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

Pursuant to section 1.429(f) of the Commission's rules,[1] AT&T Inc. (AT&T), on behalf of its operating affiliates, files this opposition to, and comments on certain petitions seeking reconsideration of the *Order*.[2]

AT&T has long supported fundamental and comprehensive reform of the Commission's existing, integrally intertwined universal service and intercarrier compensation regimes. We thus welcomed the *Order,* which appropriately undertook a holistic review of these regimes, and made significant strides toward reforming them to meet the communications needs of 21st Century America. In particular, we welcome the Commission's decision to shift the focus of its universal service policies and funding mechanisms away from supporting legacy voice services to promoting deployment of next generation broadband networks and services for all Americans. We also support the Commission's overhaul of reform of the existing intercarrier compensation regime, which all agree is fundamentally broken. Specifically, we wholeheartedly endorse the Commission's decision to bring all traffic within section 251(b)(5) of the Act, and to transition the legacy, calling-party-pays framework to a bill-and-keep regime in which service providers look to their own subscribers to recover their costs. We also support the Commission's adoption of rules to resolve myriad disputes regarding the application of intercarrier charges to VoIP-PSTN traffic, phantom traffic, and access stimulation.

Of course, as would be the case with any order tackling such a broad array of highly complex issues, numerous parties have identified and proposed a number of ways in which the

[1] 47 C.F.R. § 1.429(f).

[2] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 10-90, *et al.*, FCC 11-161 (rel. Nov. 18, 2011) (*Order*).

Order could be improved or clarified to better align the rules it adopts with the overarching principles and objectives driving the Commission's reform effort. As discussed herein, AT&T supports many of these proposals, and encourages the Commission to adopt the changes petitioners suggest to ensure the Commission achieves its ambitious goals of universal access to broadband and promoting the transition of the PSTN to all-IP networks. Among other things, the Commission should modify, clarify and/or eliminate some of the new universal service reporting requirements, relieve eligible telecommunication carriers (ETCs) of their service obligations and designations in areas where they receive no high-cost support, and reconsider the phase-down in legacy high-cost support for price cap carriers. We also encourage the Commission to reverse its conclusion that VoIP providers can impose originating access charges, confirm that its transitional rates for VoIP-PSTN traffic do not abrogate existing interconnection agreements, create a technical feasibility exception to the call signaling rules, eliminate certain loopholes in its rules to prevent access arbitrage and traffic pumping, and modify the way in which price cap LECs calculate their baseline revenues.

Other parties, however, have proposed a number of changes that would upset the balance struck by the *Order*, or which otherwise are inconsistent with Commission policies and objectives, which the Commission therefore should reject. Specifically, as discussed herein, the Commission should reject proposals that would discriminate against certain service providers by precluding them from participating in certain universal service programs, as well as proposals to impose conditions on the availability of Connect America Fund (CAF) support that are unrelated or unnecessary to ensure deployment of broadband to unserved areas. It also should reject claims that intrastate originating access charges should apply to calls that originate on the PSTN but terminate to a VoIP customer, reject proposals to impose additional call signaling requirements, and reject the DC Public Service Commission's proposal to reduce carriers' flexibility to recover lost access charge revenues through the Access Recovery Charge (ARC).

II. Petitions For Reconsideration Of The Universal Service Provisions Of The *USF/ICC Transformation Order*.

A. The Commission Should Act Now To Relieve Carriers Of Their Legacy ETC Service Obligations And Designations In Those Geographic Areas Where They Receive No High-Cost Support.

AT&T agrees with USTelecom that the Commission should act now to reform the ETC rules, and not delay reform until after the *USF/ICC Transformation FNPRM* proceedings are complete.[3] Specifically, the Commission should eliminate a carrier's existing ETC obligations *and* designation in any area where that carrier does not receive high-cost universal service funding. This result is compelled not only by sound policy, but by sections 214 and 254 of the Act. The Commission has a complete record on these issues, and thus there is no justification for further delaying these urgently-needed reforms.

Section 214(e) provides that each "eligible telecommunications carrier . . . 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) . . ."[4] The Commission has interpreted this language to require ETCs to offer legacy telecommunications services throughout their designated ETC service areas, regardless of whether those ETCs actually receive universal service funding there.[5] As the Commission phases in the reforms

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[3] USTelecom Petition for Reconsideration at 11-12.

[4] 47 U.S.C. § 214(e)(1).

[5] *See, e.g.*, 47 C.F.R. § 54.101(a); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 192 (1997) (*First Universal Service Order*).

adopted in the *Order*, this interpretation is no longer legally sound. Nor is it sensible as a policy matter.[6]

First, by definition, the purpose of the "eligible telecommunications carrier" designation is to identify those carriers that are, in fact, *eligible* to receive universal service funding. As section 214(e)(1) directs, a "common carrier designated as an eligible telecommunications carrier . . . *shall be eligible to receive universal service support*."[7] The pre-Connect America Fund (CAF) regime satisfied this requirement because it enabled more than one carrier to become an ETC and thereby qualify for any universal service funding distributed in a given geographic area. But the new regime will entitle just *one* provider to qualify for support in a given area in exchange for offering both legacy services *and* broadband. Under this new framework, many existing "eligible telecommunications carriers" will not in fact be *eligible* to receive universal service funding and, indeed, will be categorically barred from receiving it.[8] For that reason alone, the Commission would violate section 214(e)(1) if it failed to eliminate ETC service obligations and designations for such carriers.[9]

