the marketplace will award efficiency, and any universal service policies that result in favoring a single class of carriers, through transition rules or new CAF support mechanisms, would run a significant risk of wasting large sums of USF support. A better—and safer—approach would be for the Commission to develop universal service reforms that work in parallel with market forces, rather than having the effect of insulating carriers from marketplace forces.

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MTPCS, LLC, d/b/a Cellular One, and its affiliates, and N.E. Colorado Cellular, Inc., d/b/a Viera Wireless, (collectively, the “Joint Commenters”), by counsel, hereby submit these Comments, pursuant to the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

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<sup>1</sup> *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,

## I. INTRODUCTION.

An important task for the Commission, as it sets out to reform and modernize its universal service support mechanisms, is to ensure that these mechanisms are effective in bringing mobile broadband networks and services to all Americans, including those living in rural and high-cost areas.

The National Broadband Plan highlights the critical nature of this task by describing the sweeping extent to which mobile broadband has taken center stage:

Mobile broadband is growing at unprecedented rates. From smartphones to app stores to e-book readers to remote patient monitoring to tracking goods in transit and more, mobile services and technologies are driving innovation and playing an increasingly important role in our lives and our economy. Mobile broadband is the next great challenge and opportunity for the United States.<sup>2</sup>

Although the Joint Commenters commend the Commission for taking up the mission of reshaping its universal service and intercarrier compensation rules and policies to bring them into the world of broadband, the Joint Commenters are nonetheless concerned that the *Notice* in several key respects reveals a lack of commitment by the Commission to meet the “great challenge and opportunity” of mobile broadband. Funding mobile broadband deployment in rural America will benefit consumers, rural communities and institutions, public safety organizations operating in these rural communities, businesses serving rural areas, and the national economy as a whole.

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*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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 2011 WL 466775 (rel. Feb. 9, 2011) (“*Notice*”). The deadline for filing comments regarding sections of the *Notice* addressed in these Comments is April 18, 2011. See *Comment and Reply Comment Dates Established for Comprehensive Universal Service Fund and Intercarrier Compensation Reform Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, 01-92, WC Docket Nos. 03-109, 05-337, 07-135, 10-90, and GN Docket No. 09-51, Public Notice, DA 11-411 (rel. Mar. 2, 2011) at 1.

<sup>2</sup> Omnibus Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) (“Broadband Plan” of “NBP”), at 9.

There is much to be gained by facilitating the deployment of mobile broadband in rural and high-cost areas, and the Joint Commenters urge the Commission to ensure that these gains are realized.

In the following sections the Joint Commenters discuss some of the shortcomings in the Commission's proposals as they affect mobile broadband deployment, and also suggest several steps the Commission should take to rectify these problems.

## II. THE COMMISSION'S TRANSITION PROPOSALS AND SUPPORT MECHANISMS ARE NOT COMPETITIVELY NEUTRAL.

Although the Commission correctly acknowledges the growing importance of mobile broadband networks and President Obama recently announced a commitment to spur investment in the deployment of advanced mobile broadband technologies, several proposals made by the Commission would risk hindering the efforts of wireless competitive eligible telecommunications carriers ("ETCs") to expand and upgrade their broadband networks. The Joint Commenters examine the growth and importance of mobile broadband, and the failure of some of the Commission's proposals to ensure that the new Connect America Fund ("CAF") mechanisms will operate in a competitively neutral manner, in the following sections.

### A. It Is Critically Important That the Commission's Universal Service Policies Facilitate the Deployment of Mobile Broadband Networks.

To understand the importance of mobile broadband to consumers and the national economy, it is not necessary to look any further than the *Notice*, in which the Commission emphasizes that "[m]obile voice and mobile broadband services are playing an increasingly prominent role in modern telecommunications. Given the important benefits of and the strong consumer

demand for mobile services, ubiquitous mobile coverage *must be a national priority.*<sup>3</sup> The Commission has also concluded that “[b]roadband deployment is a key priority for the Commission, and the deployment of mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States.”<sup>4</sup> The Commission’s universal service reforms should be designed to provide sufficient support for mobile broadband networks, so that “Americans in every corner of the land” have affordable access to advanced mobile technologies.

The facts bear out the Commission’s observations regarding the importance of mobile broadband. For example, according to Mobile Future (a coalition of technology and communications companies, consumers, and non-profit organizations):

Mobile Internet usage is the fastest growing segment of broadband adoption today. In fact, 1 in 5 Americans now use a handheld device to access the Internet on a daily basis. And, these ranks are growing fast. Over the next 10 years, wireless Internet usage is projected to grow at 100 times the rate of wireless voice traffic.<sup>5</sup>

The Commission’s acknowledgment of the importance of mobile broadband also is in step with President Obama’s recent commitment “to invest in the next generation of high-speed

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<sup>3</sup> Notice at para. 241 (emphasis added).

<sup>4</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 4182-83 (para. 3) (2010) (“*Data Roaming Order*”). Commissioner Copps recently observed that “[i]n our new digital world, few consumers buy a mobile handset exclusively for voice telephony services. Americans in every corner of the land rely on their smartphones to stay connected through e-mail, social media and other applications—whether for business reasons or for communicating with family and friends.” *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52 (rel. Apr. 7, 2011), Statement of Commissioner Michael J. Copps.

<sup>5</sup> Mobile Future, accessed at [http://mobilefuture.org/issues/archive/mobile\\_broadband](http://mobilefuture.org/issues/archive/mobile_broadband).

wireless coverage for 98 percent of Americans.”<sup>6</sup> President Obama observed that “we’ve always believed that we have a responsibility to guarantee all our people every tool necessary for them to meet their full potential. . . . Every American deserves access to the world’s information. Every American deserves access to the global economy. We have promised this for 15 years. It’s time we delivered on that promise.”<sup>7</sup>

Given this growing importance of mobile broadband, as well as President Obama’s commitment regarding investment in mobile broadband networks, a central challenge for the Commission in this rulemaking proceeding is to devise support mechanisms that will effectively bring mobile broadband to rural and high-cost areas throughout America. In many respects, the *Notice* identifies a path to accomplish this objective, but, in certain cases, the Commission’s proposals would inadvertently work against this goal.

#### B. Competitively Neutral Proposals Are Needed To Salvage Mobile Broadband Deployment

Statutory mandates require that sufficient support mechanisms must be maintained to preserve and advance universal service, and that competition must be promoted in the telecommunications marketplace.<sup>8</sup> Significant public and private investment has been sunk into existing rural wireless networks, and it would be a public waste to abandon support of that infrastructure. One step the Commission has taken to advance the twin statutory goals of promoting both universal service and competition in local markets, is its establishment of the principle that universal

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<sup>6</sup> President Barack Obama, Remarks by the President on the National Wireless Initiative in Marquette, Michigan, at 8 (Feb. 10, 2011) (unpaginated transcript).

<sup>7</sup> *Id.* at 9.

<sup>8</sup> See Rural Task Force, *White Paper 5: Competition and Universal Service* (2000) at 8 (accessed at <http://www.wutc.wa.gov/rtf>) (indicating that “Section[s] 254(b) and 214(e) of the 1996 Act provide the statutory framework for a system that encourages competition while preserving and advancing universal service”).

service mechanisms and rules should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology or another.”<sup>9</sup> Certain proposals in the *Notice* should be modified for consistency with the Commission’s principle of competitive neutrality.

1. Both the Proposed Phase-Down of Competitive ETC High-Cost Support, and the Single-Winner Reverse Auction Proposal, Would Impose an Unfair Disadvantage on Competitive ETCs.

As the Joint Commenters understand it, the Commission intends to (1) phase down competitive ETC support immediately; (2) subject competitive ETCs to a reverse auction mechanism as their only means of continuing to receive support in the second phase of CAF, while seeking comment on funding options that would provide rural incumbent local exchange carriers (“LECs”) with a right of first refusal (“ROFR”) option that would close out any opportunity for other carriers to receive support in these areas; and (3) bypass cost models and auctions altogether for rural incumbent LECs, allowing them to receive Phase II CAF support on an embedded cost basis.

These policy choices would serve to increase funding on a per-customer basis for fixed services that consumers are abandoning at an accelerating rate. Indeed, it is not a stretch to conclude that these very policies would end up being the only thing delaying or in some cases preventing rural consumers from migrating to mobile voice and data platforms!

We urge the Commission not to adopt these contrasting proposals, which would provide a competitive advantage to rural incumbent LECs, by providing a more secure and uninterrupted avenue to Phase II support. The proposals applicable to competitive ETCs would introduce un-

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<sup>9</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801 (para. 47) (1997) (“*USF First Report and Order*”) (subsequent history omitted).

certainties and dislocations that would constitute a competitive disadvantage and that surely would undercut the Commission's goal of facilitating mobile broadband deployment.

