Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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I. INTRODUCTION

This Commission should be congratulated for making significant strides towards pulling its $4.5 billion/year high-cost universal service program out of the last century. It is time that the Commission declared victory on achieving ubiquitous voice telephony service and set its sights on this century's next communications challenge: ensuring that all Americans have access to broadband service. Through its *USF/ICC Transformational Order*, the Commission set in motion the transition of its high-cost universal service program from supporting voice service to supporting broadband service.[1] This transition was inevitable as more Americans understand the value of and thus demand broadband service. While private sector investment has ensured that the overwhelming majority of U.S. consumers have access to broadband service, there are 18 million Americans[2] living in areas that are uneconomic to serve (at least with today's technology) and where market forces alone are insufficient to incent private investment. It is these areas where Connect America Fund (CAF) support is most needed.

While universal service support is critical to encourage broadband deployment in high-cost areas, providing additional funding alone will not be sufficient to do so if the Commission fails to cut through the complex web of federal and state regulatory requirements that were designed for a different era and which now impede the transition of the PSTN to an all-IP, broadband world. As long ago as the *Competitive Carrier* proceeding, over 30 years ago, the Commission recognized that perpetuating out-moded and unnecessary regulation is contrary to

[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208; Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (2011) (*USF/ICC Transformational Order* or *Order*).

[2] *Id.* at ¶ 4.

sound public policy, and impedes private investment. Continuing to apply legacy eligible telecommunications carrier (ETC), carrier of last resort (COLR) and other regulatory requirements designed for a world of circuit-switched voice services in a monopoly environment is a recipe for failure, and guarantees that the Commission will have to rely on significantly greater CAF support amounts, rather than private investment, to close most of the current gap between served and unserved areas. By relieving ETCs from legacy service obligations in areas where they receive no high-cost support, the Commission will free those ETCs to make better use of their limited capital resources by extending broadband service to more customers rather than maintaining increasingly obsolete facilities in areas that most likely have broadband service available today via an unsubsidized broadband competitor. Equally, if not more, importantly, granting ETCs this relief will ensure that the Commission's new CAF rules are consistent with its statutory requirements.

But, rather than proposing to eliminate such obsolete regulations in its *Further Notice*, the Commission proposes to adopt a number of additional, unnecessarily burdensome obligations on all ETCs and/or CAF recipients, obligations that have no relation to or are in conflict with the Commission's goal of deploying broadband to unserved areas in the most cost-efficient manner possible. *See Order* at ¶ 1 (stating that the CAF framework is designed "to distribute universal service funding in the most efficient and technologically neutral manner possible, through market-based mechanisms such as competitive bidding"). Such proposals include: requiring *all* ETCs (regardless of their broadband service obligations, if any) to expend significant resources towards testing the performance of their broadband services, possibly in conformance with a uniform testing methodology, and reporting the results to the Commission (*Further Notice* at ¶¶ 1013-17); requiring CAF recipients to construct facilities for the sole benefit of community broadband providers located outside of the CAF recipient's service area (*id.* at ¶ 1029); requiring all ETCs, including those ETCs whose high-cost support is being eliminated or phased down, to obtain letters of credit (LOCs) (*id.* at ¶¶ 1105-09); and establishing a small business bidding credit in Mobility Fund Phase II and CAF Phase II auctions (*id.* at ¶¶ 1157-60, 1213). As discussed herein, these proposals would undermine much of the progress that has been achieved to date, and significantly increase the cost of achieving the Commission's and Congress's ambitious broadband deployment objectives, with American consumers the losers. The Commission therefore should reject these proposals, and instead eliminate unnecessary, legacy regulation of next generation broadband services, as we proposed in our prior comments in this proceeding. We discuss all of these issues and others, below.

II. DISCUSSION

A. The Commission's Failure To Relieve Carriers Of Their ETC Obligations In Areas Where The Carriers Receive No High-Cost Support Violates Statutory Requirements And Should Be Corrected Immediately, Not After Completion Of The Instant Rulemaking.

The Commission missed an opportunity to ensure that its new CAF rules would be consistent with section 214(e)(1) of the Act when it declined to relieve carriers of their ETC service obligations in those areas where the carriers receive no high-cost support or as they lose their legacy high-cost support. *Order* at ¶ 83. Instead, the Commission sought further comment on this issue. *Further Notice* at ¶¶ 1089-1102. A further rulemaking is unnecessary in order for the Commission to declare that ETCs have no ETC service obligations in those geographic areas where they receive no federal high-cost support. It should do so by granting USTelecom's request that the Commission clarify now – not after completion of this further rulemaking – that ETCs are relieved of their legacy ETC service obligations in those areas where they receive no federal high-cost support. *See* USTelecom Petition for Reconsideration, WC Docket No. 10-90 at 11-12 (filed December 29, 2011). Requesting further comment is unnecessary to satisfy the Commission's obligations under the Administrative Procedure Act as the Commission previously sought public notice and comment on all relevant issues related to legacy ETC service obligations[3] and already has developed a substantial record – which the Commission neglected to discuss, or even acknowledge, in its *Order* – that supports taking this action now.[4] AT&T and the ABC Plan Coalition have discussed at length the rationale behind relieving ETCs of their legacy ETC designations and service obligations in areas where they receive no high-cost support, why such relief is necessary, and the Commission's authority to grant ETCs this relief.[5] We do not repeat all of those arguments here, except to make certain points.

Commission delay on this issue will cause existing, so-called "eligible telecommunications carriers" to become, in fact, *ineligible* for federal universal service support, which is a result that cannot be squared with the plain language of the statute. Section 214(e)(1) of the Act provides that a "common carrier designated as an eligible telecommunications carrier . . . shall be *eligible* to receive universal service support in accordance with section 254[.]" 47

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[3] *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, 4560-61 (2011) (*USF/ICC Transformational NPRM*); *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, WC Docket 10-90, DA 11-1348 (rel. Aug. 3, 2011) (seeking comment on the ABC Plan); ABC Plan, Attach. 1 at 13 & Attach. 5 at 53-58 (explaining the Commission's authority to relieve ETCs of their legacy service obligations as it reduces or eliminates these carriers' legacy high-cost support).

[4] *See* Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.*, at 6-7 (filed Oct. 19, 2011) (AT&T October 19, 2011 Letter) (detailing how the Commission previously sought public comment on the relevant ETC issues).

[5] *See, e.g.*, AT&T *USF/ICC Transformational NPRM* Comments at 75-79, WC Docket No. 10-90 (filed April 18, 2011); AT&T *USF/ICC Transformational NPRM* Reply Comments at 47-48, WC Docket No. 10-90 (filed May 23, 2011); ABC Plan, Attach. 1 at 13 & Attach. 5 at 53-58; AT&T October 19, 2011 Letter.

U.S.C. § 214(e)(1) (emphasis added). Under the Commission's new rules, however, if one provider receives CAF support to provide the supported service in a specific geographic area, no other provider may receive CAF support in that same area. *See generally, Order* at ¶¶ 164-66, 316. As a consequence, that second provider, which might be an ILEC (and an existing ETC), would be ineligible for CAF support. So, for example, if one of AT&T's ILECs bids for CAF support to deploy broadband service in certain census blocks located in one of its wire centers and another provider wins the competitive bidding process, AT&T's ILEC will be saddled with ETC service obligations in those census blocks but barred by the Commission's rules from being eligible for high-cost support, at least until the expiration of the other provider's term of service. Plainly, continuing to designate a carrier as an ETC, and imposing ETC obligations on that carrier, in an area in which it is not eligible to receive universal service support – either because the area itself is ineligible for universal service support or because another carrier receives support in that area – runs afoul of the statutory mandate in section 214(e)(1) that any such ETC "shall be eligible" to receive support in that area.

