Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan	)	
For Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for	)	
Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
Federal State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109

JOINT REPLY COMMENTS

The member states of the Mid-Atlantic Conference of Regulatory Utilities Commissioners (MACRUC)[1] hereby submit these Reply Comments (Reply Comments) in response to the February 9, 2011 Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (FCC Reform NOPR). The FCC published the FCC Reform NOPR in the Federal Register on March 2, 2011 at Vol. 76, No. 41 on pages 11632- 11663 (the FCC Notice). The FCC Notice established several deadlines, the current one being a deadline of May 23, 2011 for Reply Comments.

[1] The MACRUC Member Jurisdictions are the District of Columbia, the States of Delaware, Maryland, New Jersey, New York, and West Virginia, the Commonwealths of Kentucky, Pennsylvania, and Virginia, and the United States Virgin Islands.

As an initial matter, the Reply Comments should not be considered binding upon an individual Commissioner or MACRUC Commission. Moreover, the Reply Comments could change in response to subsequent developments, including regulatory or legal changes at the state or federal level.

The FCC Reform NOPR raises several critical issues regarding the purposes and funding for the Federal Universal Service Fund (FUSF). This includes proposals to transform the current "telecommunications" support efforts of the FUSF into an FUSF focused on broadband deployment and support for broadband services.[2]

The Reply Comments urge the FCC to develop a National Broadband Map that incorporates current spending under federal programs provided by the Rural Utilities Service (RUS) and National Telecommunications and Information Administration (NTIA). The Reply Comments further urge the FCC to enforce existing public interest commitments to broadband deployment and services undertaken by companies as conditions to prior FCC approvals of their mergers and reject arguments to the contrary. Those commitments do not rely on universal service support and should be excluded from any FCC broadband program for unserved or underserved communities.

The Reply Comments oppose any reforms that constructively or legally usurp the states' and District of Columbia's authority to regulate local telecommunications service providers. The Reply Comments recognize the need to address the multi-tiered support structure in the current FUSF. The Reply Comments also recognize the need to address the current compensation structure

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[2] *Federal Register, 11632-11645* (Vol. 76, No. 41), Wednesday, March 2, 2011.

for calls in which the rate varies depending on the regulatory classification of the communication originated or terminated on telecommunications networks.

The Reply Comments recognize that the FCC Reform NOPR and the Comments contain multiple reform proposals. Whatever the merits of those proposals, and regardless of the compensation approach chosen by the FCC, the Reply Comments make two additional critical points regarding use of the National Broadband Map and the impact of existing public interest commitments to broadband deployment made by companies as part of the FCC's approval of prior mergers. These points must be reflected in the FCC's approach to any final compensation and/or FUSF reform structure.

Identifying Unserved Areas Eligible for CAF Support and the National Broadband Map

The FCC proposes to rely on the National Broadband Map to identify unserved or underserved communities for FUSF / Connect America Fund (CAF) support. This approach is particularly evident in the proposal "to define unserved areas based on the data collection initiated by the Broadband Data Improvement Act and funded through the State Broadband Data and Development Grant Program (SBDD)" which served as the basis for the NTIA's National Broadband Map.[3]

MACRUC agrees with the Comments of the Blooston Rural Carriers that "the data in the currently available National Broadband Map is not accurate or reliable for this purpose."[4] The map does not reflect areas and communities that will be served by 123 broadband infrastructure projects which received $3.5

[3] See, *FCC Reform NOPR,* paragraph 291 and, in particular, http://broadbandmap.gov.
[4] See Comments of the Blooston Rural Carriers at pp. 11–12.

billion in NTIA funding under the Broadband Technology Opportunities Program (BTOP). The National Broadband Map also does not reflect 320 broadband projects which received $3.529 billion in financial support, and accompanying financial repayment obligations, from the RUS Broadband Initiatives Program (BIP).

The FCC's reliance on the National Broadband Map without including the areas and communities to be served by the NTIA's BTOP and RUS's BIP loans and grants, creates the potential for FUSF / CAF financial support being used for unjustified overbuild projects. The resulting overbuild will divert critical funding from rural areas and communities that need broadband services and urban areas that need FUSF support for broadband adoption programs.