Although rural incumbent LECs may hope to be successful competitors to carriers providing Commercial Mobile Radio Service ("CMRS"), the reality is that customers want mobility increasingly more than fixed communications. Given these consumer preferences, some of the policy choices reflected in the *Notice* appear to be skewed in the wrong direction. The Commission should recalibrate its approach to ensure that all fund recipients "share the pain" if overall levels of funding are capped or scaled back, to avoid winner-take-all funding mechanisms, and to prevent any return to the monopoly era of the Bell System.

The Commission proposes to reduce the interim cap on competitive ETC high-cost funding in annual 20 percent installments, beginning in 2012.<sup>10</sup> The proposals should be clarified to provide that the proposed Phase II CAF mechanism for providing ongoing support for broadband deployment will be fully implemented and operational pursuant to a timeline synchronized with the proposed phase-down of competitive and incumbent ETCs' support.<sup>11</sup>

Failure to synchronize this timing carefully would increasingly stymie the maintenance and buildout of systems that are uniquely positioned to provide the only broadband in many areas. Despite the supposed existence of competition, the Joint Commenters' engineers and roaming coordinators have data showing that the Joint Commenters provide the only mobile signal in many of their licensed areas—and, of course, incumbent LECs do not actually serve much

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<sup>10</sup> *Notice* at para. 248.

<sup>11</sup> The Broadband Plan recommends that the Commission should begin making CAF disbursements sometime between 2012 and 2016, and should complete the transition to new CAF funding mechanisms by 2020. NBP at 148-49.

of the area within a rural CMRS carrier's licensed footprint; they only serve slim lines in contrast to a mobile carrier's broad swath of radio frequency coverage.

If the Commission adopts its proposal, then, beginning next year, wireless competitive ETCs would find it increasingly difficult to continue their plans for the deployment of mobile broadband networks, and to maintain the ongoing operation of these networks. Many competitive ETCs have developed and implemented deployment and operational plans as a result of commitments made to state regulatory commissions as conditions to the grant of the wireless carriers' ETC status, and commitments made to lenders based upon reasonable business plans. Put simply, at a time when the President and Chairman Genachowski openly acknowledge how critical mobile broadband is for rural Americans, why would any policy choice serve to reduce funding to the very communities that most need investment?

At the same time, the Commission has sought comment on a mechanism that would provide rural incumbent LECs with the option of avoiding the Phase II reverse auction process by exercising an ROFR, under which they would be the exclusive funded service providers in their service areas, and would receive ongoing support pursuant to a cost model developed by the Commission.<sup>12</sup> In addition, the Commission seeks comment on a proposal whereby the Commission "could determine that support for these carriers [*i.e.*, small companies operating in rural areas] should remain based on reasonable actual investment, rather than a cost model or auction."<sup>13</sup>

These proposals would apply disparate treatment to different technologies for no logical reason, and the Joint Commenters urge the Commission instead to grant neither set of carriers a

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<sup>12</sup> *Notice* at para. 431.

<sup>13</sup> *Id.* at para. 448. The Joint Commenters discuss this proposal in Section III.D., *infra*.

“right of first refusal” for support in any territory they both serve. The Joint Commenters note that the “carrier of last resort” distinction is a red herring. CMRS carriers, in their competitive ETC designation proceedings, often commit to comply with state regulations requiring service to any customer upon reasonable request. Incumbent LECs are not unique in being required to meet such commitments. Moreover, CMRS carriers are in some cases subject to onerous buildout requirements that are not imposed upon incumbent LECs. The Commission aspires to adopt a “proposal to support broadband [that] is competitively neutral because it will not unfairly advantage one provider over another or one technology over another.”<sup>14</sup> But the contrast in the proposed approaches for funding (or not funding) competitive ETCs, and for funding rural incumbent LECs, requires a different approach than the current proposals made in the *Notice* in order to achieve competitive neutrality.

2. Accelerating the Phase-Down of Competitive ETC Support, by Deeming Wireless Service Family Plans To Be Single Lines, Would Not Be Competitively Neutral.

The Broadband Plan suggested that the Commission should accelerate the phase down of competitive ETC support by immediately treating a wireless service family plan as a single line for purposes of Fund support calculations.<sup>15</sup> The Commission should reject that proposal because it would not be competitively neutral.

Singling out the treatment of wireless family plans for funding purposes, in order to accelerate the reduction of competitive ETCs’ high-cost support would not be consistent with the competitive neutrality principle because it would treat high-cost support currently received by

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<sup>14</sup> *Notice* at para. 82 (footnote omitted).

<sup>15</sup> *Id.* at para. 257 (citing NBP at 148).

competitive ETCs and by rural incumbent LECs differently, without having any reasonable basis for doing so.

There is no reasonable basis for treating wireless family plans as the equivalent of a single line; providing high-cost support as though the plans were a single line would be competitively unfair to competitive ETCs. The Broadband Plan notes a belief that “in many instances, companies receive support for multiple handsets on a single family plan. Given the national imperative to advance broadband, subsidizing this many competitive ETCs for voice service is clearly inefficient.”<sup>16</sup>

The Broadband Plan does not provide any explanation for its conclusion that providing high-cost support for all handsets included in a wireless family plan is inefficient. The conclusion reached is erroneous because it presumes that multiple mobile lines in a household are used like fixed lines—only at the home. In fact, because each wireless handset in a family plan provides a *mobile* service, infrastructure that supports the use of *each* of the handsets *anywhere* in a competitive ETC’s service area must be built and maintained. Moreover, sufficient spectrum must be acquired and coordinated to enable the use of each handset. Given these requirements, each handset in a family plan is the fair equivalent to a separate “line” for which service must be ubiquitously available. Accordingly, the facts demonstrate that each handset (or “line”) should be eligible for high-cost support.

Perhaps most important, the Broadband Plan’s statement ignores the fact that the handsets in question are increasingly capable of providing mobile broadband service. Subsidizing the networks that enable mobile handsets in high-cost rural networks should be a national priority.

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<sup>16</sup> NBP at 148 (footnote omitted).

### III. THE COMMISSION SHOULD MAKE SEVERAL KEY ADJUSTMENTS TO ITS PROPOSED TRANSITION RULES AND CONNECT AMERICA FUND SUPPORT MECHANISMS.

The Joint Commenters agree with the Commission that “[b]ringing robust, affordable broadband to all Americans is the great infrastructure challenge of our time[.]”<sup>17</sup> and commend the Commission for its efforts in proposing mechanisms in the *Notice* to meet this challenge. In the following sections, the Joint Commenters suggest that the Commission should modify some of these mechanisms, abandon others, and consider additional mechanisms that would further the Commission’s efforts to facilitate broadband deployment.

#### A. The Commission Should Not Cap Connect America Fund Support.

The Commission proposes to cap the overall level of disbursements both for the first phase of CAF,<sup>18</sup> and also for ongoing support as long-term reform measures are implemented during the second phase of CAF.<sup>19</sup>

The Joint Commenters strongly encourage the Commission not to cap the level of Fund disbursements. The Commission presents no analysis or explanation of why a cap would be necessary to protect the fiscal health of its Universal Service Fund (“USF” or “Fund”) programs, and, in fact, the Commission expresses confidence that its proposed reforms—even absent any funding cap—will be effective in controlling the size of the Fund. The Commission points out, for example, that “[w]e believe that our proposals to rationalize investment in modern communi-

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<sup>17</sup> *Notice* at para 1.

<sup>18</sup> The Commission proposes to dedicate a defined amount of money to fund the first phase of CAF, and, specifically, seeks comment on an overall budget for CAF “such that the sum of any annual commitments for the CAF and any existing high-cost programs (as modified) in 2012 would be no greater than projections for the current high-cost program, absent any rule changes.” *Id.* at para. 275.

<sup>19</sup> The Commission seeks comment on the following proposal for a funding cap for the second phase of CAF: “[S]et an overall budget for the CAF such that the sum of the CAF and any existing high-cost pro-

cations networks, to better target support, and to employ market-based mechanisms *will control costs and thereby control the contribution burden borne by consumers.*”<sup>20</sup>

There are further reasons for concluding that an up-front cap on CAF disbursements would not be a sound policy choice. For example, it is difficult to reconcile an up-front, across-the-board cap on CAF disbursements with President Obama’s commitment to “invest in the next generation of high-speed wireless coverage for 98 percent of Americans.”<sup>21</sup> Instead of starting out the implementation of its universal service reforms with a cap on spending, the Commission should balance its fiscal responsibility goals with its other objectives in facilitating broadband deployment.<sup>22</sup> Unless the Commission insists on installing fiscal responsibility in the driver’s seat of its universal service policies, any reasonable and balanced analysis should conclude that the Commission can pursue its goals for broadband deployment, and also operate the Fund in a fiscally responsible manner, without imposing an upfront spending cap.

