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 Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

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Executive Summary

USTelecom supports the Commission's efforts to comprehensively reform high-cost universal service and intercarrier compensation and largely endorses the USF/ICC Transformation Order. However, an Order of this scope and magnitude invariably raises issues requiring reconsideration as well as implementation and other issues requiring clarification. Several implementation issues were addressed in USTelecom's Petition for Reconsideration and many more are the subject of these comments on Sections XVII.A-K of the Further Notice.

The essential foundation of a universal service high-cost reform order is the recognition that the Commission is obligated by law to provide sufficient funding to ensure reasonably comparable services and rates are available to inhabitants of rural areas. To accomplish this goal for rate-of-return and price cap areas, the Commission must take great care in designing a compensatory and equitable CAF for all high-cost areas.

The CAF must be sufficient and conform to the high-cost fund budget. USTelecom continues to support the Commission's decision to establish a budget for the high-cost portion of the universal service fund. The Joint Framework, submitted by USTelecom, NTCA, OPASTCO, WTA, and the ABC Plan participants, proposed an overall high-cost fund budget of $4.5 billion. The allocation proposed by the Joint Framework continues to best fulfill the Commission's goal of extending broadband availability through provision of sufficient funding. Now that the budgets have been established in the Order with funding different than that proposed in the Joint Framework, to ensure sufficiency the Commission must be careful to align the obligations of both price cap and rate-of-return ETCs with the funding made available. The Commission's decision to bootstrap a broadband deployment and maintenance obligation onto carriers that only receive federal universal service funding for the provision of voice telephony service in their geographic service areas turns a blind eye to the sufficiency of the support necessary to satisfy this obligation.

Modification of the Rural Association proposal is the proper direction for the Commission to take when designing a CAF for areas served by rate-of-return carriers. It is vitally important that such modifications conform to the principle of sufficiency and not impose unfunded mandates on rate-of-return companies serving rural high-cost areas.

The Commission should be sure to provide additional, sufficient support to address middle mile and broadband backbone costs. As recognized in the National Broadband Plan, a significant barrier to providing high-speed broadband Internet access services in rural areas, in addition to the cost of last mile and second mile network facilities, is the cost of middle-mile facilities and services between rural areas and the Internet backbone. The price cap and rate-of-return area CAF should support those facilities to leverage the investment in second mile and last mile facilities.

ETCs should 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. It is neither sensible nor lawful for the Commission to retain its existing interpretation of section 214(e) or its ETC rules, which require ETCs to offer legacy services throughout their designated ETC service areas. Conversely, the Commission should not eliminate support for areas with an unsubsidized competitor until all requirements to serve such areas, whether they be state or federal requirements, are eliminated. If and when that occurs, elimination of support may be appropriate. However, such elimination must be done carefully and gradually. The Commission should certainly adopt a rule that an ETC does not have to serve any location within its study area that is served by an unsubsidized competitor, but its support for those lines should not be phased out until equivalent state requirements are also eliminated. The practical effect of removal of the federal requirement is nil as long as the state requirements are extant.

The Commission should adopt appropriate measures recognizing that accurate identification of areas with competitive overlap is a difficult process with significant consequences. If a third-party source (such as NTIA's National Broadband Map) is initially used for identification, there must be a challenge or appeal process to deal with situations where that map is not accurate.

The transition period for phase out of support to ILEC lines in areas served by an unsubsidized broadband competitor should be five years. The Order uses five years as a reasonable phase down for phasing out identical support from the high-cost universal service mechanism. That time period should be no shorter for phase-downs of universal service support for ILECs.

The Commission should apply the same public interest obligations, including broadband performance requirements and performance measurement methods, to all CAF recipients providing fixed service, whether such service is provided by wireline or wireless means. Moreover, the Commission must carefully weigh the potential costs and benefits of any particular obligation. The Commission's experience pursuant to the SamKnows process should inform its consideration overall and, in particular, its consideration of speed, latency and other performance measurement rules. Since the CAF is a technologically neutral mechanism, implementation of speed and latency measurement, certification and reporting obligations should be the same for all fixed ETCs regardless of the platform on which they are providing broadband service. So there should be no greater burdens on wireline ETCs than on wireless ETCs, and any implementation of measurement methodologies for wireline ETCs should be concurrent with that of wireless ETCs.

There is no need to alter the Commission's current approach toward determining reasonable comparability of voice services. The Commission currently determines the reasonable comparability of voice rates and services using publicly available data sources and provider websites. There is nothing in the Order that modifies the reasonable comparability requirement and necessitates a greater level of information than was previously collected.

CAF recipients should not be required to offer IP-to-IP interconnection for voice service beyond what the Commission adopts more broadly. The social contract of universal service funding is that monies will be supplied to allow an ETC to have a viable business case to deploy and maintain facilities to provide ubiquitously available service. The Commission should not impose further obligations unrelated to that fundamental goal that go beyond those imposed on similarly situated providers who are not ETCs. The proposal by Public Knowledge and the Benton Foundation to have CAF recipients make interconnection points and backhaul capacity available so that unserved high-cost communities could deploy their own broadband networks also should be rejected.