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[6] Many of the arguments in this section are drawn from AT&T's prior ex parte and comments on these issues; for additional detail, please refer to those pleadings. *See, e.g.*, Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.* (filed Oct. 19, 2011) (AT&T 10/19/11 *Ex Parte*); AT&T *USF/ICC Transformation NPRM* Comments, WC Docket Nos. 10-90 *et al.*, at 54-82 (filed Apr. 18, 2011) (AT&T *USF/ICC Transformation NPRM* Comments); AT&T *USF Transformation FNPRM* Comments, WC Docket Nos. 10-90 *et al.*, at 3-17 (filed Jan. 18, 2012) (AT&T *USF Transformation FNPRM* Comments).

[7] 47 U.S.C. § 214(e)(1) (emphasis added).

[8] For example, any carrier that elects not to provide broadband service in a given area not only will lose its existing support, but also will be barred even from *competing* for future funding. Similarly, any carrier that does not prevail in the competitive bidding process will be ineligible for funding until the expiration of the auction winner's term of service.

[9] *See also* AT&T *USF Transformation FNPRM* Comments at 4-5.

Second, many ETCs will lose their existing universal service funding under the new regime. Some carriers depend heavily on that support to offset the high costs of providing service in funded areas, and the Commission cannot rationally compel these carriers to continue providing service at a loss after it withdraws that support. Indeed, such an unfunded mandate would violate the Takings Clause and contravene section 254, which requires the Commission to design its universal service programs so that support is "sufficient" to enable providers to offer the services deemed "universal."[10]

Third, the Commission could not lawfully force any ETC, whether funded today or not, to continue providing service in any high-cost area where it is not the CAF recipient.[11] Under the new regime, only the CAF recipient will be entitled to universal service funding. And forcing an unsupported competitor to provide service in competition with a CAF recipient would violate the Commission's well-established principle of "competitive neutrality," which requires that universal service policies "be competitively neutral . . . [and] neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[12]

As AT&T has explained in prior submissions, the Commission has authority to adopt these ETC reforms under several independent legal theories.[13] First, the Commission could adopt a rule pursuant to its section 201 rulemaking authority to interpret and implement section

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[10] 47 U.S.C. § 254(b)(5), (e), (f). *See also* AT&T *USF Transformation FNPRM* Comments at 6; AT&T *USF/ICC Transformation NPRM* Comments at 125-28.

[11] *See also* AT&T *USF Transformation FNPRM* Comments at 5-6.

[12] *First Universal Service Order* at ¶¶ 43-55.

[13] We mention those theories only briefly here. For a more detailed analysis, see the prior pleadings cited herein.

214 limiting an ETC's "service area" – and thus its ETC designation and obligations – to those specific geographic areas where the ETC is receiving universal service support.[14] Second, section 254(f) independently empowers the Commission to adopt a rule that limits ETC "service areas" for purposes of determining where legacy designations and obligations apply.[15] This conclusion follows from longstanding Commission and judicial precedent,[16] as well as the text of section 254(f) itself, which bars states from adopting universal service policies that are "inconsistent with the Commission's rules to preserve and advance universal service."[17] Third, the Commission has authority under section 10 of the Act[18] to forbear from section 214(e) to the extent it determines – wrongly – that the latter requires ETCs to offer service in areas where they receive no universal service support.[19] Finally, the Commission could relieve ETCs of their existing obligations by reinterpreting the language of 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* . . ."[20] This provision could be read to mean that a carrier's obligation to offer service applies *only* in those

[14] *See* AT&T 10/19/11 *Ex Parte* at 3-4 (explaining how such a rule would be consistent with section 214(e)(5)'s allocation of certain authority to state commissions); AT&T *USF Transformation FNPRM* Comments at 8, 11-13.

[15] AT&T 10/19/11 *Ex Parte* at 4-5; AT&T *USF/ICC Transformation NPRM* Comments at 69-71, 77-79; AT&T *USF Transformation FNPRM* Comments at 8-11.

[16] AT&T *USF/ICC Transformation NPRM* Comments at 69-71, 77-79 (analyzing relevant precedent); AT&T 10/19/11 *Ex Parte* at 4 & n.11 (same); AT&T *USF Transformation FNPRM* Comments at 8-11 (same).

[17] 47 U.S.C. § 254(f).

[18] 47 U.S.C. § 160.

[19] AT&T 10/19/11 *Ex Parte* at 5-6; AT&T *USF Transformation FNPRM* Comments at 8, 14-15.