The Commission in fact points toward a more reasonable and balanced analysis in the *Notice* by acknowledging that “[o]n the other hand, . . . high costs [are] required to deploy ubiquitous mobile coverage and very-high-speed broadband to every American[,]”<sup>23</sup> and by asking “whether additional investments in universal service may be needed to accelerate network dep-

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grams (however modified in the future) in a given year are equal to the size of the current high-cost program in 2010.” *Id.* at para. 414.

<sup>20</sup> *Id.* at para. 487 (emphasis added).

<sup>21</sup> President Obama Remarks at 8.

<sup>22</sup> One of the principles proposed by the Commission to guide its universal service reform efforts is to “[m]odernize and refocus USF and ICC to *make affordable broadband available to all Americans* and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks. *Unserved communities across the nation cannot continue to be left behind.*” *Notice* at para. 10 (emphasis added).

<sup>23</sup> *Id.* at para. 414.

loyment.”<sup>24</sup> In light of the substantial commitment needed to achieve President Obama’s and the Commission’s broadband goals,<sup>25</sup> the Commission should focus on devising means of providing additional funding, rather than proposing an overall cap on funding.

In addition, the Commission could avoid any need for an up-front, permanent cap on the ongoing support mechanism that would be implemented in the second phase of CAF, by acting on universal service contribution reform. One step to consider would be to spread the contribution burden across all users of the networks that will benefit by USF investments.

B. The Commission Should Take Several Steps That Could Improve the Reverse Auction Mechanism.

The Joint Commenters will discuss in a later section of these Comments their view that the Commission should use a forward-looking economic cost model, and not a single-winner reverse auction mechanism, to disburse CAF support.<sup>26</sup> Nonetheless, if the Commission decides to rely on a reverse auction mechanism to some degree in providing CAF support, then the Joint Commenters suggest several modifications that they believe would improve the operation of such a mechanism.

1. Reverse Auctions Should Permit Support for More Than One Carrier in a Service Area.

Making CAF support available to more than one service provider would better meet consumer and business needs by providing more options in local markets, and the possibility of even more options in the future. Many businesses and consumers rely on the availability of both fixed

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<sup>24</sup> *Id.*

<sup>25</sup> See NBP at 139 (indicating that “[c]losing the broadband availability gap and connecting the nation will require a substantial commitment by states and the federal government alike[,]” and that “[t]his commitment must include initial support to cover the capital costs of building new networks in areas that are unserved today, as well as ongoing support for the operation of newly built networks in areas where revenues will be insufficient to cover ongoing costs”).

and mobile telecommunications and Internet access options, and these preferences should be reflected in the design of the reverse auction mechanism.

Multiple-winner auctions also would, by definition, cure some of the most problematic deficiencies of single-winner reverse auctions. For example, restricting reverse auctions to a single winner would invite manipulative strategies by larger carriers that might seek to underbid smaller carriers for anti-competitive reasons, but that might not be committed to delivering quality services and extensive signal coverage in their service areas. A multiple-winner auction would address this problem by helping to facilitate competitive entry.<sup>27</sup>

One option for guarding against the marketplace dangers that would be created by single-winner reverse auctions would be for the Commission to establish a bidding “floor” as part of the reverse auction process. Under this approach, the Commission would determine a specified bid amount that would serve as a floor for bidding. The determination could be made through use of a cost model or by other methodologies the Commission finds to be appropriate. The level of the floor also could vary, depending upon the characteristics and demographics of the particular service areas involved in the various reverse auctions.

If bidding in a particular auction reaches the “floor” level, then all participants in the auction would be eligible to receive support at the established “floor” level, on either a per handset, per minute, or per megabit delivered basis. Support would be portable to the carrier that wins the customer, and all carriers would be required to offer service throughout the entire area, either

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<sup>26</sup> See Section IV, *infra*.

<sup>27</sup> See Scott Wallsten, *Reverse Auctions and Universal Telecommunications Service: Lessons from Global Experience*, 61 FED. COMM. L.J. 373, 394 (2009) (emphasis in original) (indicating that “[t]he existing evidence shows that reverse auctions can effectively reduce expenditures by promoting competition *for* the market rather than competition *in* the market. Reducing expenditures on universal service may not be consistent, at least in the short run, with increasing competition in a given geographic market.”).

through facilities or a combination of facilities and resale (consistent with Section 214 of the Communications Act of 1934 (“Act”). State commissions would be responsible for resolving which carrier should extend service to requesting customers, on a case-by-case basis. Such a mechanism would provide for multiple auction winners in certain circumstances, and would also prevent “low ball” bidding or other similar anti-competitive bidding practices. Moreover, portability would act as a *de facto* cap on support among carriers, while allowing newer entrants an opportunity to participate in the marketplace.

2. Eligibility Criteria for Participation in Reverse Auctions Should Guard Against Gaming the System.

The Commission seeks comment on whether it should retain or modify existing ETC requirements as it proceeds with universal service reforms,<sup>28</sup> and also asks for comment regarding whether it should forbear from requiring that the recipients of universal service support must be designated as ETCs at all, either for purposes of receiving support during the first phase of CAF,<sup>29</sup> or in the broader context of receiving any CAF support.<sup>30</sup>

The Joint Commenters believe it would be a mistake to forbear from ETC designations as a prerequisite for receiving Fund support, because this would risk opening the door to reverse auction participants that might have incentives to “game” the competitive bidding mechanism but might also lack the necessary resources and qualifications to effectively utilize support for the deployment and operation of broadband networks.

The Commission instead should retain existing ETC designation requirements, and do nothing to disturb the current authority of state regulatory commissions to designate ETCs within

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<sup>28</sup> *Notice* at para. 89.

<sup>29</sup> *Id.* at para. 318.

<sup>30</sup> *Id.* at para. 89.

their states (in cases in which the state commissions have jurisdiction to do so).<sup>31</sup> Current state procedures, which typically involve extensive proceedings designed to obtain and review evidence of a carrier's ability to meet ETC obligations if it is designated by the state commission, have proven to be an effective means of ensuring that universal service support is used effectively and efficiently for the purposes for which it is provided. Requiring future recipients of CAF support to be subjected to this type of scrutiny by state regulatory commissions would best serve the Commission's goals for deploying broadband and for "[r]equir[ing] accountability from companies receiving support, [and] ensur[ing] that public investments are used wisely to deliver intended results."<sup>32</sup>

3. The Commission Should Rely Upon State Regulatory Commissions as Much as Possible To Enforce Public Interest Obligations of Fund Recipients.

As the Joint Commenters discuss in more detail in a later section,<sup>33</sup> one of the drawbacks of the Commission's proposed single-winner reverse auction mechanism is that, because it would provide a competitive advantage to auction winners in service areas receiving CAF funding, active regulatory oversight would be necessary to police and deter anti-competitive conduct and actions harmful to consumers.

If the Commission nevertheless decides to adopt a single-winner reverse auction mechanism, then, to the extent practicable, these enforcement responsibilities should be the province of state regulatory commissions, rather than the Commission. The state commissions have considerable experience in overseeing the activities of ETCs operating in their jurisdictions, and the

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<sup>31</sup> See 47 U.S.C. § 214(e)(1).

<sup>32</sup> Notice at para. 10.

<sup>33</sup> See Section IV.A., *infra*.

state commissions would be positioned better than the Commission to monitor compliance with any service, coverage, and deployment requirements the Commission prescribes in this proceeding. The regulatory challenges presented by a reverse auction mechanism are likely to be daunting, and the resulting strain on Commission resources could be ameliorated to some degree by enabling state commissions to play a substantial role in enforcing ETC obligations.

4. The Commission Should Establish Exemptions to Its Proposed “Competitive Bidding Everywhere” Disbursement Mechanism.

The Commission proposes to use a competitive bidding mechanism to award funding to one provider per geographic area in *all* areas designated to receive CAF support, which the Commission dubs as the “competitive bidding everywhere” approach.<sup>34</sup> The Commission proposes two exemptions to this mechanism, neither of which should be adopted. The first, which involves providing a “right of first refusal” to rural incumbent LECs that would enable them to opt out of the reverse auction process, has been criticized by the Joint Commenters because it is not competitively neutral.<sup>35</sup> The second, which would permit rural incumbent LECs to continue to receive support on an embedded cost basis instead of being required to participate in the reverse auction process in order to receive CAF support, is discussed in a later section.<sup>36</sup>

The Joint Commenters suggest that there are two other exemptions to the reverse auction mechanism that the Commission should adopt instead of the two exemptions addressed above.