Referral of any issues involving the CAF to the Separations Joint Board should be as narrow as possible, and with respect to the CAF for rate-of-return carriers, limited to the issue raised by the Rural Association plan. In general, retention of jurisdictional cost separations merely perpetuates an unnecessary legacy mechanism. Now that the Commission has begun comprehensive reform of intercarrier compensation and high-cost universal service, it should indefinitely extend the separations freeze and initiate a proceeding reflecting its forward-looking actions on intercarrier compensation and high-cost universal service, which would result in the elimination of cost separations for all providers.

Both the Joint Framework and the Rural Association proposal offered to waive the Part 65 rules to significantly lower the interstate rate of return without a full-blown rate-of-return represcription proceeding as part of a comprehensive plan to equitably spread the belt-tightening required to fit into a high-cost budget for rate-of-return high-cost support, but the Commission chose to reject that proposal. The Commission should not try to have its cake and eat it too – a lower rate of return and a less than thorough represcription proceeding. Based on its decision to allow small rural high-cost companies to continue to be subject to rate-of-return regulation, the Commission retains the statutory responsibility to have a fair and thorough rate-of-return represcription proceeding. Such a proceeding must be based on rules subject to notice and comment prior to its commencement.

The regression analysis proposed in the Further Notice can have significant implications for the calculation of support for high-cost rate-of-return ETCs. It is very important that the analysis be fair and accurate. The Commission's methodology requires further review and evaluation before being implemented. USTelecom has several concerns about the regression analysis proposed in the Order.

It is not necessary for the Commission to impose new remedies for ETC non-compliance with rules. Rules currently in place in the high-cost program have proved their adequacy. ETCs receiving CAF funding should not have to obtain an irrevocable letter of credit (LOC). Such a requirement would create the necessity of establishing a cash reserve against the amount of the LOC and, for many ETCs, could create significant financial hardship.

Price cap ETCs not electing statewide model support should have the opportunity to receive support for eligible areas through the competitive bidding process. The competitive bidding process benefits from having more participants involved. In addition, a price cap carrier should not be penalized by disqualification from the bidding process if it determines that it cannot make a viable economic case that would justify assuming statewide obligations in exchange for proposed CAF support.

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COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

This submission by USTelecom[1] is in response to the Federal Communications Commission's ("Commission") request for comments on its Further Notice of Proposed Rulemaking ("Further Notice") on the high-cost universal service aspects of its USF/ICC Transformation Order ("Order") contained in Sections XVII.A-K.[2] USTelecom supports the Commission's efforts to comprehensively reform high-cost universal service and intercarrier compensation and largely endorses the Order. However, an Order of this

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

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

scope and magnitude invariably raises issues requiring reconsideration (two of which the Commission has already addressed in its *sua sponte* Order on Reconsideration adopted December 23, 2011,[3] and several of which were included in USTelecom's Petition for Reconsideration),[4] as well as implementation and other issues requiring clarification. Several implementation issues were addressed in USTelecom's Petition for Reconsideration[5] and many more are the subject of the Further Notice. USTelecom respectfully requests that the Commission adopt USTelecom's recommendations contained in both its Petition for Reconsideration and in these comments.

I. ANY HIGH-COST OBLIGATIONS MUST BE MATCHED TO FEDERAL SUPPORT

Areas served by high-cost recipients, both rate-of-return and price cap carriers, encompass a significant portion of the geography of our nation. Americans living in those areas deserve and expect services that are reasonably comparable to those in urban areas, and the Commission is obligated by law to provide sufficient funding to ensure reasonably comparable services and rates are available to inhabitants of rural areas. To accomplish this goal for rate-of-return and price cap areas, the Commission must take great care in designing a compensatory and equitable CAF for all high-cost areas.[6]

[3] *Order on Reconsideration, Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, (rel. Dec. 23, 2011) (*USF/ICC Transformation Order).*

[4] Petition for Reconsideration of USTelecom, ("Petition"),WC Docket No. 10-90 (December 29, 2011).

[5] *Id*.

[6] The CAF for rate-of-return areas affiliated with price cap carriers was included in the *USF/ICC Transformation Order* at ¶129 ("we will, for purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps.")

A. **The CAF Must Be Sufficient and Conform to the High-Cost Fund Budget**

USTelecom continues to support the Commission's decision to establish a budget for the high-cost portion of the universal service fund. The Joint Framework[7] submitted by USTelecom, NTCA, OPASTCO, WTA, and the ABC Plan participants,[8] proposed an overall high-cost fund budget of $4.5 billion, with $2.2 billion allocated to price cap companies and beginning at $2 billion for rate-of-return areas, and to the extent necessary to ensure sufficient funding, the rate-of-return budget would increase by $50 million per year to an annual budget target of $2.3 billion in the sixth year. The Commission reduced the price cap budgeted amount by $400 million to $1.8 billion and set the rate-of-return budget at $2 billion, while moving approximately $50 million from the rate-of-return side of the equation to the price cap side by virtue of its treatment of the rate-of-return affiliates of price cap companies. The allocation proposed by the Joint Framework continues to best fulfill the Commission's goal of extending broadband availability through provision of sufficient funding.

Establishment of a CAF for rate-of-return and price cap carriers must be accomplished within the context of a high-cost budget. Unfortunately the Order established the budget without concurrently determining how a CAF for price cap and rate-of-return companies could be established that would provide sufficient funding to meet universal service obligations. Now that the budgets have been established in the

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[7] *See*, Letter from Jonathan Banks, USTelecom, to Marlene Dortch, Secretary, Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, et. al., July 29, 2011 (available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021699004) (visited January 12, 2012).