Even worse, by funding the ILEC's competitor alone while perpetuating the ILEC's ETC service obligations, the Commission is creating an anticompetitive marketplace, placing its thumb on the scale in favor of the new entrant. Through its inaction, the Commission also would be violating its own competitive neutrality universal service principle, which requires the Commission to adopt universal service policies that neither unfairly advantage nor disadvantage one provider over another.[6] Failing to relieve an existing ETC of its legacy ETC service obligations, while denying it high-cost support because the Commission is providing such

[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 47 (1997) (*First Universal Service Order*) (subsequent history omitted).

support to a competitor, plainly unfairly disadvantages that legacy ETC. If the Commission has determined that an area is eligible for high-cost support, it essentially has concluded that the area is uneconomic to serve absent such support. It is therefore indefensible – and inconsistent with the Commission's requirement in section 254(b)(5) to establish "sufficient" universal service support mechanisms – to compel a provider to offer service in such an area but deny it support that the Commission already has concluded is necessary. The Commission simply cannot require carriers to comply with ETC service obligations when its rules render that carrier ineligible for high-cost support.[7]

The answer is not to resurrect the flawed identical support rule, which funded competition. The Commission was right to eliminate that misguided policy. *Order* at ¶¶ 502-11. Rather, the Commission should grant USTelecom's petition for reconsideration and relieve carriers of their ETC service obligations in areas where they receive no high-cost support. While we described the scenario of one provider winning CAF support and thus rendering the ILEC, which is an ETC in that same area, ineligible to receive CAF support for five years or more (*see Further Notice* at ¶ 1197, proposing a five-year service term but seeking comment on a service term of ten years), the Commission should not limit its relief to just this scenario. Instead, it is essential that the Commission immediately sunset all ETC service obligations for those ETCs providing service in geographic areas that are ineligible for high-cost support (e.g., census blocks

[7] The Commission's response to this quandary cannot be that it is appropriate to maintain the ETC's current designation because the ETC remains eligible for non-high-cost universal service support, such as E-rate and Rural Health Care (RHC) support. Such support does nothing to enable the carrier to provide quality services at just, reasonable, and affordable rates (47 U.S.C. § 254(b)(1)) to consumers in rural and high-cost areas (47 U.S.C. § 254(b)(3)). Instead, this support only satisfies the requirement that the Commission ensure that schools, libraries, and health care providers have access to advanced telecommunications services (47 U.S.C. § 254(b)(6)). In any event, E-rate and RHC service providers do not need to be ETCs. *See, e.g., First Universal Service Order* at ¶ 449 ("any telecommunications carrier, even one that does not qualify as an 'eligible telecommunications carrier,' should be eligible for support for services provided to schools and libraries"). We discuss Lifeline, *infra*, at 17.

where there is an unsubsidized broadband competitor, census blocks where the modeled cost of providing service is beneath the Commission's high-cost benchmark). Even though in these geographic areas the Commission may not be supporting a competitor to the existing ETC (or ETCs), the Commission's rules still make the existing ETC(s) ineligible for high-cost support and thus violate the statute unless the Commission relieves such carriers of their ETC service obligations.

Undertaking these reforms is essential given the transformational changes the Commission made to its high-cost program. By these changes, the Commission effectively abrogated the regulatory compact under which price cap carriers sought and received ETC status in 1997. In particular, the Commission shifted the focus of its high-cost program from supporting POTS (which was intended to permit ILECs to offer their existing voice services at affordable rates to consumers in high-cost areas)[8] to supporting universal access to broadband (which, in many cases, will require ETCs to construct entirely new networks and facilities in unserved areas). AT&T believes this shift in focus was both necessary and appropriate. But, in light of this transformation, the Commission cannot reasonably require those ETCs that accepted the regulatory compact in 1997, which was premised on the old paradigm, to accept involuntarily the new compact. Rather, the Commission must recognize that the sunset of its existing high-cost universal service goals, funding, and distribution mechanisms also requires it to sunset existing ETC designations, and replace them with new designations for carriers willing and able

[8] As AT&T repeatedly has explained in prior stages of the high-cost proceeding, the Commission's existing high-cost support mechanisms for so-called "non-rural" carriers failed to provide adequate support to ensure that universal service objectives, and, in particular, the principles laid out in section 254(b) of the Act, could be met in markets opened to competition, as Congress intended. Given that fact, and the Commission's fundamental transformation of its universal service regime to supporting broadband, it is all the more essential that the Commission take steps to prevent the carry over to that new regime of the flaws of the existing regime – such as by continuing to apply existing ETC designations in the new, broadband world.

to accept the new service obligations, under the terms and conditions laid out in its *USF/ICC Transformational Order*. In particular, the Commission should declare that the existing ETC designations will no longer remain in effect, and attending service obligations will terminate, effective January 1, 2013 – the date on which new broadband deployment/service obligations take effect. Further, pursuant to its section 201 authority, the Commission should adopt rules interpreting and implementing section 214(e) to limit ETC designations only to those carriers that voluntarily apply for ETC status, and thus which are willing to accept the new compact. Such designations should apply only in those areas where support is provided, and should continue to apply only for so long as such support is provided. For example, if a CAF Phase II receives an award of support for five years, its ETC designation, support, and service obligations all should terminate at the end of that five year period.

The existing record offers the Commission several other ways to achieve ETC relief. First, the Commission could direct states to redefine the ETC service areas of non-rural carriers and CETCs to remove those geographic areas from an ETC's designation where the carrier receives no federal high-cost support. Second, the Commission could reinterpret subsection 214(e)(1) so that an ETC's obligation to offer the supported services exists only in those areas where the ETC actually receives high-cost support (i.e., where those services actually are "supported"). Third, the Commission could forbear from section 214(e)(1) to the extent that this section requires ETCs to offer services in areas where they receive no support. We discuss all three options in detail.

Require states to redefine existing ETC service areas. The Commission is correct that there is nothing in section 214(e) of the Act that "precludes the redefinition of an existing service area, for either an incumbent ETC or a competitive ETC at a later date." *Further Notice* at ¶

1091. For reasons we explain below, the Commission should require state commissions to redefine existing price cap carrier and CETC service areas[9] within a specified time frame (e.g., 30 days) of the Commission or the ETC notifying the state which wire centers do not receive federal high-cost support, after which time the redefinition would be deemed granted. As we have explained separately and with the ABC Plan Coalition,[10] an ETC's "'service area' means a geographic area established by a State commission … for the purpose of determining universal service obligations and support mechanisms." 47 U.S.C. § 214(e)(5). While this subsection establishes a presumption that the "service area" for a *rural* carrier is its "study area,"[11] Congress established no such presumption for a *non*-rural carrier's service area and thus plainly envisioned that it would be *smaller* than its study area. Consistent with this notion, the Commission in its *First Universal Service Order* encouraged states to define small service areas when designating non-rural carriers as ETCs. *First Universal Service Order* at ¶ 116. But, despite the urging of the Commission (and the Joint Board),[12] many, if not all, states have designated non-rural carriers as ETCs for their entire study areas.[13]

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[9] While we discuss relieving ETCs of their designations and service obligations in areas where they do not receive high-cost support, our proposal, previously filed at the Commission, is limited to price cap carriers and CETC service areas. For convenience we use the term "ETCs" throughout this section, however, that term is limited to price cap carrier ETCs and CETCs. We take no position on whether the Commission should extend this proposal to rate-of-return carriers as well.

[10] AT&T *USF/ICC Transformational NPRM* Comments at 77-79, WC Docket No. 10-90 (filed April 18, 2011); ABC Plan Attach. 5 at 54-58. *See also* AT&T October 19, 2011 Letter.

[11] 47 U.S.C. § 214(e)(5) ("In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board … establish a different definition of service area for such company.").