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<sup>34</sup> *Notice* at para. 418.

<sup>35</sup> See Section II.B.1., *supra*.

<sup>36</sup> See Section III.D., *infra*.

a. The Commission Should Exempt Small Businesses from the Reverse Auction Process.

Smaller wireless competitive ETCs and other small rural carriers have been the lifeblood of the universal service program, providing the initiative in many cases to bring telecommunications services and broadband Internet access to rural and high-cost areas across America. These carriers generally allocate a large share of their revenues into the deployment and upgrading of their networks, combining these revenues with universal service support and funding from private investors and lenders to maximize their infrastructure build-out efforts.

For these carriers, universal service funding is critical in enabling them to meet ETC obligations in their states. In Montana, for example, the state regulatory commission requires ETCs to make service available to 98 percent of the population in their designated service areas. Moreover, larger carriers naturally focus their attention on large cities, whereas small rural carriers do not have urban revenues and therefore focus attentively on serving their neighbors well. In addition, competitive carriers can only get support when they get a customer, which motivates them to provide high-quality service in order to retain customers and the corresponding support.

These smaller rural carriers, more than other classes of carriers, would be placed at risk by the Commission's reverse auction proposal. They generally lack the financial resources that would lessen the impact on their business plans and their operations that likely would be caused by the Commission's CAF proposals.<sup>37</sup> Single-winner reverse auctions would destabilize these carriers' access to universal service support, and this destabilization would have ripple effects for the carriers' operations.

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<sup>37</sup> As the Joint Commenters have discussed, for example, the Commission's proposals would impose a five-year phase down of existing capped high-cost support received by wireless competitive ETCs, without providing for certainty regarding the continuation or timing of CAF support. See Section II.B.1., *supra*.

To take one example, private investors and private lenders that in the past have provided financial resources to smaller wireless competitive ETCs and other smaller rural carriers, enabling them to bring both telecommunications and broadband services to rural and high-cost areas, would likely become more reluctant to commit these resources to these carriers. The reason for this is that the success of these carriers' business plans for deploying networks and providing service in rural America depends in part on their continued receipt of universal service funding for which they currently are eligible.

If this component of these carriers' access to financial resources is removed or placed in jeopardy, then this destabilization of funding sources would likely prompt private investors and private lenders to conclude that the business plans of these carriers represent a much riskier investment or lending option. As these scenarios unfold, the ability of these carriers to expand their networks and maintain their operations would be severely jeopardized.

For these reasons, the Joint Commenters encourage the Commission to consider a "grandfather" exemption that would provide smaller wireless competitive ETCs, and other smaller rural ETCs, that qualify as small businesses, to elect to continue receiving high-cost support at current levels (as a baseline), so long as the qualifying carriers continue to meet their ETC obligations.<sup>38</sup> Pursuant to the exemption, the ongoing level of support for each qualifying carrier would be subject to adjustment for inflation (on a quarterly basis) and for changes in line counts.

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<sup>38</sup> Under this proposal, the annual level of support used to calculate ongoing support for qualifying carriers would be the level of support each such carrier received for the fourth quarter of 2010 (annualized). In the case of wireless competitive ETCs, this amount would be adjusted to derive an amount each such carrier would have received for the fourth quarter of 2010 but for the application of the interim cap on competitive ETCs' high-cost support. *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834 (2008) ("*Interim Cap Order*"), *aff'd*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009). The Commission would instruct the Universal Service Administrative Company ("USAC") to make these calculations for each qualifying wireless competitive ETC.

The determination of whether a carrier qualifies as a “small business” for purposes of the exemption would be made by the Commission based upon the definitions of “small entity,” “small business,” and “small-business concern” employed pursuant to the Regulatory Flexibility Act of 1980,<sup>39</sup> and upon the small business size standard for Wired Telecommunications Carriers used by the Small Business Administration.<sup>40</sup>

Establishing this grandfather exemption for smaller wireless competitive ETCs and other smaller rural carriers would serve the Commission’s objectives for facilitating broadband deployment in rural and high-cost areas because it would enable qualifying carriers to continue their efforts to bring broadband services to consumers and businesses in these areas, while also minimizing the risk that these carriers will lack sufficient resources to maintain these efforts.

b. Carriers Serving Areas with Low Population Densities and Low Income Levels Should Be Exempt from the Reverse Auction Process.

The Joint Commenters understand the Commission’s interest in directing universal service resources toward the objective of bringing broadband services to consumers and businesses in areas that currently are unserved.<sup>41</sup> The Joint Commenters are concerned, however, that the pursuit of this objective could have unintended consequences.

Specifically, to the extent that universal service resources are redirected to focus on bringing service to areas that currently are unserved, these resources could be drawn away from

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<sup>39</sup> See *Notice*, App. E (Initial Regulatory Flexibility Analysis) at para. 13.

<sup>40</sup> See *id.*, App. E, at para. 15.

<sup>41</sup> As the Commission has explained:

There are unserved areas in every state of the nation and its territories, and in many of these areas there is little reason to believe that Congress’s desire “to ensure that all people of the United States have access to broadband capability” will be met any time soon if current policies are not reformed.

areas that are currently receiving some level of telecommunications or broadband service from existing networks. These existing networks collectively are serving millions of customers in rural and high-cost areas, and, if ongoing universal service support for these networks is diminished or interrupted as the Commission focuses attention and resources on unserved areas, then the ability of carriers to expand and maintain these existing networks would be at risk.

Continued universal support for these areas is critical because, in many cases, the large national carriers have not constructed, upgraded, and extended their networks in a manner that provides adequate coverage in these areas. Wireless competitive ETCs and other smaller rural carriers are utilizing universal service support to bring service to consumers in these areas, by upgrading existing facilities in order to improve coverage and service quality.

To ensure that these efforts by wireless competitive ETCs and other smaller rural carriers are able to continue, the Commission should provide an exemption from any reverse auction or other CAF disbursement mechanisms it may adopt. The exemption would apply in the case of any carrier currently providing service, pursuant to an ETC designation, in any service area with (1) a low population density; and (2) a median income level that is less than the most recent U.S. Census Bureau estimate of the national median income.<sup>42</sup>

The exemption would entitle qualifying carriers to continue to receive high-cost support at current levels, so long as the qualifying carriers continue to meet their ETC obligations. The methodology for calculating levels of support for individual carriers would be the same as proposed by the Joint Commenters in the case of the suggested exemption for wireless competitive

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*Notice* at para. 5.

<sup>42</sup> According to the U.S. Census Bureau, the national median income in 2008 was \$52,029. U.S. Census Bureau website, accessed at <http://quickfacts.census.gov/qfd/states/00000.html>.

ETCs and other smaller rural carriers that meet the “small business” definition.<sup>43</sup> Such an exemption would enable qualifying carriers to continue to compete in these remote, low-income areas, bringing affordable telecommunications and broadband services to consumers who otherwise would “continue to be left behind.”<sup>44</sup>

C. The Commission Should Provide an Exception to Its Proposed Phase-Down of Competitive ETC Support, and to Its Proposed Funding Mechanisms for Ongoing Support, That Would Ensure a Sufficient Level of Funding for Tribal Lands.

The Commission observes in the *Notice* that the telephone penetration rate on Tribal lands historically has been substantially lower than the national average,<sup>45</sup> and the Broadband Plan indicates that “[w]hat little data exist on broadband deployment in Tribal lands suggest that fewer than 10% of residents on Tribal lands have terrestrial broadband available.”<sup>46</sup>

These low telephone penetration rates and low levels of broadband deployment on Tribal lands are the result of unique circumstances that prevail on Tribal lands and that cause exceptionally high construction, maintenance, transportation, and other related costs for deploying voice and broadband networks in these areas.

These unique circumstances include geographic remoteness and isolation that affect telephone subscribership on Tribal lands. “Tribal lands are mostly rural and characterized by large land areas, rugged terrain such as mountains and canyons, low population density, and geographic isolation from metropolitan areas.”<sup>47</sup> These conditions “make the cost of building and main-

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<sup>43</sup> See Section III.B.4.a., *supra*.

<sup>44</sup> *Notice* at para. 10.

<sup>45</sup> *Id.* at para. 101.

<sup>46</sup> NBP at 23.