[8] The ABC Plan participants are AT&T, CenturyLink, FairPoint Communications, Frontier Communications, Verizon and Windstream.

Order, the Commission must be careful to align the obligations of both price cap and rate-of-return ETCs with the funding made available to ensure sufficiency.[9]

B. The CAF Must Provide Sufficient Funding for Any New Broadband Performance Obligations

CAF support for both price cap and rate-of-return carriers must conform to the Act's principle of sufficiency.[10] USTelecom addressed concerns about sufficiency for price cap and rate-of-return carriers in its Petition for Reconsideration of the Order.

As noted in USTelecom's Petition, 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).[11] Even though ensuring the sufficiency of universal service support is a direct statutory command, the *Order* is devoid of any analysis that legacy universal 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 funding

[9] A fundamental principle of high-cost universal service funding must be sufficient compensation in exchange for obligations imposed, whether that be for areas served by rate-of-return companies, price cap providers, or other high-cost fund recipients.

[10] See Section 254(b)(5) which requires "*sufficient* Federal and State mechanisms to preserve and advance universal service," and Section and 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) and 254(e) (emphasis added).

[11] *Id.* at 10.

for the provision of voice telephony service in their geographic service areas, while turning a blind eye to the sufficiency of the support necessary to satisfy this obligation.[12]

The Commission also lacks authority under Title I to impose broadband deployment and maintenance obligations as a condition to carriers' receipt of legacy federal universal service support.[13] Broadband is an information service regulated under Title I, and section 3(51) of the Act expressly precludes the Commission from imposing common-carrier regulations on broadband. Mandatory broadband deployment and maintenance obligations are precisely the type of common-carrier regulation precluded by section 3(51). Broadband public interest obligations are merely a subset of deployment and maintenance obligations. 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.

In particular, the Commission should be sure to provide additional, sufficient support to address middle mile and broadband backbone costs. As recognized in the National Broadband Plan,[14] a significant barrier to providing high-speed broadband Internet access services in rural areas, in addition to the cost of last mile and second mile network facilities, is the cost of middle-mile facilities and services between rural areas and the Internet backbone. The price cap and rate-of-return area CAF should support those facilities to leverage the investment in second mile and last mile facilities.

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[12] Such bootstrapping itself violates section 254(e). First, it contravenes the mandate that universal service support be use "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.

[13] Petition for Reconsideration of USTelecom at p. 11.

[14] See, Report, *Connecting America: The National Broadband Plan* (released March 16, 2010) (*National Broadband Plan*) (available at: http://www.broadband.gov/plan/).

The absence of adequate middle-mile facilities can undermine the investment made in robust last mile and second mile plant. Increased adoption and usage of broadband services, an important public policy goal endorsed by the Commission,[15] places even more strain on middle-mile facilities and other facilities needed to access the Internet backbone. Funding the necessary investment in such facilities in the CAF for rural high-cost areas will help to ensure that service in such areas is reasonably comparable to that of urban areas.

For purposes of funding middle-mile facilities of rate-of-return carriers, the Commission should consider adopting the middle-mile funding proposal made by the Rural Associations[16] as modified by any funding constraints imposed by the Joint Framework or the Order. The Rural Associations responsibly proposed a constraint on the recovery of middle-mile costs for rate-of-return carriers.[17] The Commission should fund middle-mile costs and adopt the mechanism proposed by the Rural Associations to ensure that such funding for rate-of-return carriers is efficient and effective.

C. ETC Obligations Should Be Eliminated in Areas Where a Carrier Does Not Receive Legacy High-Cost or CAF Support

ETCs should 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

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[15] *See e.g.*, *National Broadband Plan*, p. xi (stating that the Government can positively influence the broadband ecosystem by "support[ing] efforts to boost adoption and utilization." *See also National Broadband Plan*, pp. 165 – 190.

[16] See Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization For The Promotion And Advancement of Small Telecommunications Companies; and Western Telecommunications Alliance; Concurring Associations, WC Docket No. 10-90, pp. 29 - 31 (April 18, 2011) (available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021238834) (visited January 13, 2012) (*Rural Association Comments*).

[17] *Id.*, p. 30 (stating that "To ensure efficiency and fiscal responsibility, however, support from the CAF for the middle mile cost component would be constrained by measures based on capacity per subscriber (in Mbps) determined to be necessary under standard engineering practices to meet actual broadband demands of customers, and would reflect the actual cost per megabit of the in-place middle mile network.").

CAF support. It is neither sensible nor lawful for the Commission to retain its existing interpretation of section 214(e)[18] or its ETC rules,[19] which require ETCs to offer legacy services throughout their designated ETC service areas.

By definition, the ETC designation's purpose is to identify carriers that are *eligible* to receive universal service funding. Given the change from the legacy regime (which enabled more than one carrier to become an ETC and thereby qualify for any universal service funding distributed in a given geographic area) to the new regime (which will entitle just one provider to qualify for support), many existing ETCs will no longer be eligible to receive funding. Perpetuating ETC service obligations for carriers that do not receive universal service support would therefore be a clear violation of section 214. Furthermore, such a result would violate the "equitable and nondiscriminatory" provisions of section 254,[20] since an ETC that has lost its universal service support would be compelled to continue competing against a CAF-funded provider.

