Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for	)	WC Docket No. 07-135
Local Exchange Carriers	)	
	)	
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	)	CC Docket No. 96-45
Service	)	
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION OF THE UNITED STATES TELECOM ASSOCIATION

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December 29, 2011

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PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE UNITED STATES TELECOM ASSOCIATION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.429 of the Commission's rules,[1] the United States Telecom Association ("USTelecom") respectfully petitions the Commission to reconsider and clarify certain aspects of its *Order*.[2]

The Commission's *Order* represents a landmark decision in telecommunications regulation, and the Commission's willingness to tackle many of the problems that undermine the

[1] 47 C.F.R. § 1.429.

[2] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, ¶ 164 (rel. Nov. 18, 2011) ("*Order*").

universal service and intercarrier compensation programs in a comprehensive way is an unprecedented achievement. In a bold move, the Commission took long overdue steps to reform and modernize these complicated programs, which in their present form no longer serve the purposes for which they were established.

USTelecom and its members support the Commission's efforts and largely endorse the *Order*. However, the *Order* falls short in several important respects, particularly regarding: (i) the Phase I of the Connect America Fund ("CAF"); (ii) the flash-cut to new CAF Phase II support levels; (iii) compelling eligible telecommunications carriers ("ETCs") to use legacy support to deploy and maintain broadband; (iv) failing to relieve ETCs of their obligations and designations when their universal service support has been eliminated; (v) reducing high-cost support based on end-user rates; (vi) the new reporting and record retention requirements for ETCs; and (vii) the Access Recovery Charge ("ARC") mechanism. Accordingly, USTelecom seeks reconsideration of these issues

In other respects, the *Order* raises issues that create potential implementation or other problems, which require clarification from the Commission. These issues include: (i) implications of the Commission's decision not to make broadband a supported service; (ii) the calculation of the Commission's broadband deployment timeframes; (iii) implementation of the incremental support regime; (iv) the phase-out of safety net additive support; (v) the treatment of financial disclosures of privately held companies; (vi) additional steps to prevent regulatory arbitrage; (vii) the treatment of originating access charges; and (viii) differences between the *Order* and the Commission's new rules.

II. THE COMMISSION SHOULD RECONSIDER AND CLARIFY CERTAIN ASPECTS OF ITS UNIVERSAL SERVICE REFORMS.

A. The CAF Phase I Deployment Requirement is Unreasonable and Counterproductive to Achieving The Commission's Universal Service Goals.

The Commission should reconsider its CAF Phase I deployment requirement, which obligates recipients of CAF Phase I incremental support to deploy broadband to one household for every $775 in support received. *Order* ¶ 138. This requirement is based on an unrealistic assessment of the cost of deploying broadband to homes in unserved areas and likely will deter carriers from accepting CAF Phase I incremental support and from deploying broadband to unserved areas in any meaningful manner.

Although the Commission was clear that it was "not attempting to identify the precise cost of deploying broadband to any particular location," the $775 per household deployment requirement will not succeed in "spur[ring] immediate broadband deployment to as many unserved locations as possible." *Id.* ¶ 139. First, it relies upon nationwide data, which ignores that broadband deployment costs can vary considerably across geographic locations.[3] Second, it relies upon limited cost projections, which do not necessarily reflect the actual cost of deploying broadband to unserved areas.[4] Third, it relies upon the costs of a hypothetical broadband provider, even though a provider's actual deployment costs can vary considerably.[5]

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[3] For example, the Commission relied upon data from the cost model developed in connection with the National Broadband Plan, though the model team itself noted that its results should be relied on only for nationwide averages and specifically acknowledged that "[f]urther analysis and improved source data would be required to refine estimates for particular geographies." Omnibus Broadband Initiative, *The Broadband Availability Gap:OBI Technical Paper No. 1*, at 5 (April 2010).

[4] Specifically, in justifying the $775 figure, the Commission cited to projections by a single mid-sized price cap carrier submitted to the Rural Utilities Service ("RUS") as part of the carrier's application for funding under the Broadband Initiatives Program ("BIP"). *See Order* ¶ 140. Even assuming data from this carrier's BIP deployment is sufficiently representative of the

The $775 figure is even more unreasonable in light of the Commission's decision to require that CAF Phase I incremental support recipients exclude areas covered by existing capital improvement plans, BIP deployment obligations, and merger commitments from areas eligible to meet a provider's broadband deployment obligation. *Id.* ¶ 146. By excluding these areas, the remaining unserved areas that are the intended beneficiaries of CAF Phase I incremental support are the most costly to serve and could not reasonably be served for $775 per household.[6]

Accordingly, to ensure that CAF Phase I incremental support achieves its intended purpose, the Commission should reconsider its $775 figure and develop more realistic deployment requirements. In particular, such requirements should address not only an individual broadband provider's cost to deploy broadband in its unserved areas (i.e., areas lacking broadband service at 768 Kbps speeds) but also the cost to upgrade service in its underserved

(footnote cont'd.)

costs of broadband deployment generally – a dubious proposition – the cost data submitted to RUS were merely projections for broadband deployment to a combination of unserved and *underserved* locations. These projected costs could vary considerably from actual costs for deployment only to unserved locations, particularly when areas addressed by BIP are not even eligible for CAF Phase I support.

5 The median cost of deploying broadband in an unserved census block group may differ dramatically from one provider to another, largely for two reasons: (i) some providers have more aggressively invested in broadband deployment in rural areas than others, as a result of which only the most expensive areas remain unserved; and (ii) some providers' service territories may include a disproportionate number of higher cost census block groups. In either instance, by establishing a per household figure that does not take into account a broadband provider's actual circumstances, the Commission would be unfairly penalizing providers based on their prior deployment decisions or on the high cost of the areas they serve.

6 For example, Frontier currently provides broadband to 92 percent of the households in its incumbent local exchange carrier ("LEC") territory and must deploy broadband to 85 percent of the households in the former Verizon territory under its merger commitments. *See Applications Filed by Frontier Communications Corp. & Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, 6001 (2010). Not surprisingly, $775 per household would not come close to covering the costs of deploying broadband to the remaining 8 percent of the unserved households in Frontier's incumbent territory and the 15 percent of the unserved households in the former Verizon territory.

areas (i.e., areas lacking broadband service at 4 Mbps speeds). This approach is more likely to "expand voice and broadband availability as much and as quickly as possible" because upgrades in adjacent, underserved areas often must precede deployment of new broadband facilities in outlying, unserved areas that are farther from a LEC's central office. *See Order* ¶ 145.

B. <u>Rather Than Requiring a Flash Cut to New CAF Phase II Support Levels, The Commission Should Adopt A Five-Year Phase-down As Recommended By the ABC Plan.</u>

The Commission should reconsider its decision to adopt a flash-cut approach to eliminating existing legacy support in connection with the implementation of CAF Phase II. Under the transition mechanism for CAF Phase II, the Commission directed that, for a price cap ETC that declines to serve all locations in its service territory in a state:

> the carrier will continue to receive support in an amount equal to its CAF Phase I support amount until the first month that the winner of any competitive process receives support under CAF Phase II; at that time, *the carrier declining the state-wide commitment will cease to receive high-cost universal service support*.

Id. ¶ 180 (emphasis added). Under a literal reading of this provision, a price cap carrier's support throughout a given state could disappear overnight simply because some other provider receives CAF Phase II support by virtue of committing to serve a few census blocks in that state. Even worse, the language cited above also suggests that a price cap carrier in one state could lose all its support in a flash-cut because some provider in another state is receiving CAF Phase II support. *See id.* ("the winner of *any* competitive process") (emphasis added). Presumably the Commission did not intend such illogical results, which itself warrants reconsideration.