[12] *See* Recommended Decision, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, ¶¶ 176-77 (1996) (*Joint Board Recommended Decision*).

[13] In a handful of the twenty-two states where AT&T serves as an ILEC, the state commission designated AT&T as an ETC on a wire-center or exchange basis. But because AT&T is designated as an ETC in *all*

Even in 1997, the Commission recognized that this action might be unlawful because it would interfere with federal universal service goals.[14] Specifically, the Commission noted that, "if a state commission adopts as a service area for its state the existing study area of a large ILEC, this action would erect significant barriers to entry" for competitive providers, undermining universal service and potentially violating section 254(f).[15] That section prohibits states from adopting universal service policies that are "inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Fifteen years later, adopting (and/or maintaining) excessively large ETC service area designations imposes significant, unfunded ETC service obligations that are even more inconsistent with federal policy – in this case, by undermining incentives to invest in deployment of broadband services on the part of non-rural carriers,[16] and by violating the Commission's competitive neutrality principle, as well as the requirement that federal universal service support mechanisms be "sufficient." 47 U.S.C. § 254(b)(5), (e) . Accordingly, section 254(f) gives the Commission the authority to adopt a rule limiting ETC "service areas" (at least for non-rural carriers and CETCs) for purposes of determining where legacy obligations and designations apply. The Commission thus should deem all such designations "inconsistent with the Commission's rules to preserve and advance

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of its wire centers in those states, this is a distinction without a difference – in effect, AT&T is required to serve as an ETC throughout its entire study area.

[14] *First Universal Service Order*, 12 FCC Rcd at ¶¶ 184-85.

[15] *Id. See also Joint Board Recommended Decision*, 12 FCC Rcd at ¶¶ 176-77 (noting that excessively large ETC service areas "could potentially violate section 254(f)" by undermining the Commission's efforts to preserve and advance universal service).

[16] *See, e.g.,* ABC Plan, Attach. 5 at 7-8, 49-53.

universal service,"[17] and direct the states to redefine ETC service areas to encompass only those places where ETCs receive high-cost universal service support.

The Commission also may rely on its section 201(b) authority to require states to redefine existing ETC designations to exclude those geographic areas where an ETC receives no federal high-cost support.[18] As interpreted in *Iowa Utilities Board*, section 201(b) authorizes the Commission to adopt rules guiding the states' exercise of the duties allocated to them elsewhere in Title II.[19] Just as the Commission may adopt rules that limit the states' prerogative and determines what costs may and may not be included to "establish . . . rates" for unbundled network elements,[20] so too it can adopt rules that interpret and implement section 214(e)(1) by limiting ETC designations (and, concomitantly ETC obligations) only to those areas in which an ETC receives high cost support. Thus, while section 214 assigns the states a significant role in the ETC designation process, the Commission plainly has authority to interpret the text of section 214, and the states are bound by its interpretation. And to the extent that the statutory language is ambiguous, the courts likewise must defer to the Commission's interpretation of section 214.[21] That deference should be especially strong in this context, because section 254 grants the Commission broad authority to implement the entire federal universal service program, of which ETC designations form only a small part. The Commission recognized as

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[17] 47 U.S.C. § 254(f).

[18] Section 201(b) provides that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act." 47 U.S.C. § 201(b).

[19] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (*Iowa Utilities Board*).

[20] 47 U.S.C. § 252(c)(2); *Iowa Utilities Board*, 525 U.S. at 384-85.

[21] With respect to section 214 in particular, the Tenth Circuit has noted that "[t]he FCC's interpretation of the Telecommunications Act's provisions addressing state ETC designations is, of course, subject to deference." *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007).

much in the *Western Wireless Order*, noting that, in designating ETCs under section 214(e), state commissions may not adopt policies or eligibility criteria that thwart federal universal service goals, and that to conclude otherwise would "effectively undermine[] congressional intent in adopting the universal service provisions of section 254."[22]

At the staff's request, the ABC Plan Coalition submitted detailed proposed rules to implement the universal service components of the Plan.[23] Included among the rules was a process to relieve price cap carriers and CETCs of their ETC service obligations on a wire center by wire center basis where they do not receive high cost universal service support.[24] AT&T recommends that the Commission adopt the proposed rules implementing this process, as well as the Coalition's proposed changes to rule 54.207 to conform it to this process.[25] In a nutshell, under this process, the Commission would rank the wire centers of every price cap carrier ETC and CETC at a holding company level based on the average monthly per line high-cost support amount. As the Commission phases out price cap carrier ETC and CETC high-cost support, the Commission would remove the carrier's high-cost support and associated service obligations on a wire center by wire center basis, beginning with the wire centers with the lowest

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[22] *Western Wireless Corporation Petition for Preemption*, 15 FCC Rcd 15168, ¶ 29 (2000) ("While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements…. [W]e do not believe that Congress intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers. To do so effectively undermines congressional intent in adopting the universal service provisions of section 254.").

[23] Letter from Jonathan Banks, USTelecom, to Marlene Dortch, FCC, WC Docket No. 01-90 (filed Sept. 28, 2011) (ABC Plan Coalition Proposed USF Rules).

[24] *See id.* at 25-27 (proposing new rule 47 C.F.R. § 54.320).

[25] *See id.* at 13-15 (proposing edits to 47 C.F.R. § 54.207). AT&T suggests one modification to the section 54.207(b) proposed revisions: strike the proposed insertion of "For purposes of legacy high-cost support," in the first sentence of that subsection. *See Further Notice* at ¶ 1096 (requesting comment on proposed modifications to section 54.207).

average monthly per line high-cost support amounts. This process would ensure that an ETC's highest-cost areas continue to receive high-cost support for the longest amount of time possible, which seems most consistent with the purpose of high-cost funding. The Commission should perform this process each year, as necessary, and inform carriers that lose support and the relevant state commission of the results of this process by a certain date. A corresponding redefinition of the carriers' ETC service areas should occur simultaneously and automatically as part of this process. However, if the Commission determines it is necessary, it could require state commissions to redefine the carrier's ETC service designation in accordance with the results of this Commission process within 30 days of notification of those results.

Reinterpret section 214(e)(1) to impose ETC service obligations only in those areas that receive high-cost support. As an alternative to directing state commissions to redefine existing ETC's service areas to remove certain geographies from the designation itself, the Commission could reinterpret section 214(e)(1)(A) of the Act so that an ETC has an obligation to serve a given geographic area *only* when the ETC receives high-cost support for that area. Section 214(e)(1)(A) states that ETCs "shall, throughout the service area for which the designation is received [ ] offer the services *that are supported by* Federal universal service support mechanisms under section 254(c)[.]" 47 U.S.C. § 214(e)(1)(A) (emphasis added). The Commission has previously interpreted this provision as requiring an ETC to provide supported services *throughout its service area*, regardless of whether the ETC is receiving any high-cost support in that area. But this is not the only permissible interpretation of the statutory language. The Commission can, and should, reinterpret it to mean that a carrier's obligation to offer service applies only in those geographic areas where the carrier agrees to receive support – that is, where the services "are supported."[26] Under this interpretation, even if an ILEC technically is an ETC for a large "service area," its actual service obligations would be far less expansive.[27]

Forbear from section 214(e)(1) to the extent that it requires ETCs to offer service in areas where they receive no high-cost support. Again in the alternative, the Commission could exercise its authority under section 10 of the Act to forbear from section 214(e)(1) to the extent the latter requires ETCs to offer service in areas where they receive no high-cost universal service support. ETC service obligations arise from section 214(e)(1), which provides that ETCs "shall, *throughout the service area for which the designation is received* . . . offer the services that are supported by Federal universal service support mechanisms under section 254(c)[.]" 47 U.S.C. § 214(e)(1) (emphasis added). With respect to ETCs that receive no high-cost support for areas within their designated "service areas," the Commission should forbear from any requirement that those ETCs offer services "throughout the service area for which the [ETC] designation is received." Such forbearance plainly satisfies the statutory requirement that forbearance authority be limited to "telecommunications carriers" or "telecommunications services." 47 U.S.C. § 160. All ETCs are telecommunications carriers, and all of the existing "supported" services are telecommunications services. In addition, as noted in the *Further*

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[26] By contrast, where the ETC *is* receiving high-cost support, it would be required to provide the services and functionalities set forth in 47 C.F.R. § 54.101(a). Similarly, where a carrier is receiving E-rate or RHC funding, it would be required to provide the services supported by those programs to eligible customers in a manner consistent with the Commission's rules. And until the Commission creates a new Lifeline Provider service category that is separate from the ETC designation, discussed below, existing ETCs would be required to continue participating in the Commission's low-income program in the event that no other provider is offering Lifeline service in that area.