[20] 47 U.S.C. § 214(e)(1) (emphasis added).

geographic areas where the carrier is receiving support—*i.e.*, where the services actually "are supported."[21]

The Commission should act *now* to reform existing ETC obligations and designations; it should not delay these needed reforms until after the *FNPRM* proceedings are complete. As AT&T has explained, the Commission has previously sought comment and compiled a record on these issues, which is all that is required under the Administrative Procedure Act (APA).[22] Indeed, the Commission sought such comment on *two* occasions—both in its *NPRM* [23] and again in its August *Public Notice*.[24] Specifically, in one section of the *NPRM*, the Commission requested "comment on issues related to the geographic scope of ETC obligations and ETC designations. Current ETC obligations apply throughout a designated service area regardless of whether support is actually provided to an ETC operating within the designated service area. *To what extent could we limit ETC obligations to the targeted geographic areas for which an ETC receives support, under both the existing high-cost programs* as well as the proposed CAF, consistent with section 214(e)."[25] In another, it comprehensively discussed section 214(e) and the respective roles of the Commission and the states, and inquired "how the Commission can best interpret these existing requirements to achieve our goals for reform. We also seek comment on whether (and if so how) we should modify the ETC requirements as we proceed

[21] AT&T 10/19/11 *Ex Parte* at 6; AT&T *USF Transformation FNPRM* Comments at 8, 13-14.

[22] AT&T 10/19/11 *Ex Parte* at 6-7; AT&T *USF Transformation FNPRM* Comments at 4.

[23] *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (*USF/ICC Transformation NPRM* or *NPRM*).

[24] *See Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, 26 FCC Rcd 11112 (2011) (*Public Notice*).

[25] *NPRM* at ¶ 386 (emphasis added).

with reforms."[26] The Commission further cited forbearance as one means of altering the ETC regime, asking whether it should "forbear from requiring that recipients of universal service support be designated as ETCs at all."[27] It also raised the possibility of forbearing from section 214(e) in particular.[28] Then, in the *Public Notice*, the Commission teed up these issues a second time by seeking public comment on the ABC Plan.[29] As the Commission highlighted,[30] the ABC Plan made elimination of legacy ETC obligations and designations a central priority, and the Plan explained in detail why the Commission can and should eliminate legacy ETC duties in areas where carriers do not receive any universal service support.[31]

In short, all interested parties have had ample notice of the ETC rule changes outlined above. And numerous parties have in fact *responded* to the Commission's repeated calls for comment. Many of those parties agree with AT&T that ETC obligations and designations should be eliminated in areas where a carrier receives no high-cost support, while others do

[26] *Id.* at ¶¶ 88-89.

[27] *Id.* at ¶ 89.

[28] *Id.* at ¶ 72.

[29] *See* Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 *et al.* (filed July 29, 2011) (ABC Plan).

[30] For example, under the heading "Eligible Telecommunications Carrier (ETC) Requirements," the Commission sought comment on the ABC Plan's "procurement model" approach to universal service, under which carriers would "incur service obligations only to the extent they agree to perform them in explicit agreements with the Commission" in exchange for a specific amount of universal service support. *Public Notice* at 5. *See also* ABC Plan, Attach. 5, at 7-8, 52-53 (ABC Plan Legal Analysis) (discussing procurement model). In addition, the Commission inquired whether "the opportunity to exercise a ROFR [is] reasonable consideration for an incumbent LEC's ongoing responsibility to serve as a voice carrier of last resort throughout its study areas, even as legacy support flows are being phased down." *Id.* at 4.

[31] ABC Plan Legal Analysis at 6-7, 49-59; ABC Plan, Attach. 1, Framework at 1, 13.

not.[32] Those parties have supplied copious legal and policy analyses on both sides of these ETC issues, and little would be gained by waiting for yet another round of notice and comment. Instead, the record on these ETC issues is complete, and the Commission should decide them now.

B. The Commission's New High-Cost Reporting Requirements Violate The Administrative Procedure Act And The Paperwork Reduction Act, Are Unnecessarily Burdensome And Unlawful, And Must Be Rejected.

Numerous petitioners identified fundamental flaws in the Commission's new reporting rule, section 54.313.[33] AT&T agrees with these petitioners and urges the Commission to reconsider this new reporting rule by limiting its application to only those ETCs that affirmatively seek new CAF support. And even for that class of ETC, the Commission should make significant alterations to the rule before it allowing it to become effective. The Wireline Competition Bureau and the Wireless Telecommunications Bureau's recent order clarifying aspects of the Commission's new ETC reporting rule[34] is a good start but, as we discuss below, the Commission should go further.

1. The Commission Should Not Apply Its New Reporting Requirements To Recipients Of Legacy High-Cost Support.

New section 54.313 requires every ETC that receives any high-cost support to comply with burdensome new reporting requirements, regardless of whether and how quickly the ETC

[32] *See, e.g.*, AT&T *USF/ICC Transformation NPRM* Reply Comments, WC Docket Nos. 10-90 *et al.*, at 42-47 (filed May 23, 2011) (discussing comments on both sides).

[33] 47 C.F.R. § 54.313. *See* USTelecom Petition at 15-22; NECA Petition for Reconsideration at 22-25; Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition for Reconsideration; Alaska Rural Coalition (ARC) Petition for Reconsideration at 16-18.