Reconsideration also is warranted because the Commission's flash-cut approach is contrary to the *NPRM* and the policies embodied in the *Order*. For example, in outlining proposed reforms in the *NPRM*, the Commission stated its intent "to avoid sudden changes or 'flash cuts' in our policies" and acknowledged "the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption."[7] Consistent with this intent, the Commission adopted other reforms that included multi-year transitions from legacy support mechanisms.[8] However, for reasons never explained, the Commission decided to adopt a flash-cut mechanism in implementing CAF Phase II support levels that could result in an immediate loss of a price cap carrier's existing high-cost support.[9]

The Commission's decision was adopted without notice in violation of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553(b)(3) While the *NPRM* proposed eliminating carriers' IAS support in two years and phasing out competitive ETC support over

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[7] *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, ¶ 12 (2011) ("*NPRM*"); *see also id.* ¶ 17 ("[w]e do not propose any 'flash cuts,' but rather suggest transitions and glide paths that we believe will facilitate adaptation to reforms. Change to USF and ICC policies need not and should not be sudden or overly disruptive, but change must begin so that our country can reach its broadband goals in an efficient and accountable way.").

[8] *See, e.g., Order* ¶ 242 ("By adopting a multi-year transition [for implementation of urban rate floor], we seek to avoid a flash cut that would dramatically affect either carriers or the consumers they serve"); *id.* ¶ 513 (explaining how a five-year transition for competitive ETCs is "desirable in order to avoid shocks to service providers that may result in service disruptions for consumers" and how such a multi-year transition is sufficient for affected carriers to "adjust and make necessary operational changes to ensure that service is maintained during the transition"); *id.* ¶ 802 (endorsing transition plans consistent with "our commitment to avoid flash cuts").

[9] While the federal courts may have deferred "to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal service system to another," *NPRM* ¶ 239 (quoting *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999)), no such deference would be warranted here. First, the decision to implement a flash-cut approach by which a price-cap carrier's support could be eliminated overnight is not predicated on any "predictive judgment." *Cf. TOPUC*, 183 F.3d at 436-37 (noting that Commission "made a reasonable determination" regarding emerging competition in local markets); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 537, 556 (8th Cir. 1998) (noting the Commission's "predictive judgment" regarding competitive pressures in the local exchange market). Second, in contrast to other transition plans to implement changes to the universal service system, "the transition period" in this case is nonexistent.

five years, it did not propose to eliminate any other high-cost support provided to incumbent LECs.[10] In fact, the *NPRM* did not expressly seek comment on any Commission-proposed transition plan for non-IAS high-cost support – let alone a flash-cut elimination.[11]

The flash-cut elimination of price cap carriers' legacy support also violates the APA because the Commission did not consider alternatives, namely the proposal to phase out such support over a five-year period.[12] AT&T included this proposal in its comments, and the five year phase-down was an essential component of the ABC Plan on which the FCC sought public

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10 *See NPRM* ¶ 234 (proposing a two-year phase-out for IAS support but seeking comment on whether a longer transition is warranted to "minimize disruption to service providers"); *see also id.* ¶ 242.

11 To satisfy the APA's notice requirement, the NPRM and the final rule need not be identical: "[a]n agency's final rule need only be a 'logical outgrowth' of its notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). A final rule qualifies as a logical outgrowth "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *See, e.g., Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (citations omitted). Here, the Commission fails the logical outgrowth test because the FCC expressly stated "[w]e do not propose any 'flash cuts.'" *NPRM* ¶ 17; *see CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1082 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

12 *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (agency has the duty "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives") (citation omitted); *International Ladies' Garment Workers' Union v. Donovan,* 722 F.2d 795, 817 (D.C. Cir. 1983) ("[I]n addition to requiring rational consideration of alternatives, the APA demands an adequate explanation when these alternatives are rejected").

comment.[13] Nonetheless, contrary to the APA, the Commission adopted its flash-cut approach without acknowledging – let alone explaining why it was rejecting – a five-year transition.[14]

The Commission's decision to eliminate existing support on a flash-cut basis also is inconsistent with the statutory requirement that universal service funding be "sufficient." *See* 47 U.S.C. § 254(e). "Sufficiency" for universal service purposes relates to the level of support necessary "to enable all customers to receive basic telecommunications service."[15] Under the Commission's approach, support that is sufficient (*i.e.*, necessary) on January 1, 2013 to enable a price cap carrier to provide basic telecommunications services throughout its service territory is suddenly transformed into being unnecessary on January 2, 2013, simply because a CAF Phase II recipient begins receiving support to provide service in a small part of that service territory. By way of illustration, if $100 million in high-cost support was necessary for the provision of basic service in Mississippi on January 1, 2013, it seems illogical that on January 2, 2013 only $5 million in CAF Phase II support is "sufficient to achieve universal service goals." *Order* ¶ 510.[16]

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[13] *See* Comments of AT&T, WC Docket 10-90, at 109-11 (filed April 18, 2011) ("AT&T Comments"); Public Notice, *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket 10-90, DA 11-1348, at 9 (rel. Aug. 3, 2011).

[14] *See Public Citizen v. Steed,* 733 F.2d 93, 105 (D.C. Cir 1984); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal").

[15] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (section 254 requires that there be "sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services…"); *see also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (level of high-cost support is insufficient when it "will undercut adequate telephone services for customers …").

[16] Worse still, $0 in support would be deemed sufficient for a carrier that continues to be designated as an ETC because, as discussed below, the Commission also has declined for the time being to eliminate legacy ETC service obligations even when that carrier has lost all high-cost support in certain areas. *Order* ¶ 79. That is nonsensical and cannot be consistent with section 254(e).

C. <u>The Commission Should Reconsider Its Decision To Compel Providers to Use Legacy Support to Deploy And Maintain Broadband Service.</u>

Support under CAF is voluntary; providers may decline CAF Phase I incremental support if they "cannot meet [the Commission's] broadband deployment requirement" and may decide not to accept CAF Phase II support. *Order* ¶¶ 144 & 160. However, at the same time, the Commission's new framework compels ETCs to use their *existing* support to deploy or maintain broadband service in their service territories and, beginning in 2013, imposes strict broadband obligations on these carriers.[17] The Commission should reconsider this decision, which runs afoul of section 254 and contravenes Title I. Instead, the Commission should *permit* ETCs to use legacy high-cost support to deploy and maintain broadband service but not *obligate* ETCs to satisfy particular build-out requirements.

Requiring providers to use legacy universal service support to deploy broadband to unserved areas or to maintain broadband service in areas without a subsidized competitor contravenes section 254(b)(5), which requires "*sufficient* Federal and State mechanisms to preserve and advance universal service," and section 254(e), which provides that "any [universal service] support should be … *sufficient* to achieve the purposes of this section." 47 U.S.C. §§ 254(b)(5), (e) (emphasis added). Even though ensuring the sufficiency of universal service support is a direct statutory command,[18] the *Order* is devoid of any analysis that legacy universal

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[17] *See Order* ¶ 150 (requiring price cap carriers "receiving frozen high-cost support" to transition such support over a two-year period to "build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor"); *id.* ¶ 206 (requiring rate-of-return carriers to use legacy support to deploy 4/1 Mbps broadband "upon reasonable request" throughout its service territory).

[18] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1197, 1200 (10th Cir. 2001) (explaining that "the FCC must base its policies on the [enumerated] principles" in section 254(b) and holding that the principles' "language indicates a mandatory duty on the FCC"); *TOPUC*, 183 F.3d at 412

service amounts would represent sufficient funding to support the Commission's broadband deployment mandate and allow a carrier to meet its existing ETC obligations. In essence, the Commission impermissibly bootstraps a broadband deployment and maintenance obligation onto carriers that only receive federal universal service for the provision of voice telephony service in their geographic serving areas,[19] while turning a blind eye to the sufficiency of the support necessary to satisfy this obligation.[20]

The Commission's decision to allow rate-of-return carrier to assess "construction charges … subject to limits" is no answer. *Order* ¶ 208. The Commission does not explain how a rate-of-return carrier would reasonably recover the massive costs of broadband deployment throughout its service territory by means of special construction charges, which, by the Commission's own estimates, could be several thousand dollars per location. *Cf. id.* ¶ 140 n.233 (noting per location broadband deployment costs as high as $3,000). Nor does the Commission explain how such an ad hoc process would lend itself to the economies of scale necessary to spread the cost of a broadband network.

(footnote cont'd.)
(holding that "the plain language of § 254(e) makes sufficiency of universal service support a direct statutory command").

[19] Such bootstrapping itself violates section 254(e). First, it contravenes the mandate that universal service support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). It also violates the requirement that support be "explicit" by creating an implicit cross-subsidy running from voice to broadband service. *Id.* Finally, such bootstrapping also could violate section 254(b)(1)'s "affordability" mandate, as customers could be charged too much (through USF contributions) for the service (voice) to which the funding is directed.