[27] Such an interpretation is not only consistent with the plain language of the statute, but also with Congress's expectation and intent that, in markets opened to competition, regulators would replace implicit subsidies with explicit universal service funding. Where service providers have a positive business case to provide service without support, they will do so. Thus, limiting service obligations to only those areas where explicit support is necessary to create such a positive business case not only would ensure that support is sufficient to meet universal service objectives, but also finally comply with Congress's direction that implicit subsidies be replaced by explicit universal service funding.

Notice, the Act authorizes the Commission to tailor forbearance relief to "any or some of [telecommunications carriers'] geographic markets." 47 U.S.C. at §160(a); *Further Notice* at ¶ 1097. The Commission previously forbore from the facilities-based requirement of section 214(e)(1) to enable pure resellers to be designated as ETCs[28] and, as the Commission recognizes, there is no reason why the Commission could not likewise forbear from the section 214(e)(1) requirement that ETCs offer the supported services "throughout [their] service area." *Further Notice* at ¶ 1097. Forbearance here would also meet the Commission's mandate under section 706 of the 1996 Act to forbear from obligations that frustrate broadband deployment,[29] as legacy ETC obligations do today. Forbearing on a case-by-case basis would be burdensome to industry and the Commission. *See Further Notice* at ¶ 1097 (seeking comment on its proposal to use forbearance on a case-by-case basis); 47 U.S.C. § 160(c) (giving the Commission 15 months to act on a forbearance petition before it is deemed granted). Instead, the Commission should grant nationwide forbearance from section 214(e)(1) to the extent it concludes that this subsection requires ETCs to offer supported services in geographic areas that receive no high-cost support.

Miscellaneous ETC-related issues. In its *Further Notice*, the Commission asks whether the proposal to redefine existing ETC service areas to remove those geographic areas where the ETC receives no federal high-cost support is in tension with the requirement in section 214(e)(4) that "ETCs may only be allowed to relinquish their designations in 'area[s] served by more than one eligible telecommunications carrier.'" *Further Notice* at ¶ 1100 (quoting 47 U.S.C. §

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[28] *See, e.g., Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Rcd 15095 (2005).

[29] *See, e.g., Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009) ("As contemplated by § 706, the FCC has utilized forbearance from certain Title II regulations as one tool in its broadband strategy.").

214(e)(4)).[30] The question assumes that it was Congress's intention that every square inch of the country would be covered by one or more ETC designations. However, nothing in the statute supports that view. The Commission itself seems to have rejected that interpretation in 1997, when it cautioned states *not* to designate large ILECs (i.e., non-rural carriers) as ETCs throughout their entire service territories. *First Universal Service Order* at ¶ 184 ("Specifically, we conclude that service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors."). If the states had obliged and only designated non-rural carriers as ETCs in high-cost areas, the states would have left other geographic areas within those non-rural carriers' service territories (e.g., New York City, Los Angeles, Dallas) as unserved by any ETC.

Such a result is not troubling and also is not inconsistent with section 214(e)(5), which allows a state or the Commission to compel a provider to serve a community that lacks the supported services (i.e., voice telephony service). Under the Commission's new rules, price cap carrier ETCs are ineligible for CAF support in areas where some other ETC is receiving CAF support, where some unsubsidized broadband competitor is providing service, and/or where the costs of providing service are beneath the high-cost benchmark (to be established). Similarly, wireless carriers are ineligible for Mobility Fund support in those areas that are served by 3G or better service. The areas where price cap carrier ETCs and CETCs would be relieved of their ETC designation and service obligations are areas where some entity is almost certainly already

[30] We note that AT&T's other, alternative proposals (i.e., reinterpret section 214(e)(1) or forbear from section 214(e)(1)) do not implicate section 214(e)(4) because under those other proposals, only carriers' ETC service obligations would change, and not their ETC-designated service areas.

providing voice telephony service, although not necessarily as an ETC.[31] Unless the consumer is eligible for Lifeline, it matters not whether its service provider is an ETC and therefore the Commission should expect no consumer confusion.[32] And any Commission concern about the ability of a low-income consumer to participate in the Lifeline program in the unlikely event that there is no ETC (including a Lifeline-only ETC) in that area can be addressed by the Commission delinking Lifeline from the ETC designation and establishing a new category of universal service provider – the Lifeline Provider.

B. The Commission Should Give CAF Recipients The Flexibility To Measure Broadband Performance In Accordance With Certain Commission-Defined Criteria And Not Mandate A Uniform Broadband Measurement Methodology.

In the *Further Notice*, the Commission requests comment on whether it should establish a specific broadband measurement methodology that would apply to ETCs. *Further Notice* at ¶¶1013-17. Before addressing any such methodology (i.e., *how* providers should test and report), the Commission should first clarify which providers are subject to the new reporting obligations (i.e., *who* should test and report).

In particular, the Commission states that it adopted "a rule requiring the actual speed and latency be measured on *each ETC's* access network from the end-user interface to the nearest Internet access point, and we require that ETCs certify to and report the results to USAC on an annual basis," *id.* at ¶1013 (emphasis added). Read literally, this rule would impose burdensome reporting obligations on certain ETCs that are not required to make service available at the

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[31] According to the Commission's own reports, as of December 2010, almost 90% of U.S. households are located in zip codes where *ten or more* CLEC or non-ILEC VoIP providers are offering service. *FCC Local Telephone Competition Report* at 29 (Table 19) (rel. Oct. 2011).

[32] *Further Notice* at ¶ 1101.

requisite 4 Mbps downstream/1 Mbps upstream speeds. Thus, as explained below, the Commission should clarify through this rulemaking that only CAF Phase II support recipients and price cap carriers that accept incremental CAF Phase I support are subject to this testing and reporting requirement.

While the Commission clearly stated that CETCs whose legacy high-cost support is being phased out have no broadband obligations (which presumably includes broadband testing and reporting requirements),[33] the Commission was not as clear with respect to price cap carriers whose legacy high-cost support is frozen and will be phased out and transitioned to the CAF. Unlike incremental CAF Phase I and CAF Phase II support recipients, price cap ETCs whose high-cost support is frozen have no obligation under the *Order* to deploy broadband service that satisfies a 4 Mbps downstream/1 Mbps upstream speed. Instead, such price cap ETCs are required in 2012 simply to "use their frozen high-cost support in a manner consistent with achieving universal availability of voice and broadband" (*id.* at ¶ 149) and, in 2013 and later years, to use a specified percentage of frozen high-cost support "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.* at ¶ 150.