[34] *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Order, DA 12-147 (WCB/WTB rel. Feb. 3, 2012) (*USF Reporting Clarification Order*).

will lose that support. In contravention of Executive Order 13579, which requires the Commission to make regulatory decisions "only after consideration of their costs and benefits (both qualitative and quantitative),"[35] the Commission failed to undertake any cost/benefit analysis prior to adopting this new rule.[36] If it had, it necessarily would have concluded the costs of requiring ETCs whose support the Commission is eliminating far exceed any conceivable benefit from requiring them, for example, to prepare and submit a five-year build-out plan by April 1, 2013.[37] AT&T notes in this regard that one of its competitive ETC affiliates receives only about $90,000/year in interstate access support (IAS), which it will lose in 20 percent increments each year beginning July 1, 2012.[38] Likewise, AT&T's ILEC affiliates could lose all of their support in a flash-cut as early as 2013. *See Order* at ¶ 180. What possible sense could it make for such providers to detail at a wire center level how they intend to use their ever-diminishing or, in some cases, soon-to-be-nonexistent support to "improve service quality, coverage, or capacity"?[39]

The Commission appears to have imposed the new ETC reporting requirements on all recipients of high-cost support in order to ensure that the cost (in time and resources) of

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[35] Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

[36] USTelecom Petition at 15.

[37] *Id.* (citing *Order* at ¶ 587).

[38] *Order* at ¶ 519.

[39] 47 C.F.R. §54.313(a)(1). In its recent *USF Reporting Clarification Order*, the Bureaus introduced ambiguity about the extent of a competitive ETC's broadband obligations. While clear from the *Order* that competitive ETCs whose support is being phased down have *no* broadband obligations (*Order* at n.172), the Bureaus assert that such competitive ETCs must nonetheless submit a five-year plan on April 1, 2013 "that accounts for the new broadband obligations." *USF Reporting Clarification Order* at ¶ 6. The Commission should clarify that the Bureaus were mistaken to infer that competitive ETCs whose support is being phased down have any broadband obligations, including any broadband reporting obligations.

complying with those requirements does not disproportionately burden some recipients.[40] But, plainly, not all recipients of high-cost support are similarly situated, and it thus would not violate competitive neutrality principles to impose different reporting requirements on different support recipients depending on the support they receive. In AT&T's view, the Commission should apply its new reporting requirements only to recipients that have affirmatively sought and received high-cost support awarded through one of the Commission's new permanent funding mechanisms (e.g., CAF Phase II, Mobility Fund Phase II). By contrast, recipients of legacy high-cost support (i.e., support that the Commission is eliminating), should continue to adhere to whatever reporting rules applied to them prior to the effective date of the *Order* as they ride down their support.

Even if there were a legitimate reason to impose such a reporting requirement on ETCs whose support the Commission is eliminating, which there is not, the Commission failed to seek necessary Office of Management and Budget (OMB) approval to extend its preexisting ETC reporting requirements to *every* ETC that receives any high-cost support.[41] Moreover, as USTelecom explains, the previous Commission reporting requirements applied only to ETCs designated by the Commission so when the Commission originally sought and received OMB approval in 2005 for the reporting rule, it anticipated that only 22 carriers would be affected.[42]

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[40] *USF/ICC Transformation NPRM* at ¶ 459 (seeking comment on "how to transition from the current reporting requirements to more competitively neutral reporting requirements that would apply to all high-cost and CAF recipients").

[41] USTelecom Petition at 16.

[42] *Id.*

Extending this rule to over *60 times* that number (about 1,400 carriers) clearly is a "material modification" that requires OMB approval,[43] which the Commission failed to obtain.

Assuming the Commission will seek to remedy these procedural deficiencies by requesting OMB approval for these new reporting requirements, the Commission must revisit its estimate of the average number of hours it claims respondents require to comply with the reporting rule. In 2005, when it adopted the existing rule, the Commission estimated that affected ETCs would require, on average, 11 hours to compile the information required in section 54.209 (much of which has been incorporated into section 54.313).[44] That estimate was woefully unrealistic in 2005 and it remains so. Last year, just one of AT&T's wireless affiliates required *at least* 4 times that amount of time to comply with section 54.209. While we have not calculated how long it took other AT&T affiliates to comply, the Commission's current estimate, which does not account for the additional burdens imposed under the new rules, plainly is incorrect. Having failed to consider, much less quantify, the cost – in time and resources – of complying with the new ETC reporting requirements, the Commission had no basis for its blithe conclusion that the benefits of its new ETC reporting rules outweigh "the imposition of *some additional time and cost* on individual ETCs." *Order* at ¶ 575 (emphasis added).

We agree with USTelecom that the Commission's reporting requirements suffer from other Paperwork Reduction Act (PRA) infirmities as well. For example, the Commission failed to ensure that its data collections "minimize the burden . . . on those who are to respond."[45] If

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[43] *Id.*

[44] *Id.* at n.31.

[45] *Id.* at 16-17 (further citations omitted). *See also Order*, App. O at ¶ 114 (incorrectly stating that the "Order seeks to minimize reporting burdens where possible by requiring certifications rather than data

the Commission had performed the requisite analysis, it would have, among other things, eliminated its ETC outage reporting requirement. The Commission already receives carrier-supplied outage information and it is unclear why the Commission finds this other outage information collection inadequate.[46]

2. The Commission Should Clarify That It Intended To Preempt Existing State ETC Reporting Requirements.

AT&T agrees with USTelecom that the Commission should clarify that it intended to preempt existing state reporting requirements that are applicable to ETCs that will have to comply with the new federal reporting requirements.[47] Absent this relief, many ETCs will be subjected to different reporting requirements at different times of the year. And, in some cases, ETCs may have to collect similar information (e.g., outage information) in a different manner to account for divergent federal and state reporting standards. As USTelecom explains, affected ETCs will not experience any reduced "regulatory compliance costs" – a stated benefit of the Commission's new "uniform reporting and certification framework" – unless the Commission preempts state reporting requirements.[48]

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collections and by permitting the use of reports already filed with other government agencies, rather than requiring the production of new ones.").