D. The Commission Should Not Reduce a Carrier's Support for Areas with an Unsubsidized Competitor Until All of the Carrier's Requirements to Serve Such Areas Are Eliminated, and the Transition Period for Any Phase Out in ILEC Support Should Not Be Less than Five Years

The Commission should not eliminate support for areas with an unsubsidized competitor until all requirements to serve such areas, whether they be state or federal requirements, are eliminated. If and when that occurs, elimination of support may be appropriate. However, such elimination must be done carefully and gradually.

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[18] *See* 47 U.S.C. Sec. 214(e)(1).
[19] *See* 47 C.F.R. Sec. 54.101(a).
[20] *See* 47 U.S.C. Sec. 254(b)(4), (d), (f).

For the determination of support for rural high-cost areas served by price cap and rate-of-return carriers, it is not relevant as to whether an area is served by an unsubsidized broadband competitor as long as the incumbent provider is required to extend voice service to that area. Under the Order, voice is the supported service and broadband must be provided as a condition of receiving high-cost universal service support. The Commission explicitly declined to adopt the proposal included in the ABC Plan that it preempt state Carrier of Last Resort (COLR) requirements.[21] The continuation of those requirements means that whether a price cap carrier or a small rate-of-return carrier is receiving any revenue from end-user customers or high-cost universal service funding for providing service in the area served by an unsubsidized broadband provider, it must provide facilities and potentially service to all locations within that area. The Commission should certainly adopt a rule that an ETC does not have to serve any location within its study area that is served by an unsubsidized competitor, but its support for those lines should not be phased out until equivalent state requirements are also eliminated. The practical effect of removal of the federal requirement is nil as long as the state requirements are extant.

In addition, the Commission should adopt appropriate measures recognizing that accurate identification of areas with competitive overlap is a difficult process with significant consequences. If a third-party source (such as NTIA's National Broadband Map) is initially used for identification, there must be a challenge or appeal process to

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[21] *See,* ABC Coalition Proposal Framework, p. 13 (stating that if a state maintains COLR obligations for price cap incumbent LECs, "the Commission must preempt such obligations as inconsistent with federal broadband policy unless the state fully funds the obligations with explicit support and the ILEC agrees to accept the obligations in exchange for funding.") (available at: http://americasbroadbandconnectivity.org/wp-content/uploads/2011/07/Attachment1-Framework-of-the-Proposal.pdf) (visited January 13, 2012) (*ABC Framework*).

deal with situations where that map is not accurate. That appeal process should be administered by an impartial third party. Data submitted in the appeal process should be auditable and as granular as possible. In addition, given the large size of many rural census blocks and the associated high-costs of serving such census blocks, eliminating support for an entire census block based on the unsubsidized competitor passing one location in the census block would not serve the interest of extending the availability of broadband service.

With respect to areas served by rate-of-return carriers, once the study area is divided into areas still eligible for support and areas no longer eligible for support due to the presence of an unsubsidized competitive broadband provider, loop costs could be allocated between the two areas based on a cost study. Joint and common costs could then be allocated based on the factor developed in the loop cost study. In most instances the competitor's facilities will cover the lower-cost higher-density portions of the study area (the town), so a per-line *pro rata* allocation would understate the costs in the outlying area. Since the price cap cost model has not yet been adopted by the Commission, no conclusions can be drawn as to whether it would be appropriate to use the model for this purpose.

Finally, the transition period for phase out of support to ILEC lines in areas served by an unsubsidized broadband competitor should be five years. The Order uses five years as a reasonable phase down for phasing out identical support from the high-cost universal service mechanism.[22] That time period should be no shorter for phase-downs of universal service support for ILECs.

[22] *See USF/ICC Transformation Order* at para. 519.

E. The Rural Association Proposal Should be Modified Consistent with the Framework of the Order and in Conformance with the Principle of Sufficiency

Modification of the Rural Association proposal is the proper direction for the Commission to take when designing a CAF for areas served by rate-of-return carriers. It is vitally important that such modifications conform to the principle of sufficiency and not impose unfunded mandates on rate-of-return companies serving rural high-cost areas. The Rural Association proposal, as modified by the Joint Framework, was carefully structured to match obligations with funding within a specific budget. Given the reduction in the budget for support allocated to rate-of-return areas, the Commission cannot reasonably expect that the same level of increased broadband availability can be funded by a significantly reduced high-cost funding mechanism. The Rural Association plan properly tied build-out commitments to an individual company's ability to receive incremental CAF support for new investment, subject to capital investment constraints and the budget target. Given that legacy funding has resulted in the current level of voice and broadband availability in areas served by rate-of-return carriers, the Rural Association approach tying incremental funding to incremental broadband availability is eminently reasonable and should be adopted.