<sup>47</sup> GAO, Report to Congressional Requesters, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands*, GAO-06-189 (rel. Jan. 2006), at 33.

taining the infrastructure needed to provide [telephone] service higher than they would be in urban settings.”<sup>48</sup> These costs can have the effect of discouraging service providers from investing in voice and broadband networks to serve Tribal lands, which in turn impairs access to service and subscribership levels.<sup>49</sup>

There is a strong case that special measures are necessary to ensure that consumers living on Tribal lands are provided with sufficient access to advanced broadband networks. The manner in which high-cost and CAF support is made available for Tribal lands will play a central role in achieving this objective.

The Joint Commenters propose two steps that the Commission should take to facilitate broadband deployment on Tribal lands. First, the Joint Commenters support a proposal made by General Communication, Inc. (“GCI”), that any reduction in competitive ETC support adopted by the Commission as part of the transition to new CAF support mechanisms should include an exception for competitive ETCs serving Tribal lands, such that these competitive ETCs would not be subject to any phase-down of their existing support.<sup>50</sup> The continuation of universal service support for competitive ETCs serving Tribal lands will be critical during the transition. A failure to continue this support would “risk[ ] disrupting services that are critical to highly rural residents’ livelihoods, safety, and abilities to communicate with their families.”<sup>51</sup>

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<sup>48</sup> *Id.* at 34.

<sup>49</sup> *See id.* at 78.

<sup>50</sup> *See* GCI Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337 (filed July 12, 2010), at 24, *cited in Notice* at para. 259 & n.415. GCI observes that the Commission took a similar step in 2008 by exempting competitive ETCs serving Tribal lands and Alaska Native regions from the interim cap imposed by the Commission on high-cost disbursements to competitive ETCs. *Id.* at 21-22 (citing *Interim Cap Order*).

<sup>51</sup> *Id.* at 22.

And, second, the Commission should adopt a “grandfather” exemption that would permit competitive ETCs serving Tribal lands to elect to continue receiving high-cost support at current levels (as a baseline), so long as the qualifying carriers continue to meet their ETC obligations.<sup>52</sup> Pursuant to the exemption, the ongoing level of support for each qualifying carrier would be subject to adjustment for inflation (on a quarterly basis) and for changes in line counts.<sup>53</sup>

Establishing such an exemption would avoid any risk that the new CAF funding mechanisms would cause a significant reduction in the level of Fund support received by competitive ETCs serving Tribal lands. Any such reduction would seriously impair the broadband deployment efforts of these competitive ETCs, and could also “put them in default on their existing loans and threaten the viability of their existing operations.”<sup>54</sup>

D. Rate-of-Return Incumbent Carriers Should Not Continue To Receive Support Based on Their Embedded Costs.

The Commission has proposed a series of reforms to rationalize loop support, local switching support, and interstate common line support received by rural incumbent LECs<sup>55</sup> “intended to improve the incentives for rational investment and operation” by these carriers.<sup>56</sup> The Commission suggests that, if it “finds that the reforms have adequately improved the incentives for investment and operation by small, rural companies, it could determine that support for these

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<sup>52</sup> Under this proposal, the annual level of support used to calculate ongoing support for qualifying carriers would be the level of support each such carrier received for the fourth quarter of 2010 (annualized).

<sup>53</sup> A similar proposal was recently made by Cordova Telephone Cooperative, Inc. *See* Letter from Gerard J. Duffy, Counsel to Cordova Telephone Cooperative, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 (filed Apr. 13, 2011).

<sup>54</sup> *Id.* at 1.

<sup>55</sup> *See Notice* at paras. 162-215.

<sup>56</sup> *Id.* at para. 448.

carriers should remain based on reasonable actual investment, rather than a cost model or auction.”<sup>57</sup>

Such an approach would disserve the Commission’s proposed principles for guiding its universal service reforms. Permitting rural incumbent LECs to continue to receive universal service support based on their embedded costs would not be fiscally responsible because the continued use of an embedded cost mechanism would likely drive up the size of support mechanisms. The Commission has acknowledged the shortcomings of rate-of-return regulation<sup>58</sup> and also has indicated that “[i]n many cases, [high-cost] support is used to offset the increasing revenue losses to . . . incumbent carriers as the gap between legacy technology and more efficient technologies has widened.”<sup>59</sup> Thus, the Commission has recognized that the existing embedded cost methodology used for the disbursement of high-cost funds to rural incumbent LECs does not work effectively in advancing universal service goals.

A further problem with the embedded cost model is that it does not promote reasonable investments or efficient operations, and thus would not advance the Commission’s proposed principle of “[m]oderniz[ing] and refocus[ing] USF . . . to make affordable broadband available

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<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987); Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988); Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989); Supplemental Notice of Proposed Rulemaking, 5 FCC Rcd at 2176 (1990).

<sup>59</sup> *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, WC Docket Nos. 03-109, 04-36, 05-337, 06-122, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6656 (2008), App. B, Narrow Universal Service Reform Proposal, at para. 3.

to all Americans . . . .”<sup>60</sup> In this regard, the Commission has expressed concern that an “embedded cost [mechanism] provide[s] the wrong signals to potential entrants and existing carriers,” that “[t]he use of embedded cost would discourage prudent investment planning because carriers could receive support for inefficient as well as efficient investments[,]” that “the use of embedded cost to calculate universal service support would lead to subsidization of inefficient carriers at the expense of efficient carriers and could create disincentives for carriers to operate efficiently[,]” and that, consequently, “support based on embedded cost could jeopardize the provision of universal service.”<sup>61</sup>

For these reasons, the Joint Commenters encourage the Commission to refrain from considering the use of embedded costs as a mechanism for providing any ongoing CAF support to rural incumbent LECs, since the Commission’s universal service and broadband deployment policies would be better served by applying a forward-looking economic cost model to fund all eligible carriers, including rural incumbent LECs.

E. The Commission Should Establish Criteria for Unserved Areas That Promote Efficient Deployment of Advanced Broadband Networks.

For purposes of identifying areas that would be eligible for support during the first phase of CAF, the Commission proposes to define unserved areas based on the data collection efforts required by the Broadband Data Improvement Act of 2008<sup>62</sup> and funded through the State Broadband Data and Development Grant Program, which have led to the establishment of a National Broadband Map by the National Telecommunications and Information Administration

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<sup>60</sup> *Notice* at para. 10.

<sup>61</sup> *USF First Report and Order*, 12 FCC Rcd at 8901 (para. 228) (footnotes omitted).

<sup>62</sup> Pub. L. No. 110-385, 122 Stat. 4096 (2008).

(“NTIA”).<sup>63</sup> The Commission explains that NTIA defines “broadband” for the purposes of the National Broadband Map to be “two-way data transmission to and from the Internet with advertised speeds of at least 768 kbps downstream and 200 kbps upstream.”<sup>64</sup> The Commission asks how it should define served and unserved areas based on the data collected by NTIA.<sup>65</sup>

The Joint Commenters urge the Commission not to use the NTIA definition of broadband as the cut-off point for determining whether an area is served or unserved by broadband. The effect of using such a definition would be to disqualify substantially all rural and high-cost areas from receiving any Phase I CAF support even though broadband at download speeds greater than 768 kbps are not available to consumers or businesses in these areas.

Since the Commission’s goal should be to ensure that *all* Americans have access to *real* broadband, a better approach would be to initially set the cut-off point between served and unserved areas at speeds of 4 Mbps (download) and 1 Mbps (upload). Using this threshold would make Phase I funding available for areas that currently have “broadband” at slow speeds but do not have access to broadband at speeds comparable to those available to consumers in urban areas throughout the country.

The Commission also seeks comment on proposals, such as one advanced by the National Cable and Telecommunications Association (“NCTA”), to exclude from study areas eligible for

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<sup>63</sup> *Notice* at para. 291. The National Broadband Map may be accessed at <http://broadbandmap.gov/>.

<sup>64</sup> *Id.* at para. 291, n.450.

<sup>65</sup> *Id.* at para. 291.

support those portions of the areas that state regulatory commissions have determined do not need support due to the presence of unsubsidized competition.<sup>66</sup>

The Commission must not confuse the provision of *some* service in a general area with the provision of high-quality services that are capable of providing reliable service throughout a high-cost rural area. The NCTA proposal for limiting or eliminating universal service support in areas ostensibly served by an unsubsidized carrier would not be effective in limiting the growth of universal service support mechanisms<sup>67</sup> or in advancing the Commission's broadband deployment objectives. Worse still, adoption of NCTA's proposal also would threaten the delivery of service in the highest-cost portions of study areas.<sup>68</sup>

Discounting the need for universal service support in areas that unsubsidized carriers serve in part would not be a wise policy because it would undercut the ability of smaller wireless competitive ETCs to continue making progress in deploying broadband infrastructure. These carriers invest a greater percentage of their revenues than the large national carriers in capital expenditures to expand and upgrade their networks,<sup>69</sup> and they also provide consumers with attractive competitive options typified by affordable prices, a high quality of service, and exemplary customer care.