[46] In its 2005 *ETC Report and Order*, the Commission stated that it wanted to track ETC outage information based on a 10 percent customer threshold "because populations can vary." *Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371, n.194 (2005) (*ETC Report and Order*). If the Commission believes it needs to maintain this separate standard to capture outages by small providers that would not otherwise submit network outage information to the Commission pursuant to the thresholds contained in section 4.9 of its rules, then it should refine the rule to target only those ETCs serving small populations.

[47] USTelecom Petition at 17. Again, as we note above, AT&T recommends that the Commission maintain the reporting status quo for those ETCs whose high-cost support the Commission is eliminating.

[48] *Id.* (quoting *Order* at ¶ 575).

In fact, it appears that the Commission intended to supplant existing state ETC reporting requirements. Among other things, the Commission asserted that, with its new uniform framework, "ETCs should be able to implement uniform policies and procedures in all of their operating companies to track, validate, and report the necessary information."[49] The Commission also was very clear that, in order for a state to impose additional regulations to preserve and advance universal service, it must adopt a mechanism to support those additional requirements, and states' reporting requirements cannot create burdens that thwart achievement of the Commission's reforms set forth in the *Order*.[50] Plainly, allowing states to impose different reporting obligations that differ from the Commission's ETC reporting requirements would impose significant burdens on ETCs, and prevent them from realizing the intended benefits of the "uniform reporting and certification framework" adopted in the *Order*. For these reasons, the Commission should clarify that states are preempted from imposing reporting requirements on those ETCs that must comply with the Commission's new reporting requirements.

3. The Commission Should Reconsider And Revise Its Tribal Engagement Reporting Requirements.

a. The Commission failed to provide notice of its intended action and the record does not support the Commission applying the Tribal engagement rules to all high-cost ETCs.

AT&T agrees with both USTelecom and Rural Incumbent Local Exchange Carriers Serving Tribal Lands that the Commission's adoption of the Tribal engagement reporting requirements violated the APA insofar as: (1) the Commission failed to "fairly apprise interested

[49] *Order* at ¶ 575.

[50] *Id.* at ¶ 574.

persons" that it was considering adopting those requirements,[51] and (2) the record on which the Commission relied in adopting those requirements does not support the Commission's decision to extend those requirements to *all* high-cost recipients.[52] As USTelecom correctly observes, the Commission never sought comment on this proposal in its *USF/ICC Transformation NPRM*.[53] Rather, the Commission sought comment on this proposal only in the context of a proposed Tribal Mobility Fund.

In a Public Notice released last April, the Wireless Bureau sought comment on several proposals related to a separate Tribal Mobility Fund,[54] including a "possible requirement for

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[51] USTelecom Petition at 18 (quoting *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980)).

[52] *See* Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition at 3-5. The Navajo Nation Telecommunications Regulatory Commission (NNTRC) filed an opposition to the Rural Incumbent Local Exchange Carriers Serving Tribal Lands Petition on January 9, 2012. NNTRC Opposition, WC Docket No. 10-90 (filed Jan. 9, 2012). In its opposition, NNTRC asserts that the record is "replete with evidence of the unique status and needs of Tribes, as well as the need for Tribal involvement, and government-to-government consultation." *Id.* at 14. While the record may contain such evidence, the Commission did not rely on it in adopting its Tribal engagement reporting rule. *See id.* at 14-15 & n.40 (citing statements made in the *National Broadband Plan* and submissions made in dockets not included as part of the record in the *Order*). More importantly and as we discuss below, neither the Commission nor NNTRC can find support in any record for imposing the Tribal engagement requirements set forth in 47 C.F.R. § 54.313(a)(9) on any high-cost recipient other than a Tribal Mobility Fund participant because no such record exists.

[53] *See Order* at ¶ 637; 47 C.F.R. § 54.313(a)(9) (requiring all "high-cost recipients" to comply with the Tribal reporting requirements). *See also* USTelecom Petition at 18 (explaining that the *USF/ICC Transformation NPRM* merely sought comment whether "recipients [should] be required to engage with Tribal governments to provide *broadband* to Tribal and Native community institutions" and "[a]re there additional requirements that should apply on Tribal lands?") (emphasis added by USTelecom). USTelecom is correct that, based on such generic requests, it was impossible for parties to anticipate that the Commission would adopt new section 54.313(a)(9) and thus, parties were unable to provide prior input on this rule.