Because these price cap ETCs are not required to use their high-cost support to deploy networks that are capable of providing customers with broadband service at certain Commission-defined speeds, there is no reason to subject such ETCs to costly and burdensome testing and reporting obligations, particularly when a certification from an officer of the company, attesting that the company complied with its broadband obligations, would suffice. In sum, it would

[33] *See Order* at ¶ 583 ("Competitive ETCs whose support is being phased down will not be required to submit any of the new information or certifications [ ] related solely to the new broadband public interest obligations.").

benefit all ETCs if the Commission clarified that: (i) only recipients of incremental CAF Phase I, CAF Phase II, and, possibly, Mobility Fund Phase II support will be required to comply with the new broadband testing and reporting requirements that will be developed through this further rulemaking; (ii) CETCs have no broadband testing and reporting obligations; (iii) price cap carrier ETCs that receive only frozen support can demonstrate that they comply with their broadband obligations via a certification, and not through testing and reporting; and (iv) Mobility Fund Phase I recipients are subject to separate reporting requirements, the details of which should be finalized prior to the reverse auction to distribute Mobility Fund support.[34]

In response to the Commission's query about whether it should establish a uniform methodology for measuring broadband performance (*Further Notice* at ¶1014), AT&T recommends that the Commission first seek expert input from appropriate standards bodies in order to ensure the chosen methodology (or methodologies) is both technically sound and cost effective. In the interim, within certain Commission-defined parameters, the Commission should give providers the flexibility to measure their broadband service in a manner that makes sense for that provider's particular broadband network, while still giving the Commission the assurance that its high-cost dollars are being used appropriately.

For example, the Commission could require incremental CAF Phase I and CAF Phase II support recipients to test their networks using a statistically valid sample size, consisting of customers who purchase broadband service at speeds of 4 Mbps downstream/1 Mbps upstream

[34] *See* 47 C.F.R. § 54.313(k) ("This section does not apply to recipients that solely receive support from the Phase I Mobility Fund.").

or greater.[35] The Commission's requirements should be sufficiently flexible to allow those CAF recipients to demonstrate the statistically valid performance of a service tier (as opposed to every individual line)[36] in a manner that minimizes costs while still providing the Commission with assurance that service is being provided in a manner consistent with the required speeds. By minimizing the costs of its testing requirements, the Commission will maximize the funds available for deploying new infrastructure capable of supporting broadband service, thereby encouraging a more rapid deployment of broadband service.

Importantly, the Commission should not require CAF support recipients to demonstrate that they are satisfying the applicable speed thresholds 100 percent of the time for 100 percent of their customers using CAF-supported infrastructure. No service provider, whether voice, data or broadband, designs its networks to achieve such perfection because such a perfection requirement would result in an overbuilt network that is extremely and unnecessarily costly,

[35] If the Commission does not alter its suggested approach to permit flexibility in testing, then it is important that the Commission permit providers to exclude from any such testing regime those customers who have elected to purchase broadband service at speeds that are *less than* 4 Mbps downstream/1 Mbps upstream. While a CAF recipient will have engineered its network to enable such customers to obtain at least 4 Mbps downstream/1 Mbps upstream, the Commission should expect that some percentage of customers will select slower speeds. Once a consumer has selected broadband service at speeds of less than 4 Mbps downstream/1 Mbps upstream, it would be unduly burdensome – and a waste of resources – for the customer's broadband service provider to modify the customer's service for the sole purpose of testing whether that customer could, as a purely academic matter, achieve speeds greater than 4 Mbps downstream/1 Mbps upstream from the consumer's modem to a point on the Internet. To conduct such a test, the broadband provider would likely have to coordinate a reset of the customer's service profile to a higher-speed service tier (i.e., 4 Mbps downstream/1 Mbps upstream or greater), perform the requisite test, and then coordinate the reactivation of the customer's service profile back to the service tier to which they have subscribed. This process (which likely would include issuing multiple service orders per customer) would have to be repeated each time the test was run. It makes little sense to require providers to expend the time and effort to demonstrate that such customers are capable of obtaining faster speeds than they have purchased, and thus the Commission should expressly permit providers to exclude such customers from testing.

[36] The Commission also should address whether consumers have the ability to refuse to participate in measurement collection since there can be an impact to performance of their service and it requires the customer to relinquish some degree of control over their personal devices and home network. If customer approval is required, a program based on testing all lines is practically foreclosed.

giving the Commission less bang for its CAF buck. Moreover, any such "perfection" standard would be illusory, as decades of experience have shown that there will always be events beyond the service provider's control, whether natural or man-made, that make such perfection impossible. And in all events, such a perfection standard would likely be unlawful because it runs counter to the core universal service principle that consumers in rural areas should have access to information services that are "reasonably comparable" to those in urban areas.[37] Thus, the Commission could not, at tremendous expense, require perfection for rural broadband services, given that the Commission's own data (discussed below) shows that urban consumers receive high-quality – but certainly not perfect – broadband services today.

Thus, it is far more reasonable (and lawful) for the Commission to permit these CAF support recipients to demonstrate that their networks are capable of providing broadband service within reasonable proximity of the bright line targets set by the Commission. Establishing a performance range at something less than 100 percent would be consistent with the results of the Consumer Broadband Test, performed by SamKnows, which showed that most major broadband providers' actual broadband speeds are approximately 80 percent or higher of their advertised speeds.[38] Thus, requiring that a specific proportion of the test results (e.g., 80 percent) achieve a target percentage (e.g., 80 percent) of the objective speed reflects solid statistical procedures and gives the Commission reasonable assurance that, for the vast majority of the time, consumers are receiving the level of service performance envisioned by the Commission.

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[37] 47 U.S.C. § 254(b)(3).

[38] *See* Measuring Broadband America, A Report on Consumer Wireline Broadband Performance in the U.S., FCC's Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, 2011 WL 3293034 (rel. Aug. 2, 2011).

Moreover, this type of statistical sampling offers a simple yet valid means of addressing performance-affecting factors beyond the provider's control, while keeping monitoring costs under control, thus helping the CAF to operate efficiently. For example, in order for a line's bandwidth test to accurately reflect the line's capacity, it is necessary that the test occur when no other activity is present on the line. While this may be practical in a lab environment, it is impractical when an active consumer line is being tested, particularly if the test occurs in the peak period. Furthermore, the Commission's proposed test point closest to the consumer (i.e., the modem) means that factors outside the provider's network (and thus beyond the provider's control), such as inside wire, will be included in the testing. Specifically, the connection between the network interface device (NID) on the side of the premises and the modem inside the premises is included in the Commission's test regime, which could unfairly skew the test results, particularly if that inside wire is in poor condition. Beyond this, there can be transient network events that could negatively affect performance for short periods of time. These include maintenance activity, equipment failures, and/or unpredictable load surges (e.g., due to a major breaking news event) that prevent the provider from achieving perfect performance 100 percent of the time for 100 percent of customers. If a test were run during one of these transitory events, the test results would be adversely affected.

Any interim testing regime for incremental CAF Phase I recipients also should permit such providers to test the speed of their broadband service between the customer's modem and the provider's DSLAM (or comparable device), which is where many fixed broadband providers already have deployed testing equipment. Requiring broadband providers to implement different testing practices now – even in areas that will be built-out or upgraded with incremental support – would be impractical and expensive, and would needlessly delay the CAF recipient from providing service at speeds of 4 Mbps downstream/1 Mbps upstream or greater. To the extent service providers engage in service monitoring today, many of them are likely to focus their testing regimes on the access links between the customer's premises and a local point of aggregation in their networks (e.g., a DSLAM or comparable device), and not the entire end-to-end path from the customer's premises, across their backbones, to an Internet exchange point. Additionally, not all providers perform tests regularly across their subscriber bases; instead, they test on an as-needed basis in response to customer trouble tickets.