Enforcement and Inclusion of Pre-Existing Deployment and Service Commitments

The FCC's approach should also address its ongoing oversight responsibilities for ensuring that companies comply with the considerable broadband deployment and service obligations committed to as "public interest" conditions in previous mergers approved by the FCC. An effective FCC oversight approach must ensure compliance with those public interest commitments by excluding those areas from CAF support to prevent shifting the costs for those commitments to a reformed FUSF. This should help minimize any additional burden on the FUSF by mitigating the costs to deploy broadband networks or fund broadband services in unserved or underserved communities.

The FCC has noted "that Frontier Communications in connection with its acquisition from Verizon of almost 5 million lines in primarily rural and small-town areas, has committed to significantly extend broadband availability in its

service areas."[5] Furthermore, MACRUC notes that the FCC Order approving Frontier's acquisition of the Verizon service territories stated: "Specifically, Frontier has committed to offer broadband service at actual speeds of at least 3 Mbps downstream to at least 85 percent of housing units in the transaction market area by the end of 2013, and actual speeds of at least 4 Mbps downstream to at least 85 percent of housing units in the transaction market area by the end of 2015, with interim deployment benchmarks and detailed progress reports. Frontier has also committed that all new broadband deployment in the transaction market area will offer actual speeds of at least 1 Mbps upstream. In addition, subject to appropriate confidentiality protections, Frontier will provide the Commission, upon request, with periodic reports on its broadband adoption initiatives."[6]

MACRUC also notes that, similar to the aforementioned commitment by Frontier Communications, it has been a common practice for several years for companies to make "public interest commitments" to deploy broadband services in exchange for FCC approval of an acquisition or merger. This effective use of the FCC's authority should not be eroded by FUSF reform. Otherwise, critical public interest commitments like those the FCC has generated could well disappear.

In 2005, the FCC approved the acquisition by SBC Communications of AT&T based on the public interest benefit that: "the Applicants have made a voluntary commitment to offer stand-alone DSL."[7] SBC/AT&T had committed to "continue deployment so that it can offer the service to all ADSL-capable

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[5] FCC Reform NOPR, paragraph 308.
[6] *In re: Applications of Verizon and Frontier Communications, Inc.*, Docket No. 09-95 (May 21, 2010), paragraph 50. http\\www.fcc.gov\transaction\frontier-verizon.html
[7] *In re: AT&T and SBC,* Docket No. 05-65 (November 17, 2005), paragraph 207. http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-183A1.pdf

premises in it in-region within twelve months of the Merger Closing Date."[8] These commitments contained no corresponding FCC delivery of FUSF support.

In 2007, the FCC approved the acquisition by AT&T of BellSouth based on the conclusion that the public interest benefits, including "accelerated broadband deployment", "outweigh the relatively limited possible public interest harms." In those Merger Commitments, AT&T/BellSouth committed "By December 31, 2007, [to] offer broadband Internet access service (i.e. Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory. To meet this commitment, AT&T/BellSouth will offer broadband Internet access services to at least 85 percent of such living units using wireline technologies. AT&T/BellSouth will make available broadband Internet access service to the remaining living units using alternative technologies and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies."[9]

These commitments contained no corresponding FCC delivery of FUSF support. However, even a cursory review of the National Broadband Map shows significant geographic areas within the current AT&T service territory in Kentucky where ADSL service is still unavailable to residential customers.