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<sup>66</sup> *Id.* at para. 385 (citing NCTA, Reducing Universal Service Support in Geographic Areas that are Experiencing Unsupported Facilities-Based Competition, Petition for Rulemaking, GN Docket No. 09-51, WC Docket No. 05-337 (filed Nov. 5, 2009)).

<sup>67</sup> See Rural Cellular Association ("RCA") Comments, GN Docket No. 09-51, WC Docket No. 05-337, RM-11584 (filed Jan. 7, 2010), at 11-12.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> See GAO, *Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, GAO-1-779 (July 2010) ("GAO Data Collection Report") at 20, accessed at <http://www.gao.gov/new.items/d10779.pdf> (noting that "[t]he capital investments of some large national carriers have been smaller portions of their service revenue than investments on the part of some of the smaller regional carriers").

If the smaller wireless competitive ETCs are denied CAF support because unsubsidized national carriers maintain some presence in the competitive ETCs' service areas, then this loss of support would jeopardize the operations of these competitive ETCs, would reduce the level of competition in their service areas, and would disserve consumers because the coverage and quality of service provided by the unsubsidized national carriers is often inferior to the coverage and service provided by the smaller wireless competitive ETCs.

F. The Commission Should Minimize Paperwork Burdens and Financial Disclosure Requirements.

The Commission proposes to require carriers receiving support to file annual reports with the Commission relating to their financial condition and operations,<sup>70</sup> and the Commission also asks whether it should adopt additional information requirements relating to the annual certifications that ETCs must file to account for their use of high-cost program support.<sup>71</sup>

The Joint Commenters have concerns regarding the Commission's proposed annual filing requirement relating to the financial condition and operations of ETCs because these requirements would likely be burdensome for many funding recipients, and it is not clear whether these burdensome requirements would be necessary to serve any public policies related to administration of the Commission's universal service programs. Although the Commission does not provide details regarding the form and substance of the proposed reports, it is reasonable to expect that ETCs would incur costs each year in order to comply with the proposed filing requirements, and that the imposition of these costs would be disproportionately burdensome to smaller rural carriers.

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<sup>70</sup> See *Notice* at para. 461. The Commission proposes that the annual reports must be audited and certified by an independent certified public accountant satisfactory to the Commission. *Id.*

<sup>71</sup> *Id.* at para. 475.

With regard to the Commission's annual certification requirements, the Joint Commenters suggest that the Commission should be cautious in imposing any additional requirements because of the burdens they would likely impose, which would be especially difficult for smaller wireless competitive ETCs to absorb. In reviewing the imposition of any new information requirements, the Commission should review whether the information is routinely in the possession of ETCs, so that they would be in a position to compile and provide the information to the Commission without incurring any significant burden or cost.

#### IV. THE COMMISSION SHOULD USE A COST MODEL INSTEAD OF A REVERSE AUCTION MECHANISM TO DISBURSE CONNECT AMERICA FUND SUPPORT.

Even assuming that the Commission has statutory authority to adopt a single-winner reverse auction mechanism,<sup>72</sup> substantial policy reasons support the view that the Commission should adopt alternative proposals. The following sections demonstrate that the use of a forward-looking economic cost model for the disbursement of CAF support represents a better alternative than the Commission's proposed reverse auction mechanism. In contrast, the reverse auction mechanism, which has proven in the international context to have dubious results, would harm consumers, reduce incentives for investment in broadband networks in rural and high-cost areas, create incentives for anti-competitive behavior, require extensive regulation by the Commission, and fail to promote healthy markets.

##### A. There Are Numerous Policy Reasons for Rejecting a Reverse Auction Mechanism.

Reverse auctions have an unproven track record. In fact, "[a]uctions for universal service funding have been applied abroad, however, the experience is unlikely to be of much help to

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<sup>72</sup> The Joint Commenters do not believe the Commission has such authority. This issue is discussed in Section V.A., *infra*.

U.S. policymakers.”<sup>73</sup> There is little reason to be optimistic that the experience with reverse auctions in other countries would suggest that the mechanism could be successful in the United States:

Reverse auctions have been most successful where the objective can be clearly defined and does not require long-range forecasting: e.g., provide payphone service in specified rural villages (Chile, Peru, Columbia, Guatemala). Reverse auctions in the U. S. are a different matter. There are multiple existing infrastructures, utilizing different technologies, providing different services, and with different serving areas. Universal service is an evolving set of service requirements that is difficult to forecast. The performance of auctions in this setting is theoretically and empirically untested. The limited evidence suggests that these are difficult problems.<sup>74</sup>

The Commission has not presented any analysis in the *Notice*, nor is there any credible record in prior proceedings, demonstrating that reverse auctions can be made to work effectively, fairly, and efficiently as a means of disbursing CAF support and facilitating broadband deployment. Given the stakes involved in reforming universal service mechanisms and launching efforts to accomplish the important and challenging goals of the Broadband Plan, affected parties might have a higher degree of confidence if the Commission could point to convincing cases showing that reverse auctions can be relied upon to produce the results envisioned by the Commission. As it is, however, the Commission’s proposal appears to be nothing more than a roll of the dice.

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<sup>73</sup> Trevor R. Roycroft, “Reverse Auctions for Universal Service Funding?” (Feb. 1, 2008), accessed at [www.roycroftconsulting.org](http://www.roycroftconsulting.org), at 5, *quoted in* Ex Parte Letter from David A. LaFuria, Counsel to U.S. Cellular, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 05-337 (Jan. 28, 2010), Enclosure, William P. Rogerson, “Problems with Using Reverse Auctions To Determine Universal Service Subsidies for Wireless Carriers” (Jan. 14, 2010) (prepared at the request of U.S. Cellular), at 22.

<sup>74</sup> National Telecommunications Cooperative Association Comments, WC Docket No. 05-337 (filed Oct. 12, 2006), Attachment A, Dale E. Lehman, “The Use of Reverse Auctions for Provision of Universal Service” (Oct. 10, 2006), at 23.

There might be less concern regarding the Commission's proposal if the risks and disadvantages of reverse auctions were less significant. Compared to the speculative benefits of reverse auctions, however, their disadvantages (which have been frequently documented in prior Commission proceedings) are imposing. For example, reverse auctions would likely undercut private investment in broadband deployment. Reverse auction outcomes are unpredictable, which, in turn, means that the flow of CAF support to particular carriers also would be unpredictable. Potential investors, who otherwise would be willing to invest in carriers' operations because those operations would also be funded in part through CAF mechanisms, would view their investments as more risky in a reverse auction regime because of the funding uncertainties that reverse auctions would introduce.

The negative impact of reverse auctions on investment would likely have long-term adverse consequences for rural areas. Other carriers will reduce existing investment, or abandon plans for new investment, in any area where the Commission has designated a single subsidized carrier, free from competition. This is especially harmful in underserved rural areas where the problem is not "no service" but rather "some service in some areas."

If the level of private investment is reduced, consumers will be harmed because they would be deprived of access to advanced broadband technologies and the benefits of competitive choices. The lack of sources for investment would also compound the problems for competitive entry that are inherently generated by a single-winner reverse auction.

Reverse auctions create incentives for anti-competitive conduct. For example, an auction participant might choose to engage in "law ball" bidding, being willing to win an auction at a price that would not generate a positive return, because such a strategy would improve the auction participant's market position by eliminating support for competitors, or would bring savings

to the auction participant in the form of lower contribution obligations. It would be difficult for the Commission to guard against such practices, and the fallout from such tactics would be problematic for consumers in rural and high-cost areas, because the “low ball” auction winner could deliver some minimal level of service with the artificially low level of support made available through the reverse auction process, while benefitting from the harm done to its competitors who may not have the balance sheet, or the ability to cross-subsidize from more urban operations. Again, all of these problems the Congress intended to solve in the Telecommunications Act of 1996 (“1996 Act”), by demanding market-based and competitively neutral solutions.

Providing the single winner with a dominant position in the marketplace would suppress competitive entry, undermine pricing discipline that is a product of competitive markets, and reduce incentives for technological innovation. The Commission itself has observed that “competition will help to promote investment and innovation and protect consumer interests.”<sup>75</sup> Although reverse auctions may be an attempt to pinch Fund pennies,<sup>76</sup> the Commission must confront the fact that single-winner reverse auctions create the likelihood that the Commission’s pro-competitive policies would be short-changed.