If the Commission were to insist on requiring incremental CAF Phase I participants to test their broadband performance from the customer to the nearest Internet access point (*Order* at ¶ 111) and not some other point closer to the customer (e.g., DSLAM or comparable device), the ensuing cost and complexity of creating such a testing regime is likely to deter a significant number of price cap carriers from participating. The Commission should be informed in this regard by its participation in the SamKnows testing process, which provided the Commission with some sense of the magnitude of the costs, time, and complexity associated with implementing a new testing platform, and performing data collection and analysis. The Commission can avoid the needless waste of resources – and remove a barrier to broadband deployment via the CAF – by giving broadband providers the option to satisfy their measurement obligations by utilizing the less burdensome, yet statistically valid, alternatives described above.

Finally, if the Commission ultimately determines that it should have uniform measurements and a uniform measurement methodology (or methodologies, to account for different technologies such as wireless and satellite), AT&T suggests that the Commission first seek the input of an appropriate standards-setting body, such as the Alliance for Telecommunications Industry Solutions (ATIS) or the Broadband Forum (BBF), and then base its methodology(ies) on ATIS's or BBF's recommendations. Moreover, to the extent that customer premise equipment will be implicated in the recommended approach, it is important that equipment vendors be active participants in the process, which already occurs in standards bodies. Engaging with an appropriate standards body, particularly one that can incorporate global considerations, will ensure that economies of scale for testing are achieved, thereby reducing the testing costs for the CAF program (in contrast to the Commission establishing CAF-specific testing methodologies and platforms).

As the Commission well understands, broadband measurement issues are complicated and it will take ATIS or BBF (or some other standards body) time to develop its recommendations. Consequently, it makes sense for the Commission to allow incremental CAF Phase I recipients, who will begin receiving support this year, to satisfy the testing and reporting requirements using the flexible approach we describe above. By the time the Commission is ready to launch CAF Phase II and Mobility Fund Phase II, it could incorporate the recommendations from ATIS or BBF (or some other standards body) into the CAF Phase II and Mobility Fund Phase II program requirements so that bidders could factor the cost of the Commission-specified testing methodology into their bids.

C. The Commission Should Jettison Its Existing, Two Standard Deviations Measurement Of Reasonable Comparability For Voice Services In Favor Of A More Valid Measurement Tool And It Should Conclude That It Is Not Required To Perform Any Reasonable Comparability Review For Broadband Service.

The Commission's desire to continue its "no more than two standard deviations above the national average" measurement for reasonable comparability is understandable since the Commission recently persuaded one court to uphold that measurement after having failed before in the courts.[39] But that measurement is simply no longer an appropriate tool (if it ever was) to measure whether the rates for voice service in rural areas are reasonably comparable to rates for voice service in urban areas. Continuing to measure basic R-1 voice rates is pointless given that most consumers do not purchase basic R-1 voice service and many, if not most, voice service providers do not offer it. Understanding the standard deviation of a set of normally distributed data points is helpful in appreciating how much variance there is from the average but those data points cannot be from altogether different populations as they would be if the Commission attempted to include in its analysis basic R-1 voice rates with, for example, rates for all-distance offerings. Moreover, creating separate standard deviation measurements based on the discrete type of service and technology could be infeasible because there might not be sufficient data points to produce statistically meaningful results.

Rather than trying to shoehorn its existing two standard deviations methodology into the dramatically changed marketplace for voice service, the Commission should adopt its proposal to establish a presumption that if a provider is offering the same rates, terms, and conditions for a supported service to both urban and rural customers, the services (along with the rates for those services) that it offers in rural areas are "reasonably comparable" to the services and rates that it offers in urban areas. *See* ¶ 1027; 47 U.S.C. § 254(b)(3). This presumption also should apply if rural rates do not exceed the urban rates by some percentage since the statute does not demand identical rates but, rather, provides for a "reasonable" comparability of rates. Until parties know

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[39] *Compare Vermont Pub. Serv. Bd v. FCC,* 661 F.3d 54 (D.C. Cir. 2011) *with Qwest Corp. v. FCC,* 258 F.3d 1191 (10th Cir. 2003) (court remanding the Commission's 135 percent benchmark); *Qwest Communications Int'l, Inc. v. FCC,* 398 F.3d 1222 (10th Cir. 2005) (court remanding the Commission's two standard deviations benchmark).

how much high-cost support will be available in given area and what their costs of providing service are in that area, it is impossible for commenters to suggest a percentage at this time.

Once the universe of providers that are not able to utilize the above presumption is identified, then the Commission could proceed with identifying alternative methodologies suitable to address their situations. If, for example, a particular provider does not offer service in urban areas or charges more than a negligible additional amount in rural areas than it does for the same service that it offers in urban areas, then the Commission could compare that provider's rural rates against a state-specific benchmark for that type of service (e.g., all-distance, local-only) and type of technology (e.g., mobile wireless, fixed) to evaluate whether the provider's rural rates are reasonably comparable to urban rates in that state. In compiling this information, the Commission should consider rates of all voice service providers, including providers that are currently not ETCs (e.g., cable companies, over-the-top VoIP providers).

The Wyoming Commission has recently documented the futility of comparing the national average urban rate for basic residential service to even Wyoming's statewide average rate for basic residential service (let alone Wyoming's average rural rate for basic service). In its petition for reconsideration, the Wyoming Commission states that its statewide average rate for basic local service – not including any state regulated fees – is $39.95 whereas the national average urban rate plus the subscriber line charge and the federal USF fee is $19.63 (two standard deviations of which is $27.33).[40] Continuing to apply the national average urban rate to a state like Wyoming, which "has taken all practicable steps to achieve reasonable comparability

[40] Wyoming Public Service Commission Petition for Reconsideration, WC Docket No. 10-90 *et al*. at 3 (filed Dec. 29, 2011).

through state action and existing federal support,"[41] simply does not make sense. Instead, to the extent the Commission proceeds with collecting data, it should compile state-specific rate information and establish state-specific urban averages to use only with those carriers that cannot rely on the presumption of reasonable comparability discussed above. There would be different averages for basic R-1 service and any-distance offerings, for example, because those services have different rate structures. Similarly, there would have to be different averages for mobile wireless voice offerings from fixed voice offerings because they offer consumers different functionalities. Once the Commission establishes these benchmarks, which may be many in number given the broad array of voice offerings, it would have to evaluate if the carrier's rates fall within a reasonable range of the relevant benchmark.

Finally, the Commission requests comment on what methodology it should apply to determine whether rural broadband service rates are reasonably comparable to urban broadband service rates. The simple answer is that Commission need not develop any methodology because the Commission has no statutory obligation to ensure that broadband service rates in rural and urban areas are reasonably comparable unless it makes broadband service a supported service. It makes sense that Congress intended its reasonable comparability principle to apply only to supported services. If the rates for a supported service were not reasonably comparable between rural and urban areas, Congress would expect the Commission to take action by, among other things, making available high-cost funding to those providers offering the supported service in rural areas. Congress would not expect the Commission to make available such support to providers of non-regulated, non-USF-supported services that, nonetheless, charge significantly more for their service in rural areas than in urban areas. The fact that section 254(b)(3) requires

[41] *High-Cost Universal Service Support*, 25 FCC Rcd 4072 (2010).

rates for information services – which broadband service unquestionably is – to be reasonably comparable does not undermine this interpretation because, as AT&T has explained previously, the Commission has the statutory authority to make broadband service a supported service and thus support it directly with USF funding.[42] It would be illogical *not* to limit the reach of section 254(b)(3) to supported services only because what would be the basis for Commission action in the event that providers of enterprise web hosting (another information service), for example, charge customers in rural areas significantly more than customers in urban areas?[43]

If the Commission disagrees, it should adopt the framework we propose above for voice services. The Commission should establish a presumption that a broadband provider that offers national pricing for its broadband service offerings is offering those services in rural and urban areas at reasonably comparable rates. Non-national broadband providers also could avail themselves of this presumption if the rates that they charge for broadband services are within a certain range of a nationwide broadband provider's rates. Similarly, the Commission could establish state-specific benchmarks for broadband service (based on rate information from all types of broadband providers and not just rate information from ETCs) and use a percentage to evaluate whether a CAF recipient's broadband service rates are reasonably comparable to broadband service rates in urban areas.