In 2007, the FCC approved the acquisition by FairPoint Communications of the Verizon Communications assets in the States of Maine, New Hampshire, and Vermont based on the finding that: "We are persuaded that FairPoint's proposed plan for broadband deployment is likely to provide greater benefits to consumers than they would receive absent the transaction. . . FairPoint stated that such

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[8] *Id.* at Appendix F, n. 576.
[9] *In re: AT&T and Bell South,* Docket No. 06-74 (March 26, 2007), Paragraph 224 and Appendix F, paragraphs 1 to 3 in particular. http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf

expenditures will allow it to make broadband addressable to 88 percent of lines in Vermont within 34 months of the completed transaction, and 83 percent of lines in New Hampshire and 83 percent of lines in Maine within 24 months of the completed transaction. Furthermore, FairPoint stated its plans to increase broadband addressability eventually to at least the same level (92 percent) it has achieved in its existing service territory in these three states."[10] The Commission also recognized that FairPoint has stipulated to the Maine Public Utilities Commission "to substantially increase its proposed broadband investment to reach 90 percent addressability in Maine (by the end of five years of the completed transaction), and to maintain certain price levels and service offerings."[11] The Commission then concluded that: "Accordingly, we believe that FairPoint's plan for broadband deployment is likely to accelerate availability of broadband Internet access to customers in the three states, and we reject commenters' arguments that the transaction will produce no public benefits,"[12] As with the prior merger approvals, these commitments were made with no corresponding FCC promise to provide FUSF support.

In 2008, the Commission approved the applications by Sprint Nextel and Clearwire Venture to merge certain assets to create the New Clearwire with majority ownership held by Sprint Nextel by concluding "that the transaction is in the public interest because it will facilitate the development of a nationwide WiMAX (mobile broadband) network."[13] There is no corresponding FCC delivery of FUSF to support these commitments.

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[10] *In re: Application of Verizon Communications, Inc. and Fairpoint Communications,* Docket No. 07-22 (January 9, 2008), paragraphs 31 and 32. http://www.fcc.gov/transaction/fairpoint-verizon.html
[11] *Id.* at paragraph 31.
[12] *Id.* at paragraph 32.
[13] *In re: Sprint-Nextel and Clearwire,* Docket No. 08-94 (November 7, 2008) including, but not limited to, paragraphs 96 (open network commitment), 119 (broadband buildout commitment to not less than 140 million people by the end of 2010) and 127 (development of a nationwide WiMAX network). http://www.fcc.gov/transaction/sprint-clearwire.html

Also in 2008, the FCC approved the acquisition by Verizon Wireless of ALLTEL based on the commitment by the Applicants "that Verizon Wireless is committed to deploying cutting-edge, high speed wireless broadband technology and services in these areas (rural areas currently served within ALLTEL's geographic footprint) on a faster timetable than is currently planned by ALLTEL.[14] These commitments were made without a corresponding FCC delivery of FUSF support.

In 2009, the FCC approved the acquisition by CenturyTel of Embarq based on the conclusion that: "The Applicants have specifically committed in this proceeding to substantially increasing the broadband service available to consumers in the areas they serve over the next three years. The Applicants will offer retail broadband Internet access to 100 percent of the merged company's retail single-line residential and business access lines within three years of the transaction closing date."[15] These commitments were made to facilitate broadband deployment in largely rural service areas with no accompanying FCC delivery of FUSF support.

In 2010, the FCC approved the acquisition by Harbinger Capital Partners Funds of SkyTerra Communications based on the conclusion "that Harbinger's plans to provide 4G mobile wireless broadband are a significant public interest

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[14] *In re: Verizon Wireless and ALLTEL,* Docket No. 08-95 (November 10, 2008), paragraph 128 (The Applicants, along with numerous supporters contend that the proposed transaction will particularly benefit rural areas currently served within ALLTEL's geographic footprint. ALLTEL's current licensed service area includes 265 RSAs and 1,455 counties that are considered "rural" under the Commission's definition, *i.e.*, having a population density of 100 persons or fewer per square mile. The Applicants state that Verizon Wireless is committed to deploying cutting-edge, high speed wireless broadband technology and services in these areas on a faster timetable than is currently planned by ALLTEL).
http://www.fcc.gov/transaction/centurytel-embarq.html