[54] *Further Inquiry into Tribal Issues Relating to Establishment of a Mobility Fund*, WT Docket No. 10-208, Public Notice, 26 FCC Rcd 5997, at 1 (WTB rel. April 18, 2011) (*Mobility Fund Further Inquiry*) (explaining that the Commission is requesting further comment on issues related to the establishment of "a mechanism or program within the Mobility Fund focused on Tribal areas").

engagement with Tribal governments prior to auction."[55] But, there, the Wireless Bureau asked only whether it should require prospective bidders for Tribal Mobility Fund support to engage in discussions with the relevant Tribal government(s) prior to the Commission's auction to ensure that "the Tribal governments have been formally and effectively engaged in the planning process and that the service to be provided will advance the goals established by the Tribal government."[56] Seeking comment on whether such discussions should occur at the "short-form or long-form application stage" of a Tribal Mobility Fund auction is a far cry from the rule that the Commission ultimately adopted, which requires all high-cost ETCs to document discussions held with Tribal governments on, among other topics, a "a needs assessment and deployment planning," "feasibility and sustainability planning," and "marketing services in a culturally sensitive manner."[57] Plainly, the scope of that public notice was so narrow that no one reasonably could have anticipated the Commission was considering the broad Tribal engagement reporting requirements it adopted.

But even if the Commission had provided adequate notice, nothing in the record it received would support extension of the Tribal engagement reporting requirements to all high-cost support recipients providing service to Tribal lands. In the context of the Tribal Mobility Fund Public Notice, there is some logic to the Commission's proposal that, if it were to require Tribal Mobility Fund bidders to engage the affected Tribal governments in "needs assessment" and "deployment planning" discussions pre-auction (the merits of which we do not address here),

[55] *Id.* at ¶ 6.

[56] *Id.*

[57] 47 C.F.R. § 54.313(a)(9)(i).

it may make sense to require bidders to demonstrate that such discussions in fact occurred.[58] But, that logic falls apart when the Commission extended the proposed Tribal engagement reporting requirements to all high-cost support recipients. Under the Commission's new rules, a large price cap carrier ETC that only receives interstate access support (IAS) (which the Commission refers to in its *Order* as frozen CAF Phase I support) now has to document having had discussions with all Tribal governments in its large service area on, among other topics, "a needs assessment and deployment planning." As the Commission knows, IAS is intended to replace implicit universal service subsidies in interstate access charges,[59] not to provide supported services in particular high-cost areas. While AT&T has long encouraged the Commission to redesign its high-cost support mechanisms for so-called non-rural carriers to target support to specific high-cost areas that otherwise would be uneconomic to serve, until this *Order*, the Commission steadfastly refused to do so. Instead, it has continued to rely on statewide averaging to mask the cost of, and avoid actually supporting, the provision of services in those areas. The result is that the Commission cannot directly tie any high-cost support to a Tribal area any more than to any other area in a state – at least in the case of non-rural carriers. And, consequently, it makes no sense to subject such carriers to the Tribal engagement reporting requirements with respect to such support. Moreover, applying the Tribal engagement requirement to any ETC whose high-cost support the Commission is eliminating (possibly, on a flash-cut basis beginning some time next year) seems similarly misguided.[60]

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[58] *Mobility Fund Further Inquiry* at ¶ 6.

[59] *CALLS Order,* 15 FCC Rcd 12962, ¶185 (2000). AT&T's wireline affiliates receive only IAS high-cost support in the following states: Arkansas, California, Connecticut, Florida, Georgia, Kansas, Louisiana, Nevada, North Carolina, Oklahoma, South Carolina, and Tennessee.

[60] *Order* at ¶¶ 180, 519.

b. Current rule 54.313(a)(9) is impermissibly vague and violates the First Amendment.

Even if the Commission were to narrow the application of its Tribal engagement rule to Tribal Mobility Fund participants, it should nonetheless provide additional explanation and detail about what information it believes should be discussed and what sort of documentation the Tribal Mobility Fund participant should include in its annual report.

As USTelecom explains, many of the criteria contained in section 54.313(a)(9) are impermissibly vague.[61] Like USTelecom, AT&T has no idea what is meant by "feasibility and sustainability planning" or "marketing services in a culturally sensitive manner."[62] By "sustainability planning" discussions, does the Commission mean, discussions about deploying a network that could be capable of being operated at a profit without federal high-cost support (however unlikely)? By "marketing services in a culturally sensitive manner," does the Commission mean that Tribal Mobility Fund recipients would advertise their services in Tribal newspapers and on Tribal radio stations or does the Commission mean that such recipients would have to alter the content of their advertisements in some unclear and unlawful manner? Because there is no discussion of these terms in any Commission document, the Commission has placed affected parties in the impossible position of having to guess as to the Commission's intent. For that reason, the Commission's current Tribal engagement reporting rule is void for vagueness.[63]

To the extent that the Commission is attempting to compel speech or control the content of speech through its requirement that ETCs discuss "marketing services in a culturally sensitive

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[61] USTelecom Petition at 19.

[62] *Id.* (quoting 47 C.F.R. § 54.313(a)(9)(ii), (iii)).

[63] USTelecom at 19 (citing *Hill v. Colorado*, 530 U.S. 703 (2000) & *Gentile v. State Bar*, 501 U.S. 1030 (1991)).

manner" with Tribal governments, the Commission is violating the First Amendment. However well-intentioned, such a requirement is flatly unconstitutional because it (1) *compels* speech and (2) unlawfully attempts to control the *content* of that speech, and each of those two characteristics independently violates the First Amendment. First, the government may not "force[] speakers to alter their speech to conform with an agenda they do not set." *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 9 (1986) (plurality). Second, it is a "fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message." *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Regardless whether these requirements are viewed as compelled speech or a viewpoint restriction (or both), they are subject to strict scrutiny and may stand only if "narrowly tailored" to serve a "compelling state interest." *See Pac. Gas & Elec.*, 475 U.S. at 19 (plurality). But here the Commission has not even attempted to supply such a justification, nor could it do so if it tried. This particular Tribal engagement and reporting requirement is therefore unconstitutional.