[20] For rate-of-return carriers, the Commission conditions receipt of "new CAF funding in conjunction with the implementation of intercarrier compensation reform" on the provision of 4/1 Mbps broadband service "upon reasonable request." *Order* ¶ 206. However, the CAF mechanism for rate-of-return providers simply replaces implicit revenues with explicit funding for voice service and cannot reasonably be expected to cover the cost of broadband deployment.

The Commission also lacks authority under Title I to impose a broadband deployment and maintenance obligation as a condition to carriers' receipt of legacy federal universal service support. Broadband is an information service regulated under Title I,[21] and section 3(51) of the Act expressly precludes the Commission from imposing common-carrier regulations on broadband. *See* 47 U.S.C. § 153(51). Mandatory broadband deployment and maintenance obligations are precisely the type of common-carrier regulation precluded by section 3(51).[22]

D. <u>The Commission Should Clarify That All ETCs Will Be Relieved of Their Obligations and Designations When Their Universal Service Support Has Been Eliminated.</u>

The Commission should clarify now—not in a future rulemaking—that ETCs will be relieved of their legacy ETC obligations (and ETC designations) in those geographic areas in which they do not receive either legacy high-cost support or CAF support. *See Order* ¶ 79. As the Commission phases in its new universal service regime, it cannot sensibly or lawfully maintain its existing interpretation of section 214(e) or its ETC rules, which require ETCs to offer legacy services throughout their designated ETC service areas. *See* 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.101(a).

First, by definition, the purpose of the ETC designation is to identify carriers that are, in fact, *eligible* to receive universal service funding. As section 214(e)(1) directs, a "common carrier designated as an eligible telecommunications carrier . . . *shall be eligible to receive universal service support*." 47 U.S.C. § 214(e)(1) (emphasis added). The legacy regime satisfied

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21 *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853, 14855-56 ¶¶ 1-3 (2005).

22 *See, e.g.*, 47 U.S.C. § 214(e)(3); *Federal-State Joint Board on Universal Service: Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Memorandum Opinion and Order, 16 FCC Rcd 18133, 18140 ¶ 18 n.47 (2001) (noting that a "common carrier" may be ordered "to provide the supported services to an unserved community").

this requirement because it enabled more than one carrier to become an ETC and thereby qualify for any universal service funding distributed in a given geographic area. But the new regime will entitle just *one* provider to qualify for support in a given area in exchange for offering both legacy voice services *and* broadband. *See Order* ¶¶ 171-79 & 316. Under this new framework, many existing ETCs will no longer be *eligible* to receive funding. For that reason alone, the Commission would violate section 214 if it perpetuated ETC service obligations and designations for carriers that do not receive universal service support.

Second, for ETCs that lose their existing universal service support under the new regime – funding that is necessary to offset the cost of providing supported services in high-cost areas – the Commission could not lawfully compel these carriers to continue providing service after that support has been eliminated. Such a result would contravene section 254, which requires the Commission to design its universal service programs so that support is "sufficient" to enable providers to offer the services deemed "universal." 47 U.S.C. § 254(b)(5), (e), (f). It also would violate section 254's mandate that universal service policies be "equitable and nondiscriminatory" and competitively neutral, since an ETC that has lost its universal service support would be compelled to continue competing against a CAF-funded provider. *See* 47 U.S.C. § 254(b)(4), (d), (f).

E. <u>Reducing High-Cost Support Due to "Artificially Low End-User Rates" is Misdirected And, in Any Event, Should be Limited Only to Certain Categories of Support.</u>

The Commission should reconsider its decision to reduce universal service support to the extent a carrier's local rates do not meet "an urban rate floor," which represents a national average of local rates in addition to defined state-regulated fees. *See Order* ¶¶ 238-39. At the very least, the Commission should clarify that any such reductions in legacy support will apply only to high-cost loop and high-cost model support.

The Commission's decision to reduce a carrier's universal service support because its local rates are too low ignores restrictions under state law that prevent or at the very least hinder a carrier from increasing local rates. For example, in many jurisdictions, a price cap carrier is prohibited from increasing rates for basic service.[23] In other jurisdictions, state law limits rate increases for basic local exchange service.[24] By failing to even acknowledge these constraints, the Commission's decision is arbitrary and capricious.[25]

Furthermore, rather than penalizing a carrier for failing to do something that it cannot lawfully do (*i.e.*, raise local rates), the Commission should preempt any state laws that cause customers to pay "local service rates that are significantly lower than the national urban average." *Order* ¶ 237. The Commission unquestionably possesses the authority to preempt state laws and regulations.[26] Indeed, the Commission has not hesitated to preempt state

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23 *See e.g.*, Ark. Code Ann. § 23-17-408(c)(1) (authorizing a company electing alternative regulation to "increase or decrease its rates for telecommunications services other than basic local exchange service . . ."); *DPUC Investigation of the Southern New England Telephone Company's Alternative Regulation Plan*, Docket Nos. 00-07-17, 2001 Conn. PUC LEXIS 93 (Conn. Dep't Pub. Util. Control May 16, 2001) (rejecting Southern New England Telephone Company's proposal to annually increase rates for residential local exchange service up to the rate of inflation, subject to competitive forces).

24 *See, e.g., Petition for Approval of Storm Cost Recovery Surcharge, and Stipulation with Office of Public Counsel, by Sprint-Florida, Inc.*, Docket No. 050374-TL, Order No. PSC-05-0946-FOF-TL at 1 (Fla. Pub. Serv. Comm'n Oct. 3, 2005) (noting that Florida law only authorizes a price regulated LEC to seek a rate increase based on a "substantial change in circumstances," which is narrowly construed but includes costs associated with hurricane damage); § 392.245 R.S. Mo. (limiting rate increases for basic local exchange to changes in inflation).

25 *See, e.g., National Treasury Employees Union v. FLRA*, 466 F.3d 1079 (D.C. Cir. 2006); *Konan v. Attorney General of the United States*, 432 F.3d 497 (3rd Cir. 2005).

26 *See* 47 U.S.C. § 251(d)(3); 47 U.S.C. § 253; *Public Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1514-15 (D.C. Cir. 1990); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2003); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

regulations that conflict with a federal regulatory objective and when that conflict impinges on its exercise of its lawful authority.[27] Under the Commission's reasoning, state laws that result in artificially low local rates frustrate the Act's universal service policies and undermine the Commission's implementation of the universal service program, which warrants preemption. *See Order* ¶¶ 237 & 767.

At the very least, the Commission should clarify the legacy mechanisms subject to reduction when a carrier's local rates do not meet the urban rate floor. The *Order* indicates that the reductions will be made to "HCLS and CAF Phase I support," *id.* ¶ 239, but the reference to "CAF Phase I support" in this context is unclear. The term presumably does not refer to a carrier's "incremental support" under CAF Phase I, the purpose of which is to "provide an immediate boost to broadband deployment in [unserved] areas." *Order* ¶ 137. No relationship exists between incremental support under CAF Phase I to fund the nonrecurring costs of broadband deployment in unserved areas and basic local rates, which are intended to cover at least a portion of the recurring cost of voice service in served areas. Furthermore, the term should not be construed to refer to either legacy IAS or ICLS, since both mechanisms provide support for interstate rather than local rates. *Order* ¶¶ 130, n.207 & 241. The Commission should clarify that reductions in legacy support resulting from a failure to meet the urban rate floor, at most, will extend only to high-cost loop and high-cost model support, which are focused on providing voice service in high-cost areas.

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[27] *See, e.g., Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE,* Memorandum Opinion and Order, 23 FCC Rcd 6371 (2008); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5157 (2007).

F. The Commission's New ETC Reporting Requirements Are Unduly Burdensome and Unnecessary, Should be Prospective Only, And Should Be Implemented Effective July 1, 2012.

1. The New ETC Reporting Requirements Should Not Apply to Carriers Whose Support is Being Eliminated.

The Commission should reconsider imposing new reporting requirements on ETCs whose support is being eliminated. The new reporting requirements will involve significant costs that are unreasonable to impose on ETCs whose support is being eliminated.