II. CAF PERFORMANCE OBLIGATIONS SHOULD BE TECHNOLOGY NEUTRAL AND PRODUCE BENEFITS THAT OUTWEIGH COSTS

A. Regardless of the Technology Employed to Provide Service, the Same Public Interest Obligations Should Apply to All CAF Recipients

The Commission should apply the same public interest obligations, including broadband performance requirements and performance measurement methods, to all CAF recipients providing fixed service, whether such service is provided by wireline or wireless means. Moreover, the Commission must carefully weigh the potential costs and benefits of any particular obligation. The Commission's experience pursuant to the SamKnows process[23] should inform its consideration overall and, in particular, consideration of speed, latency and other performance measurement rules. The SamKnows experiment required substantial resources from private industry, the government and academia. The experiment demonstrated that fixed wireline provider performance claims for the broadband services that were tested were fundamentally accurate.[24]

In the Further Notice the Commission seeks comment on whether it should adopt a specific measurement methodology beyond what is described in the Order.[25] Among other things, the Commission asks whether it should "adopt a uniform methodology for measuring broadband performance," and whether it should "require fixed funding recipients to install SamKnows-type white boxes at consumer locations in order to monitor actual performance in a standardized way."[26] USTelecom believes that proposals should be cost effective and produce program and consumer benefits. Any mechanism implemented by the Commission for measuring actual speed and latency on fixed ETC networks should be uniform and practical.

An approach implementing a uniform methodology for all fixed ETCs should be practical and cost effective. The SamKnows process, which was formally launched in

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[23] Public Notice, *Comment Sought on Residential Fixed Broadband Services Testing and Measurement Solution, Pleading Cycle Established*, 25 FCC Rcd 3836 (2010); *see also*, Report, Measuring Broadband America a Report on Consumer Wireline Broadband Performance in the U.S., August 2, 2011 (*SamKnows Report*).

[24] The first SamKnows report did not address fixed *wireless* services.

[25] The *USF/ICC Transformation Order* adopted a rule requiring that actual speed and latency be measured on each ETC's access network from the end-user interface to the nearest Internet access point, requiring ETCs to certify to and report the results to USAC on an annual basis. *USF/ICC Transformation Order*, ¶¶ 1013 – 1017.

[26] *Id.*, ¶1014.

July, 2010,[27] was a highly complex undertaking involving more than a dozen wireline ISPs, academic researchers, technology vendors and consumer groups, as well as industry and governmental representatives. As the Commission acknowledged in its final report, participants contributed “significantly” to the effort.[28] Among other things,[29] wireline ISPs engaged in a time-consuming process of soliciting volunteers from their subscriber base and then validating panelist information to ensure that test results were properly correlated to the correct service tier. ISPs also had to develop strategies for maintaining the privacy of the panelists and the integrity of the testing.

Given the fact that this effort involved only thirteen ISPs in the country, and took eighteen months to complete, the Commission should exert extreme care in developing a practical and cost effective uniform testing method for the hundreds of ISPs throughout the country, each of which may deploy distinct network platforms and architectures. Furthermore, the ISPs that participated were large multi-state providers and had ample resources to devote to this project. Burdens on smaller companies should be mitigated by taking their resources into account when developing requirements as well as considering less frequent measurement and accompanying reporting obligations. And all companies should be able to take measurements from a sample of randomly selected customer locations that would be statistically significant, rather than requiring measurement from every customer location.

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[27] Public Notice, *FCC Staff to Hold Meeting to Discuss Residential Fixed Broadband Services Testing and Measurement Solution*, 25 FCC Rcd 10041, DA 10-1349 (2010).

[28] *SamKnows Report*, p. 8.

[29] *Id.*, pp. 8 – 9. As the Commission acknowledged in its final report, participants contributed “significantly” to the effort by creating and agreeing on a standard methodology for testing broadband performance; collaborating on the parameters for these tests; providing proposals for how to analyze the data; validating the panelist information to ensure that the test results were properly correlated to the correct service tier; and developing strategies to maintain the privacy of the panelists and the integrity of the testing.

The Commission should implement a process whereby a provider could certify to USAC that its network is satisfying the minimum broadband metrics. These results could be retained by each ETC, and produced on request in the course of future USAC audits. The underlying data should be retained by the provider and when reviewed by USAC in the course of an audit, it should remain confidential.

Since the CAF is a technologically neutral mechanism,[30] implementation of speed and latency measurement, certification and reporting obligations should be the same for all fixed ETCs regardless of the platform on which they are providing broadband service. So there should be no greater burdens on wireline ETCs than on wireless ETCs, any implementation of measurement methodologies for wireline ETCs should be concurrent with that of wireless ETCs.

B. There is No Need to Alter the Commission's Current Approach Toward Determining Reasonable Comparability of Voice Services

The Commission currently determines the reasonable comparability of voice rates and services using publicly available data sources and provider websites. There is nothing in the Order that modifies the reasonable comparability requirement and necessitates a greater level of information than was previously collected. There is no reason to believe that more extensive surveys and information mandates will produce measurable benefits to the USF program or to consumers. Burdens on both the Commission and providers would be reduced by continuation of the current methodology for gathering voice rate and service information that has served the Commission well.

Information on fixed and mobile voice services may be collected and evaluated so that the Commission can construct valid "apples to apples" rate and service comparisons

[30] *See e.g.*, *USF/ICC Transformation Order*, ¶1 (stating that the Commission's framework was designed "to distribute universal service funding in the most efficient and technologically neutral manner possible.").

between fixed and mobile services. The challenge of constructing a valid rate comparison between fixed and mobile service providers may not be greater than the challenge of developing a comparison within each of the wireline and wireless spaces. Voice wireline service pricing increasingly resembles that of voice wireless service, and further rate deregulation of wireline voice service in response to the intense competition for that service will enable more creative wireline rate structures.