A possible way to offset these likely harms to competition—and to consumers—would be for the Commission to get back into the regulation business. To counteract the incentives of auction winners who have been given a dominant market position in their service areas, the Commission would need to police rates, service quality,<sup>77</sup> discriminatory pricing, interconnection,

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<sup>75</sup> *Data Roaming Order*, 25 FCC Rcd at 4183 (para. 3).

<sup>76</sup> See *Universal Service, Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14716, 14723 (para. 16) (2010) (noting that the objective of reverse auctions is to allow the Commission “to select the providers that require the least support”).

<sup>77</sup> See, e.g., National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies,

resale, and other practices that otherwise would be regulated by the forces of competitive markets.

The exercise of attempting to regulate the rates of auction winners in their exclusively held service areas would be a complicated one for the Commission. To guard against supra-competitive rates, the Commission presumably would need to devise some form of price cap regulation, or to impose cost-based rate regulation on fund recipients. The latter approach would be particularly problematic, since, for example, it would lead to different rate levels in different service areas, because of varying costs between rural incumbent LECs and competitive ETCs.

In light of these problems, any potential benefits that may be realized from reverse auctions—which are speculative at best—are more than offset by the risks. Although the Commission has applauded the notion that reverse auctions would set market-driven levels of CAF funding, the price to be paid for this perceived benefit would likely involve degraded service quality, stranded investment, decreased incentives for network investments, suppressed competitive entry, and barriers to financing.

**B. A Cost Model Would Ensure Efficient Use of Connect American Fund Support.**

The Joint Commenters suggest that the Commission should choose a better alternative. A forward-looking economic cost model would serve as a realistic and effective mechanism for ensuring efficient use of CAF funding, while at the same time avoiding the many disadvantages presented by reverse auctions. A model that provides a level of support that is sufficient to en-

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Eastern Rural Telecom Association, Western Telecommunications Alliance Comments, WT Docket No. 10-208 (filed Dec. 16, 2010), at 4 (footnote omitted) (indicating that “[r]everse auctions will . . . encourage bidders to ‘race to the bottom’ in terms of service quality and sustainability, a result inconsistent with the universal service objectives of the 1996 Act”).

sure that consumers receive the supported services, and provides no more than is needed to fund a single network, can induce limited competition in rural areas.

The Commission has long been an advocate of the use of cost models for the disbursement of Fund support, having determined in the *USF First Report and Order* that:

[T]he use of forward-looking economic cost will lead to support mechanisms that will ensure that universal service support corresponds to the cost of providing the supported services, and thus, will preserve and advance universal service and encourage efficiency because support levels will be based on the costs of an efficient carrier.<sup>78</sup>

The Commission's endorsement of forward-looking cost models also is reflected in the *Notice*, in which the Commission proposes to use a cost model to determine the level of CAF support rural incumbent LECs would be eligible to receive in certain circumstances.<sup>79</sup>

The Joint Commenters encourage the Commission to conclude that a forward-looking cost model should be used to disburse *all* CAF support. A cost model could be used effectively to target support to high-cost areas, to identify a level of portable support, and generally to preserve and advance universal service. The Joint Commenters agree with RCA that “[a] properly structured cost model that does not stifle competition would provide appropriate investment incentives, increase competition, and help to control growth of the fund.”<sup>80</sup> The Commission's goal should be to design CAF mechanisms that work with—not against—competitive markets. As the Commission has recognized, “[t]o achieve universal service in a competitive market, sup-

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<sup>78</sup> *USF First Report and Order*, 12 FCC Rcd at 8899 (para. 225).

<sup>79</sup> *Notice* at para. 432.

<sup>80</sup> RCA Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337 (filed July 12, 2010), at 8-9.

port should be based on the costs that drive market decisions, and those costs are forward-looking costs.”<sup>81</sup>

V. THE COMMISSION LACKS STATUTORY AUTHORITY FOR ITS REVERSE AUCTION PROPOSAL AND FOR ITS PROPOSED METHOD OF DEFINING SERVICE AREAS.

A. The Commission Lacks Statutory Authority To Adopt Single-Winner Reverse Auctions.

The Commission devotes but one sentence in the *Notice* to arguing that it has legal authority to adopt a reverse auction mechanism, claiming that such a mechanism would be consistent with Section 254 of the Act, and with the intent of the 1996 Act to rely upon market forces and to minimize regulation.<sup>82</sup> The Joint Commenters respectfully disagree.

A reverse auction mechanism is inconsistent with Section 254 of the Act. The U.S. Department of Justice has noted that “[t]he history of competition in the mobile wireless market suggests that the entry of additional providers has resulted in consumers paying less, receiving new features and better handsets, and enjoying higher quality service.”<sup>83</sup> History demonstrates that the converse is true as well: Fewer providers in an area results in consumers paying more, receiving fewer features and handset options, and receiving lower quality service.<sup>84</sup>

A reverse auction mechanism—by installing a single dominant carrier receiving universal service support in a service area—would result in excessive prices (unless the Commission

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<sup>81</sup> *Federal-State Joint Board on Universal Service; Access Charge Reform*, CC Docket No. 96-45, CC Docket No. 96-262, Seventh Report and Order, 14 FCC Rcd 8078, 8103 (para. 50) (1999).

<sup>82</sup> *Notice* at para. 262 (citing *USF First Report and Order*, 12 FCC Rcd at 8951 (para. 325)).

<sup>83</sup> U.S. Dept. of Justice, Ex Parte Submission, GN Docket No. 09-51 (filed Jan. 4, 2010), at 17.

<sup>84</sup> Regional and small providers have higher customer satisfaction ratings than the large players. *See, e.g.*, The American Consumer Satisfaction Index, accessed at [http://www.theacsi.org/index.php?option=com\\_content&task=view&id=147&Itemid=155&i=Wireless+Telephone+Service](http://www.theacsi.org/index.php?option=com_content&task=view&id=147&Itemid=155&i=Wireless+Telephone+Service) (showing 2010 ratings of 69 for AT&T Mobility, 70 for Sprint Nextel, 73 for T-Mobile, 73 for Verizon Wireless, and 76 for all other wireless carriers).

stepped in to regulate the carrier's rates) because a monopoly carrier's pricing would not be constrained by competitive forces in the market. A reverse auction mechanism would produce results inconsistent with the Section 254 mandate that consumers must have access to advanced telecommunications services and information services at affordable rates that are comparable to rates in urban areas.<sup>85</sup>

Consumers would suffer from poor service quality that will inevitably result from a low winning bid. The lower the bid, the less ability and motivation the winner has to provide a reasonable level of service and coverage to the areas. The U.S. Government Accountability Office has noted that regional carriers invest a greater percentage of revenues in capital expenditures than larger carriers.<sup>86</sup> Under the existing USF system, marketplace incentives and portability of competitive ETC support strongly motivate competitive carriers to attract customers, accomplished by building and upgrading infrastructure when they can afford to do so. Being forced to bid low would reverse these incentives and decrease the quality of service in rural areas.

The Joint Commenters do not believe regulation of dominant carriers is the answer for rural citizens. The Commission has limited enforcement resources that would be burdened by a dramatic increase in cases resulting from any service quality regulations. In the event a monopoly recipient of support failed to meet any such standards, the Commission could not revoke its support designation without great expense to the public, because replacing such a carrier with another supported recipient would mean the new recipient would need to build its network out to reach that area. Failure to support any recipient in high-cost areas would result in no service to

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<sup>85</sup> See Cellular South, Inc., N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, RCA, Westlink Communications, LLC, Comments, WT Docket No. 10-208 (filed Dec. 16, 2010) ("Cellular South *et al.* Comments"), at 20.

<sup>86</sup> GAO Data Collection Report at 20.

most residents of rural states, unless they are fortunate enough to live near a big city or a major highway where a nationwide carrier has customer revenue incentives to provide service to roamers.

A reverse auction mechanism would bar all ETCs, other than the auction winners, from receiving any universal service support. High cost areas do not produce sufficient consumer revenues to support service to those areas by rural carriers that possess neither significant wholesale revenue streams, such as access, nor licenses permitting service to lucrative major cities. Accordingly, the loss of support certain to result in the removal of service options from consumers in the area. Any remaining ETCs, while being shut off from receiving support—a particular burden if they only are licensed to serve high cost areas—would still be required to make contributions to fund the Commission’s universal service mechanisms. The Joint Commenters agree that such an outcome would make reverse auctions “an inequitable and discriminatory contribution scheme that violates § 254(d).”<sup>87</sup>

Nor is a reverse auction mechanism consistent with the intent of the 1996 Act. Although the Commission asserts that the single-winner reverse auction mechanism is “market driven,”<sup>88</sup> the mechanism, by design, would depress, rather than promote, competitive entry in areas receiving universal service support. Such a result would directly contravene the mandate of the 1996 Act to promote competition in the local exchange marketplace. The intent of the 1996 Act is to ensure that competitive markets determine winners and losers, and that universal service mechanisms do not skew the marketplace to the advantage of some service providers and the disad-

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<sup>87</sup> Cellular South *et al.* Comments at 17.