To take the most egregious example, the Commission's new framework arguably will require all ETCs to produce a new five-year build-out plan by April 1, 2013, which includes progress on their broadband deployment. *Order* ¶ 587. The Commission does not explain how it intends to use a five-year plan from a price cap carrier that does not intend to participate in the CAF in the long term and that stands to lose all of its existing frozen high-cost support once CAF Phase II has been implemented.

Imposing new reporting requirements on all ETCs also cannot be reconciled with the Commission's duty to "adopt regulation only upon a reasoned determination that its benefits justify its costs."[28] Indeed, the Commission made no such determination, and, instead, vastly underestimated the burdens imposed—noting only that the new reporting regime may impose "some additional time and cost on individual ETCs." *Id.* ¶ 575. Furthermore, these new reporting requirements are inconsistent with the Chairman's stated objective to "streamline and modernize the Commission's rules and reduce unneeded burdens on the private sector."[29]

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28 Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (2011); *see also* Exec. Order No.13,579, (Jul. 11, 2011).

29 *International Reporting Requirements Order*, 26 FCC Rcd 7274, 7365 (2011) (Statement of Chairman Julius Genachowski).

Apart from failing to account for the costs and benefits of applying new reporting requirements to all ETCs, including those that stand to soon lose all universal service support, the Commission has not sought the requisite Office of Management and Budget ("OMB") approval of its extension of federal ETC reporting requirements for voice services to state-designated ETCs. *See id.* ¶ 580. By extending existing federal reporting requirements to state-designated ETCs, the Commission has made a "material modification" to a previously approved information collection, which requires OMB approval under the Paperwork Reduction Act ("PRA").[30] In seeking OMB approval of its current federal ETC reporting requirements in 2005, the Commission anticipated that only twenty-two carriers would be affected—a key factor in its determination of the total annual cost burden.[31] Here, the Commission seeks to extend federal ETC reporting requirements to 1,400 or more ETCs,[32] which necessitates OMB approval.[33]

More broadly, many aspects of the new reporting requirements violate multiple other substantive provisions of the PRA. Among other things, the PRA requires federal agencies to ensure that data collections are "necessary for proper performance of the functions of the

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30 The PRA in relevant part states that "[a]n agency may not make a substantive or material modification to a collection of information after such collection has been approved by the [OMB] Director, unless the modification has been submitted to the Director for review and approval under this subchapter." 44 U.S.C.A. § 3507(h)(3); *see also* 5 C.F.R. § 1320.5(g).

31 *See Public Information Collections Approved by Office of Management and Budget*, 70 Fed. Reg. 66407 (Nov. 2, 2005) (stating that the "Estimated Annual Burden" is "22 responses; 242 total annual burden hours; approximately 11 hours average per respondent").

32 *See* United States Government Accountability Office, Report to Congressional Committees, Telecommunications: FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program, at 6 (June 2008).

33 The *Order* replaces 47 C.F.R. § 54.209 with 47 C.F.R. § 54.313, and sections (1)-(6) are virtually identical except for the major change that 54.313 applies to "any recipient of high-cost support" instead of only federally-designated ETCs. *Order*, ¶ 580 & App. A. The Federal Register announcement of the *Order* lists newly implemented rules that OMB must approve before taking effect. *Connect America Fund*, 76 Fed. Reg. 73830 (Nov. 29, 2011). The list of rules does not include 54.313(1)-(6). *Id.*

agency," the information gathered has "practical utility," and the collection itself "minimize[s] the burden ... on those who are to respond[.]" 44 U.S.C. § 3506(c)(2)(A). The new reporting requirements amount to a scatter-shot data collection effort—in many cases with no potential to add any value to Commission decision-making.

2. The FCC Should Clarify That the New Reporting Requirements Preempt Existing State Requirements.

The Commission should clarify that its new ETC reporting requirements—as applied to CAF recipients—preempt existing state requirements. The Commission states that a primary benefit of its new reporting requirements is "a uniform reporting and certification framework for ETCs" that "will minimize regulatory compliance costs for those ETCs that operate in multiple states." *Order* ¶ 575. But this benefit will not be realized if the new reporting requirements remain a "floor rather than a ceiling for the states." *Id.* ¶ 574. Requiring that ETCs continue to comply with existing state reporting requirements *in addition* to the new federal requirements would be inconsistent with the Commission's contention that its new rules will "minimize regulatory compliance costs," *id.* ¶ 575, particularly since it would result in many ETCs having to prepare and submit two different USF reports per state and, in most cases, at different times of the year.

3. The FCC Should Reconsider its Tribal Reporting Requirements.

The FCC should reconsider its Tribal engagement rules and reporting requirements, which are unlawful for several reasons. *See Order* ¶ 604.

First, the Commission adopted the Tribal engagement rules without adhering to the notice-and-comment requirements of the APA.[34] Indeed, the Commission failed to "fairly apprise interested persons" of the nature of the tribal engagement requirements that were ultimately adopted. *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980). The *NPRM* generally sought comment on whether high-cost recipients should "be required to engage with Tribal governments to provide *broadband* to Tribal and Native community institutions" and asked, "Are there additional requirements that should apply on Tribal Lands?" *NPRM* ¶ 151 (emphasis added). Such generic requests did not afford parties notice that the Commission was planning to require all ETCs serving Tribal areas to engage with Tribal governments in a specific manner and to require documentation of specific items.[35]

Second, the Commission should reconsider the Tribal engagement requirements to the extent they mandate that an ETC have certain discussions with Tribal governments, document such discussions, and "market[] services in a culturally sensitive manner." *See Order*, App. A, § 54.313(a)(9)(iii). These mandates violate the First Amendment. Even speech regarding purely factual "information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001).The Commission's Tribal engagement rules not only direct speech but attempt to direct the nature of the speech in contravention of the First Amendment, which

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34 5 U.S.C. § 553(b), (c). *See, e.g., Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

35 *Order* ¶ 604. Furthermore, no comments or *ex parte* letters on the record provide a basis for the new Tribal reporting requirements. The comments cited by the Commission, *see id.* n.1049, provide no specific proposals on how ETCs should engage with Tribal governments. *See, e.g.,* Joint Comments of Native Public Media and the National Congress of American Indians, WC Docket No. 10-90 at 8-9 (noting the importance of retaining USF support in Tribal lands).

protects a speaker's "right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *See Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Finally, the Commission should reconsider the Tribal reporting requirements because they are impermissibly vague. A regulation is void for vagueness if it (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The Tribal reporting requirements fail on both counts. The *Order* does not discuss, for example, what is meant by "feasibility and sustainability planning" or "marketing services in a culturally sensitive manner," let alone the "documents or information" sufficient to demonstrate an ETC's compliance. *See id.* ¶ 604. Nor does the *Order* provide minimal enforcement guidelines, creating a license for arbitrary and discriminatory enforcement. A regulation that "is so imprecise that discriminatory enforcement is a real possibility" is impermissibly vague. *See Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).

4. The FCC should clarify that the new reporting requirements are prospective only.

Even if the Commission does not reconsider its new ETC reporting requirements, it should apply them prospectively only. As written, the *Order* applies the new reporting requirements retroactively, which raises practical and legal concerns. *Order* ¶ 581.

To illustrate the practical problems, on April 1, 2012, a state-designated ETC would be required to file outage reports covering 2011 in accordance with new section 54.313, even though that ETC would have had no reason to keep its 2011 outage reports in the newly required format.[36] Repackaging existing reports would be burdensome, costly, and at odds with the Chairman's commitment to reducing unnecessary data collections.[37] Moreover, applying the reporting requirements retroactively would require carriers to produce data that may not exist. For instance, if state-designated ETCs have not been under a state obligation to track unfulfilled service requests or the number of complaints per 1,000 customers, new Section 54.313(a)(3) & (4), these data may not be available for the 2012 report. Similarly, ETCs serving Tribal areas would be required to provide in 2012 documentation on discussions with Tribal governments that took place in 2011 on the five enumerated topics, even though such ETCs would have had no reason under existing rules to retain such documentation.

Aside from presenting practical problems, retrospective application of the reporting requirements is contrary to the APA, which requires that rules adopted pursuant to notice and comment "be *given future effect only*." *Chadmoore Comm'ns Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (emphasis added) (quotation marks omitted). A rule is impermissibly retroactive if it "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *DirecTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quotation marks and citations omitted). Here, an ETC would potentially be liable for failing to comply with the reporting requirements in 2012 that relate to activities that took place in 2011, which violates the APA.