With respect to gathering information on broadband services and pricing, the Commission should use publicly available information to the greatest extent possible. The last thing the Commission needs to do is to delve into the detailed rate structures of the ever-changing levels of broadband service in rural or high-cost areas. Adoption of the same standard for reasonably comparability of broadband rates as that used for voice rates should spare the Commission from having to construct a perfect rate comparison.

C. **Unnecessary, Additional CAF Requirements Should be Avoided**

CAF recipients should not be required to offer IP-to-IP interconnection for voice service beyond what the Commission adopts more broadly. The social contract of universal service funding is that monies will be supplied to allow an ETC to have a viable business case to deploy and maintain facilities to provide ubiquitously available service. The Commission should not impose further obligations unrelated to that fundamental goal that go beyond those imposed on similarly situated providers who are not ETCs. Such obligations are external to the social contract and create an imbalance between the responsibilities of the parties. They may create a disincentive for providers to participate in the universal service system, potentially depriving consumers of service availability.

The proposal by Public Knowledge and the Benton Foundation to have CAF recipients make interconnection points and backhaul capacity available so that unserved high-cost communities could deploy their own broadband networks also should be rejected. First, it is not clear that any of these "communities" would fall into the high-cost areas that are the focus of the CAF. Subsidizing duplicative municipal facilities is not feasible given the tight budgetary constraints of the CAF. And imposing additional burdens and costs on CAF recipients would unnecessarily increase the costs of deploying broadband in challenging areas.

It is unclear what status the Commission would be conferring on such communities by providing them backhaul capacity and interconnection points under arrangements presumably different than other potential customers for those services. Would communities that otherwise only would qualify for the Remote Areas Fund (RAF) support now be eligible for backhaul capacity and interconnection funded with support from the Connect America Fund (CAF)? Furthermore, at what point would it be determined that a community is unserved? If the determination is made prior to the implementation of the CAF, providing such advantages to a community-based entity might discourage other providers from seeking to serve that community, unnecessarily retaining its unserved status. Finally, for communities that are not addressed by the CAF and RAF mechanisms, the need for requirements addressing backhaul and interconnection points is questionable at best. Broadband providers already have incentives to negotiate in good faith to provide such services, if available, as presumably such a negotiation would result in additional revenues that providers would not have otherwise.

Finally, the proposal by Public Knowledge and the Benton Foundation that the Commission create a fund for a Technology Opportunities Program to assist communities with deploying their own broadband networks should be rejected. As above, subsidizing duplicative facilities is not feasible under the tight budgetary constraints of the CAF. There are numerous examples of failed municipally built and operated networks that are of a large scale with significant access to resources and expertise. Funding such initiatives here – at a smaller scale, with community resources and expertise less available in high-cost areas – would be a poor investment. In addition, such a program inappropriately would divert resources from other universal service funding priorities, including funding for availability of broadband in high-cost areas by providers with a much greater level of expertise.

III. REFERRAL OF CAF ISSUES TO THE SEPARATIONS JOINT BOARD SHOULD BE LIMITED

USTelecom has long contended that the system of cost separations is an outmoded relic of the monopoly legacy voice telephone network and should be abolished.[31] The Order recognizes the evolution of the legacy voice network to the IP world. Referral of any issues involving the CAF to the Separations Joint Board should be as narrow as possible, and with respect to the CAF for rate-of-return carriers, limited to the issue raised by the Rural Association plan. In general, retention of jurisdictional cost separations merely perpetuates an unnecessary legacy mechanism. Now that the Commission has begun comprehensive reform of intercarrier compensation and high-cost universal service, it should indefinitely extend the separations freeze and initiate a proceeding reflecting its forward-looking actions on intercarrier compensation and high-cost universal service, which would result in the elimination of cost separations for all providers.

[31] *See*, USTelecom Comments, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, March 28, 2011.

IV. THE COMMISSION SHOULD CAREFULLY AND THOROUGHLY EXAMINE THE INTERSTATE RATE OF RETURN

Both the Joint Framework and the Rural Association proposal offered to waive the Part 65 rules to significantly lower the interstate rate of return without a full-blown rate-of-return represcription proceeding as part of a comprehensive plan to equitably spread the belt-tightening required to fit into a high-cost budget for rate-of-return high-cost support,[32] but the Commission chose to reject that proposal. The Commission should not try to have its cake and eat it too – a lower rate of return and a less than thorough represcription proceeding. Certainly elements of the process the Commission has historically used that have been overtaken by technology such as the paper submissions can be dispensed with and the proceeding should be conducted as quickly as possible consistent with a fair process. But the essential elements of a rate of return proceeding must be fully explored in order for the Commission to fulfill its oft-stated goal of data-driven decision making. Moreover, the Commission must first adopt new substantive rules governing the represcription process before it begins a proceeding to determine a reasonable rate-of-return.

The Further Notice compares circumstances in 1990, when the rate of return was last prescribed, and today. However, this is somewhat misleading since the Commission ignores its examination of the rate of return in the MAG proceeding which concluded in 2001.[33] Moreover, the Further Notice inordinately focuses on the cost of capital and does

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[32]See, Letter from Jonathan Banks, USTelecom, to Marlene Dortch, Secretary, Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, et. al., July 29, 2011 (available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7021699004) (visited January 12, 2012).