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[42] *See, e.g.,* Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, FCC, GN Docket Nos. 09-51, 09-47, & 09-137 and WC Docket Nos. 05-337 & 03-109 (filed Jan. 29, 2010); Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, FCC, GN Docket Nos. 09-51 & 09-137 and WC Docket Nos. 05-337 & 03-109 (filed Apr. 12, 2010); AT&T *USF/ICC Transformational NPRM* Comments at 111-20.

[43] For similar reasons, the Commission should make clear that a high-cost recipient's reasonable comparability certification for voice service (*see* 47 C.F.R. § 54.313(a)(10)) only applies to voice telephony service offered in supported areas (i.e., geographic areas where the provider is receiving high-cost support).

D. The Commission Should Revise Its Proposal To Require All ETCs To Obtain Letters Of Credit.

The Commission proposes to require "all ETCs" "to obtain an irrevocable standby letter of credit (LOC) no later than January 1, 2013." *Further Notice* at ¶ 1105. The Commission's stated reason for its proposal is "to protect the integrity of the USF funds disbursed to the recipient and to secure return of those funds in the event of a default, even in the event of bankruptcy." *Id.* As both one of the largest contributors to the USF and, possibly, a competitor to a CAF recipient that has defaulted on its CAF performance obligations, AT&T supports this goal. However, we believe that the Commission could achieve its goal in a less burdensome manner. First, the Commission should reject its proposal to require "all ETCs" to provide LOCs next year. It is unnecessary to require an existing high-cost recipient whose support is being phased out (CETC) or eliminated on possibly a flash-cut basis (such as a price cap carrier ETC) to obtain a LOC so that the Commission can be assured that the carrier's ever-diminishing support is being used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). Instead, the Commission should apply any such requirement only to CAF recipients that are awarded high-cost support to perform Commission-specified actions within Commission-specified periods of time (e.g., offer at least 4 Mbps downstream/1 Mbps upstream broadband service to x% of high-cost locations within y years). And even for those CAF recipients with broadband build-out obligations, the Commission should more narrowly tailor its proposal to apply only to those recipients that do not satisfy certain bright line criteria, described below.

As we explained above, the Commission should reject proposals that reflexively apply new CAF obligations to existing high-cost support recipients – recipients whose high-cost support is being eliminated. This is true for ETC service obligations, broadband performance measurement requirements, and LOCs.[44] There is no basis for the Commission to be concerned that a carrier whose support the Commission is eliminating will no longer spend its legacy high-cost support consistent with its statutory and regulatory obligations and the Commission has failed to explain why its existing tools – including forfeitures – are inadequate to ensure that this remains the case. Absent any analysis supporting its proposal, requiring existing ETCs to obtain LOCs for high-cost support amounts that the Commission is eliminating is inconsistent with the Commission's duty to "adopt regulation only upon a reasoned determination that its benefits justify its costs."[45] The Commission's proposal to require all recipients of *new* high-cost support (i.e., CAF support) to obtain LOCs also violates this requirement insofar as the Commission has made no effort to tailor such an obligation to its stated goal. A LOC simply is unnecessary for a service provider that either: has an investment grade rating by at least one or more of the three ratings agencies (Standard and Poor's, Moody's or Fitch), has revenues that exceed the amount of CAF support the provider is eligible to receive each year by some large percentage, or (among other possibilities) receives more from other FCC programs (e.g., other USF programs including E-rate and Lifeline, TRS payments) than its annual CAF support amount, which would enable the Commission to claw back the CAF support amounts through netting, if necessary.

The Commission declined to limit the Mobility Fund Phase I LOC requirement to a subset of bidders that failed to meet certain bright line criteria (e.g., minimum credit rating, minimum debt to equity ratio) because "such criteria would require a level of financial analysis

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[44] Of course, the list is much longer than that. As we will discuss in our comments in response to the *USF/ICC Transformational Order* petitions for reconsideration, it was entirely inappropriate for the Commission to impose, among other things, new reporting requirements on ETCs that only receive high-cost support that the Commission is eliminating.

[45] Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011); *see also* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (Jul. 11, 2011) (applying Exec. Order 13,563 to independent agencies).

of applicants that is likely to be more complex and administratively burdensome than is warranted for a program that will provide one-time support." *Order* at ¶ 451. The Commission clearly is mistaken to think that it is more burdensome for a service provider to show that it has an investment grade credit rating than to obtain a LOC. In fact, no great "level of financial analysis" is required to show a provider's "bond rating, market capitalization, or debt/equity ratios." *Mobility Fund NPRM* at ¶ 85. Indeed, it would be unwise for the Commission to extend CAF support to any service provider that claimed it lacked the capability to perform this "level of financial analysis." In any event, the Commission is seeking comment on its CAF programs that will provide ongoing, not one-time, support so the Commission's stated justification for declining to adopt the criteria proposed in its *Mobility Fund NPRM* does not apply. At a minimum, the Commission should give CAF recipients the choice to demonstrate their financial wherewithal via the criteria we suggest above *or* through a LOC.[46] If the provider opts for the first option, the Commission should require it to provide updated information to the Commission on an annual basis in recognition that a provider's financial health could change over the term of the CAF award. Finally, if the Commission gives CAF recipients this choice then it should reject its proposal to limit the scope of this requirement to only CAF recipients that receive CAF support amounts above a certain level. *Further Notice* at ¶ 1107.

E. The Proposed Additional CAF Obligations Are Unnecessary, Unlawful Or Premature.

In evaluating whether to impose conditions on CAF support, the Commission must be mindful that providers will be competing to provide service in areas that the market already has demonstrated are uneconomic to serve. Imposing conditions that are unnecessary to ensure the

[46] In lieu of a LOC, the Commission should permit CAF recipients to satisfy this requirement through a surety bond, which may be less costly for providers to obtain.

deployment of broadband service to unserved areas – which is, after all, the purpose of the CAF – will only cause providers to increase the size of their bids or not to participate. Higher bids mean fewer CAF awards and this ultimately means delayed broadband deployment to unserved areas. Using the "is the condition necessary to ensure deployment of broadband service to unserved areas" criterion, none of the specific proposals mentioned in the *Further Notice* warrant adoption and are flawed for other reasons. First, it is impossible for commenters to address the first issue, in which the Commission seeks comment on what IP interconnection requirements it should establish "beyond whatever framework it adopts more broadly" in a separate (and later) phase of this rulemaking. *Further Notice* at ¶ 1028. Since no party knows what IP-to-IP interconnection framework, if any, the Commission will adopt in the second phase of this rulemaking, who could say whether the Commission should adopt requirements beyond such a framework? Clearly, that issue is not ripe for consideration.