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[36] Carriers generally keep outage reporting requirements according to section 4.5 of the Commission's rules, 47 C.F.R. § 4.5, which requires outage reporting in a different format than the format required under the FCC's ETC designation process. 47 C.F.R. § 54.209.

[37] *See* Statement of Chairman Genachowski, WC Docket Nos. 11-10, 07-38, 08-190, 10-132; CC Docket Nos. 95-20, 98-10 (rel. Feb. 8, 2011) ("the Commission shouldn't waste resources collecting data it doesn't need").

Moreover, imposing service quality reporting requirements on ETCs is wrong-headed and directly at odds with President Obama's directives to executive and independent agencies to minimize costly and unnecessary regulations. In 2008, the Commission eliminated similar service quality reporting requirements under the old ARMIS regime because the reports were useless and not used by consumers.[38] No reason exists to resurrect similar service quality reporting requirements under the guise of new ETC obligations.

5. The FCC should reconsider its decision regarding the effective date of its new reporting requirements.

Finally, the Commission should reconsider the April 1 deadline of its new reporting requirements and, instead, make any new reporting requirements effective no earlier than July 1, 2012. *See Order* ¶ 575.

In adopting the April 1 deadline for its new extensive ETC compliance filings, the Commission was laboring under the impression that states typically require a full six months to review ETC reports prior to submitting their annual certification to the FCC on October 1 of each year. *Id.* In fact, however, states do not require such a long lead time, and most state commissions require that data be submitted after July 1, which provides ample opportunity for them to complete their annual certifications to the FCC on a timely basis.[39]

Furthermore, an April 1 filing deadline is problematic from an ETC's standpoint. ETCs that report performance results on a calendar basis typically do not close their books until the end

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[38] *See Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, ¶ 11 (2008).

[39] *See, e.g.,* Washington (July 31), WAC § 480-123-060; North Dakota (August 1), N.D. Admin. Code 69-09-05-12.1; Idaho (September 1), IDAPA 31.46.01; Texas (August 31), 16 TAC § 26.418; West Virginia (July 1), *General Investigation Regarding Certification of Federal Universal Service Funding for Eligible Telecommunications Carriers in West Virginia,* Commission Order, Case No. 11-0818-T-GI (Jun. 13, 2011).

of the first quarter, which would make it difficult, if not impossible, to comply with a April 1 filing deadline. A deadline on or after July 1 would be more consistent with existing state certification procedures and would provide ample time for ETCs to close their books for the preceding calendar year.

G. <u>The Commission's New ETC Document Retention Requirements Are Unduly Burdensome and Unnecessary And Should Be Prospective Only.</u>

The Commission should reconsider its decision to double the existing record retention requirement from five to ten years for recipients of high-cost and CAF support. *Order* ¶ 620. The Commission based its ten-year record retention requirement on the False Claims Act. However, the False Claims Act is designed to ferret out fraudulent claims by government contractors, not to increase the recordkeeping expense of government contractors. *See* 31 U.S.C. §§ 3729-33. [40] In fact, the False Claims Act imposes no affirmative record-keeping requirements on persons or entities submitting claims to the government.

Although the False Claims Act contains a ten-year statute of limitations, 31 U.S.C. § 3731(a)-(b), this provision hardly warrants establishing an equivalent record retention obligation. Indeed, a statute of limitations period by which a claim must be brought and a recordkeeping period during which records must be maintained serve fundamentally different purposes – purposes that the *Order* conflates. Furthermore, the costs of maintaining and storing records for ten years is significant – costs that the Commission ignores and that greatly outweigh any purported benefit from having available records during the entire time that a person could assert a hypothetical False Claims Act claim.

[40] The False Claims Act provides in part that "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty. . . ." 31 U.S.C. § 3729(a)(1)(a).

The ten-year document retention requirement is inconsistent with the Commission's existing five-year administrative limitations period for audits and investigations of universal service fund beneficiaries. According to the Commission, five years "appropriately balance[d] the beneficiary's need for finality and our need to safeguard the USF programs from waste, fraud, and abuse."[41]

A ten-year document retention requirement also significantly exceeds the period for maintaining documents under other federal programs. For example, five-year employment and call record retention requirements apply for Video Relay Services,[42] and other Commission record retention requirements extend for two years or less.[43] The unreasonableness of a ten-year record retention requirement is underscored by regulations implementing the Sarbanes-Oxley Act and the Equal Credit Opportunity Act that embody shorter record retention periods.[44]

The Commission's ten-year record retention requirement also contravenes the purpose of the PRA by maximizing the paperwork burden for USF recipients with little, if any, corresponding benefit.

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41 *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372, ¶ 29 (Aug. 29, 2007). *See* 47 C.F.R. § 54.320(a)-(b) ("*Comprehensive Review Order*").

42 *See Structure and Practices of the Video Relay Service Program*, Second Report and Order, 26 FCC Rcd 10898, ¶ 28 (July 28, 2011); *Structure and Practices of the Video Relay Service Program,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, ¶¶ 85, 87 (2011).

43 *See, e.g.*, 47 C.F.R. § 64.2008(a)(2) (one year record retention of customer proprietary network information for telecommunications carriers); 47 C.F.R. § 42.6 (18 month record retention of billing records for common carriers); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14557, ¶ 225 (2011) (two year record retention after a covered entity ceases to offer a product).

44 17 C.F.R. § 210.2-06 (seven-year retention of audit records); 12 C.F.R. § 202.12 (25-month retention for creditor applications); 15 C.F.R. § 14.53(b)-(d) (three-year retention for recipients of federal grants, which is extendable if audit commences during that time).

Even if the Commission declines to reconsider its ten-year record retention requirement, it should clarify that it applies only to records accumulated from the effective date of the rule going forward. In 2007, the Commission amended section 54.202(e) to mandate that all ETCs must retain records for five years from the receipt of funding. *Comprehensive Review Order* ¶ 24. Practically speaking, this means that on January 1, 2012, compliant ETCs would have retained records from January 1, 2007. If the ten-year requirement of new section 54.320 were applied retroactively (even assuming it were lawful for the Commission to do so), otherwise compliant ETCs with only five years of records would be unable to comply with 54.320.

H. <u>The Commission Should Clarify The Implications of Its Decision Not to Designate Broadband As a Supported Service.</u>

The Commission declined to designate broadband as a "supported service" under section 254(c)(1) but obligated ETCs to deploy broadband as a condition for receiving universal service support. *See Order* ¶¶ 76 & 86. This decision results in several potentially anomalous results that require clarification by the Commission.

First, the Commission should clarify that states may not impose additional conditions on an ETC's provision of broadband services. According to the Fifth Circuit, section 214(e)(2), which authorizes states to designate ETCs, does not expressly prohibit states from imposing some additional eligibility requirements on ETCs. *See TOPUC*, 183 F.3d at 418. However, the court's holding is limited to supported services, and nothing in that decision or the Act could reasonably be read to authorize a state commission to impose conditions on non-supported services pursuant to section 214. Indeed, the court found that reading the plain language of section 214 to allow states to impose additional eligibility requirements on ETCs' provision of supported voice services made sense "in light of the states' historical role in ensuring service quality standards for local [voice] service." *Id.* Here, states have no similar historical role regarding broadband.

Moreover, the plain language of section 214(e) as a whole further evidences Congress's intent that the states' role in designating ETCs is circumscribed to the ETCs' provision of the supported service. Section 214(e)(1) provides that all designated ETCs "shall ... offer the services that are supported by the Federal universal service support mechanisms," 47 U.S.C. § 214(e)(1). And section 214(e)(2) permits states to designate ETCs only insofar as they "meet the requirements of paragraph (1)," *i.e.*, offer the supported service. *Id.* § 214(e)(2). Any attempt by a state to impose conditions on an ETC in connection with its provision of broadband, which is not a supported service, would run contrary to section 214(e), and the Commission should clarify the *Order* accordingly.