[33] See para. 210 of the Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256**,** *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers,* Fifteenth Report and Order in CC Docket No. 96-45, *Federal-State Joint Board on Universal Service,* and Report

not mention the change in the risk profile of companies serving high-cost areas, including small rate of return companies, other than to quote section 205 of the Act which states that the return should also be "commensurate with returns on investments in other enterprises having corresponding risks."[34] Clearly the risks involved with providing service to high-cost rural areas has significantly changed in the past decade. Access line growth has changed to access line decline, monopoly voice service has become extremely competitive, and the Order eliminates access revenue over time. Even the composition of the rural rate-of-return company universe has changed, with larger and more suburban rate-of-return companies being purchased by larger holding companies now included under the price cap company funding mechanism, leaving the remaining universe of small companies smaller, more rural, higher cost and thus riskier than ten years ago.[35]

USTelecom cannot comprehensively address all of the technical issues about the appropriate rate-of-return methodology to use in 2012 that are raised in the Further Notice. However, the answer to whether RBOCs should be surrogates for small rate-of-return companies based on the proposition that their risk most closely resembles the risk of rate-of-return carriers seems to be patently obvious. Companies with tens of millions

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and Order in CC Docket Nos. 98-77, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulations* and 98-166, *Prescribing the Authorized Rate of Return For Interstate Services of Local Exchange Carriers.* "We also conclude that it is appropriate to stay the effectiveness of section 65.101 of the Commission's rules, which otherwise would require initiation of a rate of return prescription proceeding immediately as a result of termination of the CC Docket No. 98-166 proceeding.548 The Part 65 rules, under which the CC Docket No. 98-166 proceeding was initiated, were adopted in 1995.549 Since that time, Congress has established competition as the fundamental policy for the telecommunications industry. Given the changed environment since the Part 65 rules were adopted, we find that it would be counterproductive to initiate a new automatic review of rate-of-return carriers' authorized rate of return at this time without a complete review of the Part 65 procedures to determine if they are appropriate and workable. Staying the effectiveness of section 65.101 will allow us to comprehensively review the Part 65 rules to ensure that decisions we make are consonant with current conditions in the marketplace."

[34] See 47 U.S.C. §205.

[35] The medium number of access lines for small companies (traditionally defined as those ILECs under 50,000 access lines) has declined from almost 3,300 at the end of 2000 to 2,500 in 2010 See "Phone Lines," JSI Capital Advisors.

of lines instead of hundreds, vastly larger geographies over which to adjust to various local economic conditions, the opportunity to engage in many more lines of business that have greater growth potential than wireline telephony, and the ability to access capital from many more sources than small companies, makes the use of RBOCs as surrogates for small companies inappropriate.

Based on its decision to allow small rural high-cost companies to continue to be subject to rate-of-return regulation, the Commission retains the statutory responsibility to have a fair and thorough rate-of-return represcription proceeding. Such a proceeding must be based on rules subject to notice and comment prior to its commencement.

V. THE LIMITS ON REIMBURSABLE CAPITAL AND OPERATING COSTS FOR RATE OF RETURN CARRIERS REQUIRE FURTHER EXPLORATION

The regression analysis proposed in the Further Notice can have significant implications for the calculation of support for high-cost rate of return ETCs. It is very important that the analysis be fair and accurate. The Commission's methodology requires further review and evaluation before being implemented.

USTelecom has several concerns about the regression analysis proposed in the Order. First, the regression parameters were developed without a hold-out set. Without a hold-out set it is difficult to evaluate how the regression equation performs in the prediction of each component. In other words, there does not appear to be a way to evaluate how the predictive equation would have performed because it appears the entire sample of data was used to generate the regression equation.

Second, data appears to be scaled on the number of loops without clarity on the types of loops (residential or business). Moreover, business location counts are not taken into effect in the regression analysis so there is a potential mismatch in the scaling effect.

Third, the use of weighted-block density may introduce some odd study area weights in that wire centers of comparable area could be composed of a combination of very large Census blocks or very small Census blocks. As the Census block size is not constant, a block-weighted density could create some unexpected results. Also, the weighting was based on the number of households, so again there may be a mismatch when a loop-weighted view is being considered. Fourth, the regression analysis uses urban areas from the 2000 census, but census blocks from the 2010 census. The impact of this is not clear, however, it may be problematic given that block shapes have changed and those areas which fulfilled the Census definitions in 2000 may or may not fulfill the definition in this Census. It should not be assumed that the degree of urbanization is constant across this long span of time. Further, it is not clear whether the classification of "urban-ness" is really appropriate given the very small size of the vast majority of rural rate-of return companies.[36] Finally, there is no accounting for the dispersion of service territories in the result. The cost profile of contiguous territories is very different than territories that are dispersed.

Updating the analysis annually has mixed impacts. On the one hand, investment decisions are made on a longer term basis. The Commission itself has asked for a five-year investment plan in the Order.[37] Annual updating will make planning difficult when companies do not have a good idea of the scope of the annual changes. On the other hand, since this is a regression analysis which captures relative differences among booked accounts, there could be a circumstance where a provider who is actively

[36] Out of the 766 small companies identified in the 2011 "Phone Lines" publication of JSI Capital Advisors, with end of year 2010 data, only the top 39 have 10,000 or more voice access lines, 538 have less than 5,000 voice access lines, and 208 have less than 1,000 voice access lines.