[15] *In re: Embarq and Century Tel,* Docket No. 08-238 (June 25, 2009), paragraph 40.
http://www.fcc.gov/transaction/centurytel-emba.rq.html

benefit . . . because it will provide mobile wireless broadband service to traditionally underserved areas."[16] Importantly, the FCC noted that with this commitment: "If realized, Harbinger's plans to offer 4G wireless broadband services will achieve substantial public benefits, relating to the build out of a new facilities-based broadband player that will serve more than 80 percent of the U.S. population by the end of 2015."[17] These commitments were made without any accompanying delivery of FUSF support although the public interest findings sustaining the merger's approval expressly depend on actually moving forward with its plan to use SkyTerra to provide 4G mobile wireless service, and especially on Harbinger's plan to build a terrestrial network using SkyTerra's ATC authority to facilitate broadband service to most of the U.S. population.[18]

This year, the FCC approved the acquisition by Comcast of NBC Universal from General Electric based on the Applicants "commitments to expand broadband deployment to unserved areas, including rural communities, and to facilitate increased broadband adoption by low income households. Specifically, Comcast will expand its existing broadband networks to reach approximately 400,000 additional homes. Comcast also will provide Internet access service in additional rural communities and provide courtesy video and HIS service to 600 new locations (such as schools and libraries) in underserved, low-income areas."[19] As with other mergers, these commitments remain in force with no accompanying FCC delivery of FUSF support.

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[16] *In re: SkyTerra,* Docket No. 08-184 (March 26, 2010), paragraph 70. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-535A1.pdf
[17] *Id.* at paragraph 72.
[18] *Id.* at paragraph 71.
[19] *In re: Comcast and NBC,* Docket No. 10-56 (January 20, 2011), paragraph 233. http://www.fcc.gov/transaction/comcast-nbcu.html

Also this year, the FCC approved the acquisition by CenturyLink of Qwest Communications International by concluding that: "In this proceeding, the Applicants have made commitments to expand broadband deployment to unserved areas, including rural communities, and to facilitate increased broadband adoption by low-income households. With respect to deployment, within seven years of the transaction closing date, CenturyLink will make available broadband service at an actual download speed of at least 4 Mbps to at least 4 million Qwest customers that do not currently have access to such service from Qwest. In addition, at least 75 percent of those 4 million customers will also have access to an actual upload speed of at least 1 Mbps. By the end of the seven-year buildout period, broadband service at speeds of at least 12 Mbps or higher downstream will be made available to more than twice as many Qwest customers as have access to such speeds today."[20]

Moreover, the FCC's long-standing practice of enforcing public interest commitments without the use of FUSF support is now expressly stated. Those binding commitments remain in force and reflect an express reliance on private investment with no reliance on public funding sources such as universal service support.[21]

Finally, and very importantly, the companies have committed to providing discounted broadband service to customers eligible for Lifeline at $9.95 per month, to provide discounted computer equipment, and to undertake a commendable public education outreach program to educate the public about the importance of broadband.[22]

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[20] *In re: CenturyLink and Qwest,* Docket No. 10-110 (March 18, 2011), paragraph 35,
[21] *Id.* at paragraph 37.
[22] *Id.* at paragraph 35. These federal policies, given the FCC's recognition of the particularly rural nature of many of the wire centers and of the decreased likelihood of competition in those same rural areas given

MACRUC notes that the FCC has properly incorporated these binding public interest commitments from companies for more than six years as part of its efforts to accelerate broadband infrastructure and service deployment in exchange for approval of the companies' proposed mergers. The aforementioned commitments were not conditioned by the companies on receipt of FUSF support or any other federal or state governmental financial support.[23] MACRUC objects to Frontier's attempt to portray the commitments undertaken in the FCC approval of its merger as dependent on FUSF support, and Interstate Access Support (IAS) in particular, because that claim contradicts the FCC's and Frontier's recognition that the merger commitments undertaken were specifically made without reliance on *any* public funding support, including universal service support. .[24] Frontier's and other companies' satisfaction of these public interest commitments is tied to private capital investment and were never contingent on receiving FUSF support or other public financial support.