The analysis is no more lenient simply because the Tribal engagement and reporting requirements apply only to ETCs receiving high-cost support.[64] It is true that the government may "cho[ose] to fund one activity to the exclusion of the other," including by placing restrictions on what may be said using government funds. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)). The government *may not*, however, condition an unrelated benefit on the recipient's "relinquishment of a constitutional right." *See Rust*, 500 U.S. at 196 (citing *Perry v. Sindermann*, 408 U.S. 593, 597

[64] *Compare* 47 C.F.R. § 54.313(a) (placing requirements on "[a]ny recipient of high cost support"), *and Order* at ¶ 637 (discussing requirements on "support recipients"), *with id.* (speaking generally of "ETCs").

(1972); *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). But that is precisely what this specific Tribal engagement and reporting requirement does. The Commission's new high-cost universal service support program exists to support rural deployment of broadband facilities, not to promote "culturally sensitive" speech with regard to any particular group, and there is no plausible nexus between the former objective and the latter. The Commission therefore cannot compel such viewpoint-oriented speech as a condition of receiving funds under this spending program.

4. The Commission Should Move Its Annual Reporting Deadline To July Or Later.

Both USTelecom and the ARC ask the Commission to move its annual filing deadline from April 1 to July 1 or later.[65] AT&T supports this request for all ETCs (not just rate-of-return carriers). The Commission did not explain why it was moving its annual reporting deadline up from October 1. As USTelecom notes, perhaps, the Commission thought that a state regulator requires six months to review its ETCs' annual submissions in order for the state to certify that its ETCs are using federal high-cost support for the intended purposes.[66] If true, the Commission is mistaken. The majority of the state commissions where AT&T's affiliates operate as ETCs require ETCs to file annual ETC reports well after April 1. The following are the filing dates for annual ETC submissions in states that require at least one of AT&T's affiliates to submit a report: *March 31* – Alaska; *April 1* – Puerto Rico (although this filing is no more frequent than every other year); *June 1* – Michigan and Mississippi; *July 1* – Arkansas and West Virginia; *July*

[65] USTelecom Petition at 21-22 (asking the Commission to use July 1 as the due date); ARC Petition at 16-17 (same); NECA Petition at 25 (asking the Commission to use September 1 as the due date for rural carriers).

[66] USTelecom Petition at 21 (citing *Order* at ¶ 575).

15 – Oregon; *July 31* – Washington; *August 1* – Louisiana and North Dakota; *late August* – Texas (date changes slightly each year); and *September 1* – Idaho, Kentucky, and Wisconsin (like Texas, the date for Wisconsin can change slightly each year). Only two of the fourteen states have filing deadlines on or before April 1 and the majority of these states have filing deadlines of July 1 or later. If the Commission moved the filing due date to July 1, it still would leave the states with three months to review their ETCs' filings prior to October 1, which is as much or more time than many (if not most) states already determined they require. Moreover, if the Commission adopts AT&T's suggestion, which it should, to maintain the reporting status quo for high-cost recipients whose support the Commission is eliminating and apply the new reporting requirements to only those ETCs that affirmatively seek and receive CAF support, states likely will see little, if any, increase in the number of annual ETC submissions. Additionally, by moving the filing due date to July 1, Commission staff will have six months to review the ETC annual reports before the end of the year, which is four months longer than staff has today to review Commission-designated ETC annual reports.

In their petitions, both NECA and ARC describe the challenges that privately held rate-of-return carriers will have in obtaining outside auditing services in the first quarter of the calendar year in order to satisfy the reporting rule's requirement that they submit a complete, audited annual financial report by April 1.[67] These challenges are real and should be reflected in a revised filing due date. However, it is important for the Commission to understand that its aggressive deadline will be difficult for even large ETCs to meet and thus it should not limit relief from its April 1 filing deadline only to rate-of-return carriers. By requiring all ETCs to file their annual ETC reports on a single day (versus the staggered due dates provided above for

[67] NECA Petition at 23-25 (citing 47 C.F.R. § 54.313(f)(2)); ARC Petition at 16-17.

AT&T's ETC states), the Commission will strain the ability of ETCs that operate in multiple states to meet an April 1 deadline (e.g., AT&T will have to submit over 30 annual reports). In sum, it is essential for the Commission to move April 1 deadline to July 1 or later.

5. Miscellaneous ETC Reporting Issues.

In its petition, NECA requests that the Commission treat carriers' annual reports as confidential, exempt from FOIA disclosure. NECA Petition at 25. We agree and note that it has been AT&T's practice for years to file confidentially certain ETC reporting data (e.g., outage information, maps, wire center-specific information). For the first time, the Commission is requiring ETCs to provide copies of the ETC's federal filing to the relevant state commission and Tribal government authority, if applicable.[68] If a state commission or Tribal government is unable or unwilling to afford similar confidential treatment, the Commission must clarify that it is acceptable for ETCs to provide redacted copies to these entities. As the Commission knows, its reporting requirements oblige ETCs to file competitively sensitive information as well as information that must be kept confidential to protect the security of the ETC's facilities. If an ETC does not have the necessary assurance that the state commission or Tribal government can or will maintain this information in a confidential manner, the Commission must permit that ETC to provide those entities with redacted filings.