Second, the Commission should clarify that to the extent states exercise their limited authority to impose additional obligations on ETCs' voice telephony services, states must fully fund such obligations. Although the *Order* requests that state commissions "review their respective regulations and policies" in light of the Commission's reforms, *id.* ¶ 83, the Commission should make clear that state obligations on voice telephony service that are not fully funded by the state are "inconsistent" with the Commission's rules and would "burden" the federal universal service mechanisms, and thus, would be preempted under section 254(f) of the Act. *See* 47 U.S.C. § 254(f).

Third, the Commission should clarify that support may be spent on equipment used solely to provide broadband services that may be necessary to meet any broadband obligations imposed on recipients. *See, e.g., Order*, ¶¶ 149-50, ¶¶ 205-09. The Commission indicates that CAF recipients may use support for dual-purpose equipment, such as a DSLAMs. *Id.* at n.238.

However, the *Order* is silent on the ability of a CAF recipient to use funds to purchase equipment – such as DSL line cards – that may only be necessary for the provision of broadband services. If a recipient of CAF funding is going to be held to strict broadband deployment requirements, it should have the flexibility to use funding in order to meet those requirements.

And, *fourth*, the Commission should clarify the scope of an ETC's obligation to offer voice telephony "as a standalone service" throughout its designated service area. *See id.* ¶ 80. The Commission appears to interpret this requirement to prohibit an ETC that receives high-cost support from requiring a customer to buy a service other than voice – such as broadband – "in order to purchase voice service." *See id.* n.117. However, the *Order* is silent on the ability of ETCs that receive high-cost support to bundle voice services – specifically local and long distance. Accordingly, the Commission should clarify that ETCs that receive high-cost support are permitted to bundle local and long distance voice service without running afoul of the obligation to offer voice on a standalone basis. Similarly, the Commission should clarify that ETCs receiving no high-cost support have no obligation to offer voice telephony service on a standalone basis. *See id.* ¶ 80.

I. The Commission's Deployment Timeframes Should Exclude Delays Due to Circumstances Outside the Control of the ETC.

The Commission should clarify that delays resulting from circumstances beyond an ETC's control will toll any CAF broadband build-out deadlines established in the *Order*.[45] To meet what the Commission rightly dubs "[t]he universal service challenge of our time" by

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[45] As part of CAF Phase I, ETCs "must complete deployment to no fewer than two-thirds of the required number of locations within two years, and all required locations within three years…." *Order* ¶ 147. As part of CAF Phase II, price cap ETCs accepting a state-level commitment must deploy broadband services to at least 85 percent of covered high-cost locations by the end of the third year and to all supported locations by the end of the fifth year. *Id.* ¶ 160.

deploying new broadband capability to millions of Americans, *Order*, ¶¶ 4-5, the Commission should afford ETCs some leeway when they confront the inevitable construction delays caused by local zoning, permitting authorities, and the like.[46]

Commission rules and past decisions recognize that delays beyond the control of a licensee warrant tolling applicable build-out deadlines. For example, the Commission will toll a broadcast facility construction permit deadline "when construction is prevented by ... *causes not under the control of the permittee* ... including any zoning or environmental requirement."[47] And, according to Commission's 2009 *Tower Siting Order*, nearly one quarter of 3,300 pending zoning applications for wireless facilities had been pending for more than a year. *Tower Siting Order* ¶ 33. For this reason, the Commission defined specific timeframes beyond which a state or local zoning authority's inaction on a tower siting application constitutes a "failure to act" under section 332(c)(7)(B). *Id.* ¶ 4. This same reasoning supports tolling any broadband build-out deadlines due to events beyond an ETC's control.

J. <u>The Commission Should Clarify Implementation of Its Incremental Support Regime.</u>

The Commission should clarify how and when price cap carriers will be able to request waivers of the upstream speed requirement. *See Order* ¶¶ 95 & 147. While noting that such

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[46] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, ¶¶ 32-33 (2009) ("*Tower Siting Order*").

[47] 47 C.F.R. § 73.3598(b)(emphasis added) (listing causes beyond a permittee's control as "any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement . . . including any zoning or environmental requirement," "administrative or judicial review," acts of God, and delayed requests for international coordination); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd 9664, ¶ 58 (2011) (noting how zoning approval extends the process and increases the cost of mobile network deployment).

waiver requests are anticipated and will be handled by the Wireline Competition Bureau, the Commission should specify whether price cap carriers must request a waiver before accepting CAF Phase I incremental support or whether the waiver process will be available after such support is accepted. *See id.* at n.234 ("Upon a showing that the specified support amount is inadequate to enable build out of broadband with actual upstream speeds of at least 1 Mbps to the required number of locations, a carrier may request a waiver.").

Additionally, the Commission notes its expectation that any facilities build out pursuant to a waiver of the minimum upstream speed "will eventually be upgraded." *See id*. ¶ 95. The Commission should clarify that carriers are not obligated to make such future upgrades as a condition to receiving CAF Phase I incremental support and that a carrier will be given the opportunity to decline support without adverse consequences should its waiver be denied.

K. <u>The Commission Should Phase Out The Safety Net Additive Support Under The Same Transition Plan Established For Competitive ETC Support.</u>

The Commission should reconsider its safety net additive support phase-out. As currently constituted, certain incumbent LECs that currently receive safety net additive support will lose this support over a two-year period. *Id.* ¶ 252. However, competitive ETCs that benefit from the same support mechanism will be able to retain safety net additive support for five years under the Commission's more generous phase-down of the identical support rule. *Id.* ¶ 519. This result is unwarranted and violates section 254. *See Alenco Communications*, 201 F.3d at 616 (holding that the universal service program "must treat all market participants equally"). To avoid this result and to ensure equal treatment of ETCs, the Commission should phase-out incumbent LEC safety net additive support on the same five-year schedule as the Commission adopted for the elimination of competitive ETC identical support. Alternatively, the

Commission must treat affected incumbent LECs equally to competitive ETCs that receive safety net additive support when phasing out such support.

L. **The Commission Should Reconsider Its Decision to Make Publicly Available the Financial Disclosures of Privately Held Companies.**

The Commission should allow privately held ETCs to seek confidential treatment of their financial and operational reports which now must be filed with the Commission, USAC, and the state commissions pursuant to the new ETC compliance reporting obligations. *See Order* ¶ 602. Privately held companies do not routinely make available confidential financial and operational reports that the Commission is now requiring be filed. The Commission should allow these private companies to file such financial and operational information pursuant to Commission rules and consistent with the Freedom of Information Act.[48] Disclosure of confidential financial information beyond the Commission, USAC, and the relevant state public service commissions, *id.* ¶ 575 would serve no legitimate governmental or public interest, and the Commission has not offered any justification for treating the financial records of privately held ETCs differently than the financial records of other regulated entities.

[48] *See* 47 C.F.R. § 0.457(d) ("Records not routinely available for public inspection; Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905."); *see also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24823 (1998) (noting the Commission's "policy of *not authorizing the disclosure of confidential financial information* …") (emphasis added) (citations omitted).

III. THE COMMISSION SHOULD RECONSIDER AND CLARIFY CERTAIN ASPECTS OF ITS INTERCARRIER COMPENSATION REFORMS.

A. The Commission Should Make Modest Changes to the Access Recovery Mechanism for Incumbent LECs.

1. The baseline revenue calculation for determining the Eligible Recovery for price cap carriers should be based on billed, not "collected" revenues.

The Commission should reconsider its decision to use "collected" revenues when calculating "Price Cap Baseline Revenues" because this approach is operationally unworkable and fundamentally unfair. *See Order* ¶ 880 (requiring for purposes of the baseline that total switched access revenues include those "for which payment has been received by March 31, 2012"). No mechanized process exists to allocate interstate switched access revenues between "billed" and "collected" revenue. Moreover, it would be difficult, if not impossible, to allocate "collected" revenues between originating and terminating access as would be required by the Commission's formula. Because the formula only includes terminating access, incumbent LECs would be forced to allocate revenues subject to billing disputes between originating and terminating access – a process that would be costly and time consuming.[49]

Because the calculation in question is a one-time event imposed by the Commission for purposes of a transition away from access charges, the Commission should not mandate the creation of a new and unduly burdensome manual process. Doing so would conflict with the

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[49] More concerning, the requirement unjustly harms carriers subject to billing disputes by enshrining their inability to collect revenue in 2011 (which in many cases may be lawfully billed and ultimately collected) as a permanent reduction to the access revenue baseline for the entire six-year terminating intercarrier compensation transition path. This unwarranted decision would compound the result of a 2011 billing dispute by a factor of six. Moreover, the decision to base the access revenue baseline on collected revenues irrationally and unfairly double counts the effect of uncollectable revenue because the end-user ARC charges that will be permitted to recover the access shift will also be subject to uncollectables, most likely at rates comparable to the uncollectable rates that apply to terminating access revenue.