[37] See *USF/ICC Transformation Order*, revised §54.402(a)(ii).

investing in its service territory (beyond its similarly situated peers) for legitimate reasons such as population growth, could find itself disincented from further investments if it sees it will hit the caps. The policy result pits the virtues of economic efficiency against forcing everyone to the lowest common denominator.

The problem with using models for determination of reasonable cost profiles for small companies is that it is almost impossible for a model to account for every unique situation, and the Commission's onerous waiver process is vastly out of proportion to what may very well be legitimate situations experienced by more than a few small companies. For example, a provider in a natural disaster prone area would have a different capex profile than a provider serving a less hazardous area. A coastal provider who may get its poles knocked down a lot by storms but cannot bury its lines due to a water table issue is probably going to be in a different capex investment category than a similar peer who has very stable plant structure type investments. The situation is totally attributable to the location of the company and bears no reflection on whether it is investing and operating efficiently. Because of the inherent problems when model data is applied to small companies, the Commission should do its best to ensure the accuracy of the model, and provide a much more ETC-friendly opportunity to obtain a waiver.

VI. REMEDIES FOR NON-COMPLIANCE WITH RULES FOR ETCs THAT RECEIVE FUNDING THROUGH A PROCESS OTHER THAN COMPETITIVE BIDDING

It is not necessary for the Commission to impose new remedies for ETC non-compliance with rules. Rules currently in place in the high-cost program have proved their adequacy.

In particular, ETCs receiving CAF funding should not have to obtain an irrevocable letter of credit (LOC). Such a requirement would create the necessity of establishing a cash reserve against the amount of the LOC and, for many ETCs, could create significant financial hardship. First, imposing a LOC requirement could have a negative impact on a CAF recipient's credit ratings. Under the current structure of some credit agreements, companies pay an upfront fee for the issuance of an LOC as well as a maintenance fee. LOCs are viewed as an outstanding debt by investors and analysts. Rating agencies consider LOCs in their overall analysis when analyzing a company and issuing their ratings of debt and likelihood of default. Second, some ETCs have a limited capacity to issue LOCs under outstanding credit agreements. Amending these credit agreements to provide additional LOC capacity might be prohibitively expensive, if possible at all. Third, the addition of a sizeable LOC pursuant to this potential USF requirement would be counterproductive by restricting the flexibility of carriers to conduct their business – that is, inhibiting the ability of carriers to transact business with other entities that may require a LOC if inadequate capacity exists. Finally, LOCs reduce a company's liquidity as every dollar committed to a LOC reduces availability of capital under revolving credit facilities.

If a carrier does not adhere to the rules governing the provision of the availability of voice and broadband services, its support could be proportionately diminished for future periods. Penalties for ETCs' failure to meet intermediate build-out requirements or 5-year performance requirements should only be imposed when such failures are not due to delays beyond their control.

VII. PRICE CAP ETCs REFUSING MODEL SUPPORT SHOULD REMAIN ELIGIBLE TO BID ON ELIGIBLE AREAS

Price cap ETCs not electing statewide model support should have the opportunity to receive support for eligible areas through the competitive bidding process. The competitive bidding process benefits from having more participants involved. In addition, why should a price cap carrier be penalized by disqualification from the bidding process if it determines that it cannot make a viable economic case that would justify assuming statewide obligations in exchange for proposed CAF support?

Concern that this approach would allow incumbent price cap carriers to pick and choose which wire centers in which to make broadband service available does not justify exclusion of price cap carriers from Phase II bidding. A price carrier would not assume the risk of moving to competitive bidding – and potentially lose the ability to receive CAF support needed for certain areas – if the statewide average commitment would result in sufficient net revenues for its operations. And if the statewide average commitment would not produce sufficient net revenues, there is no rational reason for penalizing a price cap carrier under this circumstance. The carrier would have no special ability to engage in "cherry picking." Instead, the carrier merely would be in the same position as all other entities in CAF Phase II bidding.

For wire centers where no broadband provider applies for the Connect America Fund baseline support amount, the Commission should (1) increase the amount of CAF support available to induce any qualified provider to apply to serve the CAF-eligible census blocks of the wire center or (2) if necessary to be consistent with the CAF budget, address additional wire centers with the Remote Areas Fund. Price cap ETCs not electing statewide model support should have the opportunity to receive support for eligible areas through the competitive bidding process. The competitive bidding process benefits from having more participants involved.

VIII. CONCLUSION

Areas served by high-cost universal service funding recipients, both rate-of-return and price cap carriers, encompass a significant portion of the geography of our nation. Americans living in those areas deserve and expect services that are reasonably comparable to those in urban areas, and the Commission is obligated by law to provide sufficient funding to ensure reasonably comparable services and rates are available to inhabitants of rural areas. To accomplish this goal for rate-of-return and price cap areas, the Commission must take great care in designing a compensatory and equitable CAF for all high-cost areas.

Several implementation issues were addressed in USTelecom's Petition for Reconsideration[38] and many more are the subject of this Further Notice. USTelecom respectfully requests that the Commission adopt USTelecom's recommendations contained in both its Petition for Reconsideration and in these comments.

Respectfully submitted,

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[38] *Id*.