Second, the Commission must reject the proposal to create a CAF sub-fund for municipalities. *Id.* at ¶ 1030 (requesting comment on whether to create a new fund to enable communities to deploy their own broadband network). As interpreted by the Commission in its *Order*, only ETCs are eligible to receive high-cost support. *See, e.g.*, *Order* at ¶¶ 389-92; *see also Further Notice* at ¶ 1199 (proposing to require CAF Phase II applicants to be designated as ETCs covering the relevant geographic area prior to participating in an auction). Thus, it is the Commission's view that in order for a municipality to receive high-cost support, it must be first designated as an "eligible *telecommunications carrier*" by its state commission (or the Commission in the event that the state commission has no authority to designate a municipality an ETC). 47 U.S.C. § 214(e)(2), (6). If the town becomes an ETC, there is no reason why it should not be required to compete against other ETCs for CAF support. By establishing a special pot of CAF money that is set-aside only for ETCs that are community owned and controlled, the Commission would violate its competitive neutrality universal service principle by giving certain ETCs (namely, town-owned and controlled ETCs) an unfair advantage over others. If the proposal is to give to community owned and controlled ETCs high-cost support that is in addition to whatever CAF support another ETC already may be receiving in that area, then such action is inconsistent with the Commission's decision to stop funding competition. *See generally Order* at ¶¶ 164-66, 316.

The Commission also should reject out of hand the other proposal mentioned in this part of the *Further Notice*, which would require CAF recipients to construct facilities for the sole purpose of connecting to community broadband providers that are located outside of the CAF service area. *Further Notice* at ¶ 1029 (requesting comment on a Public Knowledge/Benton proposal). *See* Public Knowledge/Benton *August 3 PN* Comments at 6 ("if a USF recipient's service area borders an underserved area, it should be required to interconnect with, and provide backhaul capacity to, networks in the underserved area"). The costs to construct such facilities would be unknown to a CAF applicant when it bids for support and, as such, it could not factor those costs into its bid, leaving the winning bidder in an untenable financial position. Instead, a CAF recipient's obligations with respect to the community broadband provider, in the scenario noted above, should be the same as with any other wholesale customer that seeks to obtain the same service.

F. It Is Premature To Adopt Final Rules For CAF Phase II And Mobility Fund Phase II.

Until the Commission and industry observe the operation of the Mobility Fund Phase I reverse auction, it is difficult at this time to suggest changes to the auction methodology. Using reverse auctions to award universal service support is untested in this country and AT&T expects that all interested parties will learn much once the first auction is complete, which will be some time later this year. *Order* at ¶¶ 28, 519. After the Commission begins disbursing support to Mobility Fund Phase I recipients early next year, it could commence an expedited comment cycle, seeking targeted comment on changes it should make to both CAF Phase II and Mobility Fund Phase II based on experience from the Mobility Fund Phase I auction. Perhaps experience will show, for example, that the Commission should obtain more information about the bidder upfront rather than waiting until after it selects the bidder as the winner. *See Further Notice* at ¶ 1217 (seeking comment on whether it should wait until after selecting a bidder for the bidder to demonstrate that it is "legally, technically and financially qualified to receive the support"). Similarly, if the Commission learns that almost all Mobility Fund Phase I bidders propose to provide service to areas with 2G service (versus areas lacking any wireless service), the Commission may want to adopt its proposal to provide a bidding credit to bidders that propose to deploy broadband service in truly unserved areas. *Id.* at ¶¶ 1132, 1193. Such a credit, however, will result in the Commission spending more money than it otherwise should and, for that reason, based on its Mobility Fund Phase I experience, the Commission may opt for the biggest bang for the buck approach, which supports not creating such a bidding credit.

There are other issues, however, that are either non-starters or so obviously essential that further consideration is unnecessary. For example, the Commission should reject out of hand its suggestion to establish a bidding credit for small businesses. *Id.* at ¶¶ 1157-60, 1213. Such a credit would cause the Commission to spend more than necessary to achieve ubiquitous broadband deployment. Moreover, the Commission would be violating its own competitive neutrality principle by providing an unfair advantage to small providers. Similarly, the

Commission can be assured of litigation if it adopts its proposal to allow bidders to submit qualitatively different bids (e.g., bids that propose to provide slower broadband speeds), which the Commission would then score. It seems an impossible task to score fairly such disparate bids. For example, is a bid that proposes to offer broadband service at speeds of 6 Mbps downstream/1.5 Mbps upstream worth $50 more per location than a bid that proposes to offer broadband service at speeds of 6 Mbps downstream/1 Mbps upstream? Is the former bid worth $5 more per location? $500 more? The losing bidder will argue that the Commission's score was arbitrary however the Commission decides that issue and that losing bidder probably will be right.

On the other hand, there is no question that the Commission should permit price cap carriers that declined the so-called state level commitment to participate in CAF Phase II on a more granular basis. *Id.* at ¶ 1201. Again, it would not be competitively neutral for the Commission to bar one category of broadband service provider – price cap carriers – from its CAF Phase II competitive process simply because those carriers were unable to deploy broadband facilities across their large study areas for the amount of support offered. Moreover, preventing these carriers, which are otherwise likely to be among the strongest competitors in the CAF Phase II process, from participating will result in higher bids and, thus, fewer CAF Phase II awards. By artificially increasing the size of winning bids by excluding price cap carriers and, among other proposals, applying a 25 percent small business bidding credit, the Commission runs the risk of violating its obligation to "preserve and advance universal service" because, as the Fifth Circuit explained, "excessive funding may itself violate the sufficiency requirements of the Act. *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000).

G. Remote Areas Fund

AT&T supports the Commission's decision to establish a Remote Areas Fund, designed to support broadband deployment in the highest-cost areas in the country. We also support using a forward-looking cost model to identify such areas. Understanding that the Commission may want to commence this fund before it adopts a cost model (*see Further Notice* at ¶ 1229), AT&T recommends that the Commission rely on output from the CQBAT, the model developed with assistance of the members of the ABC Plan Coalition, to identify areas eligible for Remote Areas Fund support. *See Order* at ¶ 183 (describing the CQBAT and access to it that is available to interested parties). The Commission already has the CQBAT data necessary to begin the process of identifying these areas. *Further Notice* at ¶ 1225. The Commission proposes to use data from the National Broadband Map modeling during this interim period. *Id.* at ¶ 1230. Both the National Broadband Map cost model and CQBAT were developed by the same firm, CostQuest. Because CQBAT was developed after the National Broadband Map, however, it has the benefit of using more recent data and modeling techniques. Moreover, any modeling lessons learned from the National Broadband Map engagement would have been incorporated into the CQBAT.

AT&T also supports testing the Commission's proposal to provide support directly to consumers – not the service provider – in these highest-cost areas through discounts on consumer bills. *Further Notice* at ¶¶ 1225, 1252. If the Commission opts to apply a means test, to limit the availability of this consumer discount to those households with incomes of less than a certain amount (*id.* at ¶¶ 1261-62), the Commission (via its designee, USAC) or the states should make the eligibility determination – not the service provider. Determining which consumers are eligible for a government assistance program (which would be the case here if the Commission adopts its portable consumer discount approach) should be a government function. No public assistance program other than the Commission's Lifeline program relies on private sector entities, with a financial interest in the outcome of the eligibility determination, to decide which consumers are eligible for the benefit. It would be unheard of to ask a grocery store to evaluate whether a consumer is eligible for the Supplemental Nutritional Assistance Program (i.e., food stamps). It is equally inappropriate to require a satellite provider to review a consumer's income information to determine whether the consumer's household qualifies for discounted voice and broadband service.

III. CONCLUSION

The long-overdue transformation of the Commission's high-cost program is finally underway. At this earliest stage of the transition, however, it is essential that the Commission do more to remove existing regulatory obstacles that will unnecessarily slow its progress toward achieving its broadband goals and it certainly should not create new ones through its further rulemaking. The unnecessary obstacles that we discussed in these comments are ones that will delay broadband build-out in unserved areas and will result in the Commission spending more than necessary on CAF awards.

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For the reasons provided above, AT&T respectfully requests that the Commission adopt our recommendations on ETC service obligations, broadband measurements, evaluating reasonably comparable services, mandatory LOCs, unnecessary broadband "public interest" requirements, CAF Phase II, Mobility Fund Phase II and Remote Areas Fund design.

Respectfully Submitted,

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