Commission's stated goal to provide a measure of "certainty" through predictable revenue streams as central to its intercarrier compensation reform. *See Order* ¶ 36. Rather than use all revenues "for which payment has been received by March 31, 2012," *id.* ¶ 868, the Commission and price cap incumbent LECs would be better served by using "billed" interstate switched access revenue for purposes of this calculation.

2. The Commission should reconsider the level at which residential rates are compared with the Residential Rate Ceiling.

The Commission contemplates that the "Residential Rate Ceiling" will be calculated by an incumbent LEC on a customer-by-customer basis. This approach is inconsistent with the Commission's pricing rules, which generally recognize the practical necessity of implementing rules on a study area basis. Furthermore, with limited exceptions, the vast majority of charges to be included as part of the Residential Rate Ceiling calculation do not vary across an incumbent LEC's study area, which obviates the need for a customer level calculation.[50]

However, some charges, such as E911 fees, can vary from jurisdiction to jurisdiction within a study area. It would be extremely impractical for an incumbent LEC to modify its billing systems to accommodate minor billing variations that may affect the Residential Rate Ceiling when the purpose of the Commission's rule – maintaining affordable rates – can be accomplished by applying that ceiling on a study area basis. In such instances, the Commission should allow a carrier to account for the average amount of fees varying within a study area.

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[50] The Commission identified the rate ceiling component charges as the federal Subscriber Line Charge ("SLC"), the ARC, the flat rate for residential service, mandatory extended area service charges, state subscriber line charges, state USF charges, state E911 charges, and state TRS charges. See *Order* ¶ 914.

3. The Commission should clarify that the ARC is an interstate charge, even though it may include recovery of intrastate revenues.

The Commission should make clear that the ARC is an interstate charge, even though it may include the recovery of intrastate access revenues and reciprocal compensation revenues in connection with the transition to a bill-and-keep intercarrier compensation regime. *Order* ¶¶ 847-51. Although carriers are not required to charge the ARC, the Commission has carefully delineated how the ARC is to be calculated, required that the ARC be "separately tariffed," and imposed reporting requirements on carriers charging the ARC to enable monitoring by the Commission. *Order* ¶¶ 905-12. Indeed, the Commission "expect[s] incumbent LECs to include the new ARC charges as part of the SLC charge for billing purposes." *Order* ¶ 1334.

Under the circumstances, the ARC – like the SLC – is an interstate charge.[51] However, unlike the SLC, at least a portion of the ARC is intended to recover intrastate revenues lost by an incumbent LEC as a result of the Commission's reforms. To avoid any ambiguity regarding the ARC's regulatory status and to eliminate any possibility that a state commission may seek to oversee the calculation or recovery of the ARC on an incumbent LEC's bill, the Commission should make clear that the ARC is an interstate charge subject to exclusive federal oversight.

This clarification also is necessary for practical reasons associated with universal service contributions. If carriers include the ARC on the SLC line-item on customer bills, the total

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[51] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 ¶ 53 n.160 (2010) (describing the SLC as "an end-user charge regulated by this Commission, for interstate access"); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, Order and Second Order on Reconsideration, 17 FCC Rcd 11593, ¶ 4 n.12 (2002) ("The SLC is a flat, monthly charge assessed directly on end users to recover interstate loop costs"); *see also NARUC v. FCC*, 737 F.2d 1095, 1113-1114 (D.C. Cir. 1984).

amount would be subject to USF contributions as an assessable interstate charge. LEC billing systems in many cases are not capable of mapping some, but not all, of the revenue associated with the SLC line-item on bills to its universal service contribution base of assessable revenues, and modifying a billing system to add the ARC as a separate line-item charge would be a costly and time-consuming exercise.

4. The Commission should permit incumbent LECs to receive reimbursement from the Lifeline fund for ARC charges that incumbent LECs cannot recover from Lifeline customers.

The Commission's decision to exclude recovery of ARC charges for Lifeline customers is arbitrary and capricious because it departs without explanation from prior Commission precedent and contradicts the Commission's articulated goal of eliminating implicit subsidies. Accordingly, the Commission should reconsider this decision and allow ARC recovery for Lifeline customers from the Lifeline fund.

First, ARC charges should be not be treated differently than SLCs under the existing Lifeline mechanism. Under the Commission's existing Lifeline program, an incumbent LEC effectively "waives" its subscriber line charge for Lifeline customers and recovers that amount from the Lifeline mechanism.[52] Here, by contrast, the Commission proposes that an incumbent LEC simply forgo that revenue without explanation. *Order* ¶ 909, n.1782.

Second, by prohibiting the recovery of an ARC charge from Lifeline customers, the Commission creates a new implicit subsidy between customers that pay the ARC charge and those that do not. This is the illogical consequence of the Commission's determination that

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[52] *See* 47 C.F.R. §54.403(a)(1) ("The tariffed rate in effect for the primary residential End User Common Line charge of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service[.]"); *see also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 341 (1997).

"incumbent LECs' calculation of ARCs for purposes of the recovery mechanism must identify and exclude such customers." *Id*. By excluding Lifeline customer ARC revenues from the calculation, the Commission's formula requires that non-Lifeline customers will pay a higher ARC than would otherwise be the case. This implicit subsidy is impossible to reconcile with section 254(e) (stating that universal service support should be "explicit") and the primary thrust of the Commission's reform efforts to eliminate implicit subsidies in general. *Order* ¶ 862.

B. <u>The Commission Should Take Additional Steps To Prevent Regulatory Arbitrage.</u>

1. The Wireline Competition Bureau should clarify the definition of VoIP-PSTN traffic in 47 C.F.R. § 51.913(a).

In including VoIP-PSTN traffic as part of a unified intercarrier compensation framework, the Commission intended to "minimize future uncertainty and disputes regarding VoIP compensation, and thereby meaningfully reduce carriers' future costs." *Order* ¶¶ 40 & 935. However, the Commission's ability to achieve that objective is threatened by alleged ambiguity regarding the scope of "VoIP-PSTN traffic," which the Commission should clarify.[53]

When seeking to collect terminating access charges for PSTN-originated calls, some cable providers claim that their VoIP service does not utilize Internet protocol-compatible customer premises equipment.[54] The *Order* includes cable VoIP traffic within the new "IP-

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[53] This petition seeks clarification of the scope of that definition to avoid inconsistency with the Commission's stated policy goals. It does not seek reconsideration of an entirely distinct issue that the Commission has already resolved: whether a LEC that accepts terminating traffic bound for a non-LEC VoIP partner may collect access charges for the functions performed by the non-LEC VoIP provider rather than the LEC. *See Order* ¶¶ 970-71; *cf.* 47 C.F.R. § 61.26. The Commission's resolution of that issue is now ripe for judicial review, irrespective of how the Commission rules on this petition.

[54] *See, e.g., Complaint Against Verizon Florida, LLC and MCI Communications Services, d/b/a Verizon Business Services for Failure to Pay Intrastate Access Charges for the Origination and Termination of Intrastate Interexchange Telecommunications Services by Bright House*

PSTN" category, regardless of how cable companies distribute traffic within a home or the standard cable VoIP equipment used at the customer location. The Wireline Competition Bureau should resolve any potential ambiguity between the *Order* and its rules by construing the term "customer premises equipment" in new section 51.913(a) to include any equipment at or within proximity of a customer premises that enables the use of voice handsets or other equipment used for voice functions. In addition, or in the alternative, given the intent of the *Order*, the Bureau could make clear in section 51.913 that the new rule covers terminating traffic when the associated revenues are reported by providers as interconnected VoIP on their 2011 FCC Form 499As. The Bureau has delegated authority to revise section 51.913 to make these clarifications under these circumstances. *See Order* ¶ 1404.