MACRUC expects the FCC to enforce these commitments and factor compliance with those commitments in an updated National Broadband Map. The

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the high cost, may give rise to comparability claims from urban areas under Section 254 of the Telecommunications Act of 1996. Section 254 requires comparable service at comparable rates for urban and rural Americans. The FCC's promotion of laudable affordability, equipment discount, and public education outreach programs in rural areas but not in urban areas may give rise to Section 254 claims from urban areas given the disparity in the absence of similar federally-approved programs in urban areas. The FCC may be inadvertently transgressing Section 254 to the extent that urban areas with underserved communities could benefit from, but do not have, federally-promoted affordability, discounted equipment, and public education outreach programs similar to those approved by the FCC for rural areas. Compare *id.* at paragraph 19 and paragraph 35. http://www.fcc.gov/transaction/centurylink-qwest.html

[23] See, for example, *id.* at paragraph 37.

[24] Compare *In re: Application of Frontier and Verizion,* Docket No. 09-95 (May 10, 2010), paragraph 53 ("We emphasize that these voluntary commitments rely on private investment, and do not rely on public funding sources such as universal service support") with *FCC Reform NOPR,* Comments of Frontier Communications Corporation, pp. 14-17, esp. p. 15 ("Yet the reward for Frontier' s commitment to the Commission' s goal of rural broadband deployment is that not only will Frontier be excluded from receiving support for deploying broadband across these rural areas, but it will have significant sources of revenues that Frontier originally used to calculate its ability to deploy broadband to these areas eliminated by the Commission' s USF and ICC reform proposals."). .

FCC must also reflect these commitments in any intercarrier compensation and FUSF reform.

This is particularly important given the FCC's recognition that 82% of the nation's exchanges that currently lack broadband are located in the service territories of large incumbent carriers operating under price cap regimes.[25] Those same carriers already have made serial and substantial existing broadband deployment and service commitments in prior federal merger approvals. The FCC must ensure that the companies making these public interest commitments complete those commitments in a timely fashion and not shift those costs to reformed intercarrier compensation or universal service structures.

This approach ensures that limited FUSF financial support will be limited to geographic areas that are not covered by the commitments made by the aforementioned companies. This is better than providing supplemental FUSF support to those companies while effectively excusing those same companies from earlier public interest commitments made in support of a merger.

MACRUC does not support alleviating these companies from their binding prior public interest commitments. Otherwise, companies with those commitments will shift their compliance costs to net contributor states. Equally important, net recipient states with legitimate unserved or underserved populations will receive less support than would otherwise be the case if those areas must now forego support to underwrite these companies' compliance with prior commitments made to the FCC and the public.

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[25] FCC Staff Presentation on the National Broadband Plan (September 29, 2009), slide 47.

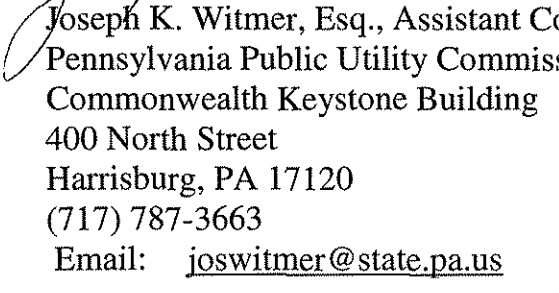
In short, the failure to ensure compliance with those public interest commitments will potentially provide FUSF support to companies to provide broadband service despite prior commitments to provide those services as a condition of a merger's approval.

CONCLUSION

The combination of a National Broadband Map that was not prepared with the goal of directing FUSF support and the failure to include broadband deployment commitments set out by the FCC in mergers makes any FUSF reform incomplete. The FCC must include outstanding BTOP and BIP supported projects, as well as the companies' completion of the broadband commitments undertaken as part of their merger obligations. Moreover, there are also broadband commitments made by many of the same companies under independent law and those commitments must be reflected in, and not preempted or usurped by, federal action.

MACRUC appreciates the opportunity to file these Joint Reply Comments. The Joint Reply Comments commend the FCC for undertaking this challenging reform of intercarrier compensation and universal service.

Respectfully Submitted On Behalf Of
The Mid-Atlantic Conference of
Regulatory Utilities Commissioners



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