<sup>88</sup> *See, e.g., Notice* at para. 25.

vantage of others.<sup>89</sup> A reverse auction mechanism would fail to comply with this mandate, because it would exclude competitors from service areas receiving universal service support.

The Commission also maintains that, whether it uses a reverse auction mechanism or some other support mechanism, the Act does not bar the Commission from limiting support to only one provider in a service area.<sup>90</sup> It bases this view on its observation that, even though state commissions and the Commission have statutory authority to designate more than one ETC in a service area, any such designation “does not guarantee support”<sup>91</sup> for the designated carrier.

Under Section 214(e), Congress conferred upon state commissions in the first instance authority to designate one or more ETCs. The Commission’s position, that states may designate as many ETCs as they wish, but the FCC need not fund more than one, completely subverts Congressional intent. Following the 1996 Act, the FCC designed universal service mechanisms that work within increasingly competitive markets to target support to areas where consumers cannot receive the benefits of competition. These mechanisms dovetailed with Section 214(e).

There would be little purpose to a state commission’s designating a carrier as an ETC if the Commission were to trump this designation with a support mechanism that blocked the designated ETC from receiving any support. Congress, in providing state commissions with the authority to designate ETCs pursuant to Section 214(e), did not intend for the designation process to be meaningless.

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<sup>89</sup> See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000) (“*Alenco*”).

<sup>90</sup> See *Notice* at para. 264.

<sup>91</sup> *Id.*

In fact, if the Commission decides to define broadband as a supported service, any carrier designated as an ETC would be *required* to provide broadband service.<sup>92</sup> The proposed reverse auction mechanism, however, would support only one carrier in a service area, and, therefore, all carriers designated as ETCs would be required to provide broadband service without receiving any universal service support. This expensive proposition would rapidly diminish service options for consumers in high cost areas.

Accordingly, if broadband is defined as a supported service, the Commission must ensure that all ETCs receive sufficient support to provide that service within their designated areas. As wireless carriers are generally recognized as the most efficient service providers, and competitive ETCs receive only about 10 percent of the Fund, the Joint Commenters suggest that supporting their services is less of a burden on the Fund than supporting providers of services that consumers have been abandoning in favor of mobile and broadband.

The Commission seeks to allay any concerns regarding this anomaly by claiming that its proposal would not be intended “to create an unfunded mandate for new obligations.”<sup>93</sup> The Commission would seek to avoid imposing such a mandate by taking “a flexible approach in developing timelines for the deployment of broadband.”<sup>94</sup> Regardless of whether the Commission is successful in developing flexible timelines for broadband deployment, the Commission cannot reasonably maintain that Section 254 gives it the authority to impose universal service obligations on ETCs, while at the same time foreclosing their receipt of any universal service support. Moreover, the Commission does not explain how flexible deployment timelines could cure this

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<sup>92</sup> *Id.* at para. 265.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

problem. In addition, even if a competitive ETC wins an auction in one or three census blocks, a single-round auction would not provide information enabling a carrier to anticipate whether it is likely to win sufficient areas to in fact support the core upgrades necessary for provision of broadband services.

Finally, there is no basis for the Commission's tentative conclusion that a reverse auction mechanism would minimize regulation, making the mechanism consistent with the intent of the 1996 Act. As the Joint Commenters discuss in detail in Section IV.A., *supra*, a reverse auction mechanism would have the opposite effect.

**B. The Proposed Use of Census Blocks As Service Areas for Universal Service Support Would Not Be Consistent with the Communications Act of 1934.**

The Commission's proposal to provide support pursuant to its new mechanisms on the basis of census blocks or aggregations of census blocks<sup>95</sup> would be inconsistent with Section 214(e)(5) of the Act,<sup>96</sup> which provides that, in the case of areas served by rural telephone companies, the area to be used for purposes of providing support must be the rural telephone company's study area, unless the Commission and the states agree to "establish a different definition of service area for such company."<sup>97</sup>

If the Commission seeks to disburse support based on census blocks, then census blocks would first need to be defined as "service areas" pursuant to the requirements of Section 214. The Commission gives no indication in the *Notice* that it intends to undertake such a process with each state commission.

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<sup>95</sup> *Id.* at para. 293.

<sup>96</sup> 47 U.S.C. § 214(e)(5).

<sup>97</sup> *Id.*

VI. THE COMMISSION MUST ADOPT EFFICIENT, PRO-MARKET PROPOSALS OR RISK STRANDING SCARCE FEDERAL RESOURCES.

Regardless of the rules the Commission adopts, carriers will continue to compete in the marketplace. Policies that generally favor inefficient carriers over efficient ones, such as rate-of-return regulation and a ROFR for rural incumbent LECs can only influence market outcomes around the margins and delay the inevitable. In most cases, efficient carriers providing products and services favored by the marketplace will continue to win customers, and the misallocated subsidies will end up as stranded investment, overruled by the market.

A. Perpetuating Rate-of-Return Regulation Guarantees Waste and Slows Investment.

While the Commission can adopt regulations that favor less efficient incumbent carriers, it cannot guarantee their success. The grants and subsidized loans recently awarded by the Broadband Initiatives Program<sup>98</sup> will prove a painful and expensive illustration of this fact. The average cost per household for winning incumbent LEC wireline projects neared \$5,000. The U.S. Department of Agriculture received applications from one party to these Comments that were estimated at roughly \$300 per household, and that would provide mobile broadband at download speeds exceeding 5 Mbps, upgradeable to 21 Mbps in the near future.

Even if the Commission were to provide a subsidy designed to guarantee the incumbent a profit by closing this \$4,700 deployment gap (almost immediately bankrupting the Fund in the process) there is no guarantee that consumers would favor the wireline service offering over a mobile broadband offering. Awarding support in a manner that does not encourage *efficient* use of subsidies could therefore waste millions, if not billions, of CAF dollars.

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<sup>98</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); Department of Agriculture, Rural Utilities Service, Broadband Initiatives Program, 75 Fed. Reg. 3792 (Jan. 22, 2010).

Competitive ETCs may very well overcome an inequitable system for distributing support and continue to provide voice services in remote areas and even begin deploying mobile broadband services. However, each federal dollar distributed inequitably makes the business case for that deployment more difficult, leading to shortages of private funding and delays in deployment. Inequitable support mechanisms may delay the availability of broadband to remote and unserved Americans, but in the end they cannot overpower the market; they can only slow its operation.

**B. Supporting One Carrier Is Tantamount to a Federal Investment in Carriers, Not Consumers, and That Investment Carries Great Risk.**

The 1996 Act wisely promotes competition, even within high cost areas that require subsidies to maintain affordable service. The current system rewards success in the marketplace by awarding per-line support (a distinct positive), while refusing to punish failure by guaranteeing incumbents a rate of return (a distinct negative). The Commission will stop rewarding success if it phases out competitive ETC support, and it will continue to insulate incumbent rural LECs from failure if it continues to guarantee them a rate of return, or a right of first refusal that prevents even an auction within their service territory.

Favoring a single carrier, be it on the basis of technology, incumbency, or a reverse auction, is really no different than buying stock in that carrier. Such a system for distributing support carries the substantial risk of equity investment. If the chosen carrier cannot perform in the marketplace, USF funding will be the equivalent of a bad stock pick.

The Commission may not want to support more than one carrier because doing so seems intuitively inefficient. However, making support portable allows consumers to dictate market outcomes, which will prevent the Commission from subsidizing failed networks.

VII. CONCLUSION.

The Commission has accurately observed, both in the Broadband Plan and in the *Notice*, that mobile broadband continues to grow in importance and now plays a central role in meeting the communications needs of all Americans who are able to access mobile broadband networks.

The *Notice*, however, does not develop a sufficient blueprint for bringing mobile broadband to rural America. This disappointing shortcoming is due, in large part, to the Commission's evident dismissal of competitive neutrality as a principle that should guide the reforms the Commission develops to enable its universal service programs to advance broadband deployment.

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To ensure that unserved communities across the Nation are not left behind,<sup>99</sup> the Joint Commenters respectfully urge the Commission to repurpose its CAF proposals so that the Commission's transition plan and its new support mechanisms are competitively neutral and achieve the goal of sufficient mobile broadband deployment.

Respectfully submitted,



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<sup>99</sup> See Notice at para. 10.