2. The Commission should limit the ability of LECs engaged in access stimulation to circumvent the rules by inflating mileage.

The Commission has taken important steps to address access stimulation by LECs. However, there is a potential loophole that the Commission should close – namely, the ability of a LEC engaged in access stimulation to route traffic merely to increase its recovery of mileage-sensitive charges.[55]

(footnote cont'd.)
Networks Information Services (Florida), LLC, Docket No. 110056-TP, Direct Testimony of Michael Starkey, at 10-14 & 38 (filed Nov. 1, 2011); *Armstrong Telecommunications Inc. v. Verizon Pennsylvania, Inc.*, Docket Nos. C-2010-2216205, *et seq.*, Main Brief of Armstrong Telecommunications Inc. at 36 (filed Dec. 6, 2011).

[55] For example, unscrupulous LECs have rehomed their traffic to a new tandem located in a distant geographic location in an attempt to increase terminating access charges, even though doing so is less efficient from a network routing standpoint. LECs have also leased capacity on equal access rings to inflate the mileage they collect. In this scenario, instead of paying the standard rate charged by the equal access provider, IXCs are charged the higher transport rate associated with the pumping LEC even though the traffic travels over the same facilities.

Accordingly, the Commission should make clear that the remedies associated with access stimulation are not limited to a requirement that the access-stimulating LEC refile its interstate access tariffs. *See Order* ¶ 679. If a LEC that meets the two conditions for access stimulation engages in other questionable conduct to increase artificially mileage-sensitive transport charges, the affected carrier should have the ability to utilize the Commission's complaint procedures to obtain appropriate relief.[56]

3. Competitive LECs engaged in access stimulation should be required to lower their rates to $0.0007.

The Commission should not permit a competitive LEC engaged in access stimulation to recover more that $.0007 per minute for terminating access. The *Order* concludes that "the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition." *See id.* ¶ 690. As AT&T and Sprint have pointed out, competitive LECs engaged in access stimulation have extremely low costs (because the equipment they use is almost always located in a carrier's rural central office, avoiding any outside plant charges), and a benchmark rate based on the incumbent LEC's rate would therefore continue to encourage access stimulation.[57] The Commission's approach to dial-up ISP-bound traffic provides a better approach to dealing with carriers that incur minimal costs to simply route high volumes of traffic, and thus the $.0007 rate provides a better benchmark for competitive LECs engaged in access stimulation. *See* AT&T Comments at 16.

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[56] The Commission has recognized in other contexts that it should take steps to ensure "that carriers do not shift costs between or among other rate elements, which would be counter to the principles" adopted by the Commission. *See Order* ¶ 798.

[57] Comments of AT&T, WC Docket No. 10-90 at 16-17 (filed Apr. 1, 2011); Comments of Sprint Nextel Corp, WC Docket No. 10-90 at 2, 8-9 (filed Apr. 1, 2011).

4. The intrastate rates charged by new entrants prior to July 1, 2013 should be subject to the mirroring rule at interstate levels.

The Commission's transition plan in implementing bill-and-keep as the default methodology for all intercarrier compensation traffic is, for the most part, carefully balanced. However, it does not indicate the appropriate level of intrastate access rates charged by a new entrant entering the market prior to July 1, 2013, the date by which intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate rate, are reduced to parity with interstate access rates. *See Order* ¶ 801.

To avoid disputes regarding appropriate rates to be charged by and paid to a new entrant, the Commission should require a carrier entering the market after December 29, 2011, to charge intrastate access rates that mirror interstate rates at the outset. Unlike existing carriers competing in the market based on established business plans that include "implicit support on which they have been permitted to rely for many years," *Order* ¶ 870, a new entrant has no expectancy interest in charging legacy intrastate access rates and no need for a transition to interstate rates.

5. The Commission should clarify that suspension decisions under section 251(f)(2) do not extend to the Commission's new intercarrier compensation regime.

The Commission correctly recognized the dangers to achieving a uniform intercarrier compensation regime if state commissions were permitted to suspend or modify requirements under this regime pursuant to section 251(f)(2). *See Order* ¶¶ 822-24. However, the possibility that section 251(f)(2) could be used to circumvent the Commission's reform efforts is not limited to future petitions seeking a suspension or modification of bill-and-keep. Specifically, state commissions previously have granted numerous suspensions and modifications of obligations under sections 251(b) and 251(c), which, if allowed to remain in effect, could undermine the Commission's reform efforts. Accordingly, the Commission should make clear that any suspension or modification decision already adopted by a state public service commission under section 251(f)(2) does not extend to the Commission's new intercarrier compensation regime.

6. The Commission should clarify that its "interim default rule" allocating responsibility for transport costs between rate-of-return carriers and CMRS providers does not affect the current rules governing points of interconnection.

To minimize adverse impacts on rural, rate-of-return carriers, the Commission adopted an "interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between CMRS providers and rural, rate-of return regulated LECs," including when a CMRS provider selects an interconnection point outside the LEC's service area. *Order* ¶¶ 998-99. The Commission should clarify that nothing in the *Order* or its the interim default rule was intended to affect the rules governing points of interconnection between CMRS providers and price cap carriers. Section 251(c)(2) requires an incumbent LEC to provide interconnection "at any technically feasible point *within the carrier's network*." *See* 47 U.S.C. § 251(c)(2)(B) (emphasis added). And, the Commission specifically concluded that it would address issues concerning the "default point at which financial responsibility for the exchange of traffic [under a bill and keep regime] shifts from the originating carrier to the terminating carrier" in its *FNPRM*. *Order* ¶ 998. In the meantime, the Commission should foreclose any suggestion that it intended to modify the rules governing interconnection points between CMRS providers and price cap carriers when it created the interim default rule for rate-of-return carriers.

C. <u>The Commission Should Revisit Its Treatment of Certain Originating Access Issues.</u>

The Commission desired to "limit[] reform to terminating access charges at this time," given its intent to "further evaluate" other charges including originating access. *Order* ¶ 739. However, the *Order* may create anomalous results and potential arbitrage opportunities regarding originating access, which the Commission should address.

First, like price cap carriers, rate-of-return carriers' originating intrastate access charges should be capped at current rates as of the effective date of the rules, subject to a rate-of-return carrier's ability to apply for and obtain a waiver. Notwithstanding the Commission's suggestion to the contrary, *id.* ¶ 805, there is no evidence that rate-of-return carriers would be financially harmed by capping their originating intrastate access charges.

Second, if there was a decision to exempt toll traffic that is originated on the PSTN and terminated on VoIP facilities from the payment of originating intrastate access charges (rather than deferring this issue to the *FNPRM*), the Commission should address the consequences of that decision. *See id.* ¶ 961. At a minimum, the Commission should provide for recovery through the CAF for lost originating intrastate access revenues associated with toll VoIP-PSTN traffic, including any such revenues lost during the first half of 2012.

Third, the Commission should reconsider its apparent decision to allow VoIP providers for the first time to impose originating interstate access charges. To the extent the Commission intended to create a new entitlement, it did not explain its rationale. Furthermore, if that was in fact the Commission's intent, it would not be appropriate to rely, as the Commission acknowledges doing, on section 251(b)(5), which cannot lawfully authorize the imposition of originating access charges, whether on a transitional or permanent basis. *Id.* ¶ 961, n.1976.

D. <u>The Commission Should Clarify The Date in Rule 51.705(c)(3) (July 1 instead of January 1).</u>

In its default rules for non-access reciprocal compensation, the Commission states that "[e]ffective July 1, 2013, no telecommunications carrier's Non-Access Reciprocal Compensation rates shall exceed that carrier's tariffed interstate access rate in effect in the same state on *January 1* of that same year, for equivalent functionality." *Order*, App. A, § 51.705(c)(3) (emphasis added). The Commission's Part 61 tariff rules typically anticipate a July 1st tariff effective date.[58] As such, the Commission should conform Commission Rule 51.705(c)(3) to its existing tariffing regime and January 1st to July 1st.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom's Petition for Reconsideration.

Respectfully submitted,

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December 29, 2011

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[58] *See, e.g.,* Commission Rule 61.3 definitions referring to July 1 effective date for certain rate calculations. 47 C.F.R. § 61.3.