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[68] *See* 47 C.F.R. § 54.313(i).

C. The Commission Should Grant USTelecom's Request And Reconsider Eliminating Price Cap Carriers' High-Cost Support On A Flash-Cut Basis And, Instead, Adopt A Five-Year Phase Down As It Did For Wireless Carriers.

AT&T supports USTelecom's request that the Commission reconsider its decision to eliminate on a flash-cut basis existing high-cost support provided to price cap carriers.[69] Instead, as USTelecom proposes, the Commission should adopt the same five-year phase down for legacy price cap carrier high-cost support that it adopted for competitive ETCs.[70] The Commission ignored the record and statements it made in its *USF/ICC Transformation NPRM* – and the *Order* itself – about the importance of a transition when it adopted a flash-cut mechanism for existing price cap carrier high-cost support. In response to the Commission's *USF/ICC Transformation NPRM*, which proposed to eliminate IAS in two years and phase-out competitive ETC support over five years,[71] AT&T recommended that the Commission phase-out all legacy high-cost support over a five-year period.[72] Similarly, phasing out all legacy high-cost support for price cap carriers and competitive ETCs over a five-year period was a central component of the ABC Plan, on which the Commission sought comment last August.[73] With no discussion or

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[69] USTelecom Petition at 5.

[70] *Id.* at 7-8. *See Order* at ¶ 519 (describing the competitive ETC phase-down).

[71] *USF/ICC Transformation NPRM* at ¶¶ 234 (proposing a two year phase-out for IAS but seeking comment on whether it should adopt a longer transition to "minimize disruption to service providers), 242.

[72] AT&T *USF/ICC Transformation NPRM* Comments at 109-11.

[73] ABC Plan, Attach. 1 at 8-9; *Public Notice*.

notice,[74] the Commission adopted a flash-cut mechanism that may cause price cap carriers to lose their legacy high-cost support overnight.[75]

The Commission's flash-cut approach is invalid for several reasons. First, it violates the APA insofar as the Commission failed to apprise interested parties that their legacy high-cost support could disappear overnight but also to discuss alternatives in the record.[76] Second, the Commission's flash-cut approach violates the statute. As USTelecom explains, section 254(e) requires the Commission to provide universal service support that is "sufficient."[77] Section 254(b)(5) also requires that the Commission's universal service mechanisms be "predictable," in addition to "sufficient." 47 U.S.C. § 254(b)(5). It simply cannot be that the amount of support that the Commission previously concluded was necessary to comply with these requirements in a given state is no longer necessary at all and must be eliminated in a flash-cut if the price cap carriers operating in that state decline the state-level commitment.[78] In that event, the price cap carriers would lose their support "the first month that the winner of *any* competitive process [any where in that state] receives support under CAF Phase II." *Order* at ¶ 180 (emphasis added).

USTelecom provides an example that illustrates how irreconcilable the Commission's flash-cut approach is with the statute: Assume the Commission provides $100 million/year to

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[74] USTelecom Petition at 6-7 (explaining that the *USF/ICC Transformation NPRM* did not expressly seek comment on any transition plan for non-IAS high-cost support provided to price cap carriers and it certainly did not propose to flash-cut that support).

[75] *Id.* at 5 (citing *Order* at ¶ 180).

[76] *Id.* at 6-8.

[77] *Id.* at 8.

[78] This seems particularly wrongheaded since it is likely that the price cap carriers would decline the state-level commitment only if they determined that the Commission-offered support amount was inadequate to satisfy the service obligations.

price cap carriers in Mississippi on January 1; those price cap carriers decline the state-level commitment (because these carriers conclude that the Commission-offered support amounts are inadequate); in response, the Commission awards $5 million/year in CAF Phase II support to some provider to serve a handful of census blocks in Mississippi.[79] The first month that the Commission disburses support to that provider, the amount of support that the Commission disburses to Mississippi via non-rate-of-return providers drops to 5 percent overnight. Under such a framework, either the Commission must concede that Mississippi's price cap carriers' support amounts were wholly unnecessary and thus excessive, in contravention of the section 254,[80] or the amount of support that it is now providing to non-rate-of-return carriers in Mississippi (i.e., 5 percent of what it was providing in the previous month) is insufficient. We agree with the Commission that support does not have to be "sufficient" for any one carrier "so long as the level of support provided is sufficient to achieve universal service goals." *Order* at ¶ 510. But, under the new flash-cut approach that the Commission adopted, it simply cannot say that the post-CAF Phase II level of support is sufficient (i.e., the 5 percent disbursed to some provider to serve a few census blocks in Mississippi, using the example provided above). Additionally, there can be no claim that this flash-cut proposal provides any predictability to either the affected carriers or their customers. To the contrary, a flash-cut likely will leave price cap carriers with stranded investment and cause service disruptions.

The Commission's statutory quandary would be solved if it were to apply the same five-year transition to competitive ETCs *and* price cap carriers. Such action is appropriate since the

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[79] USTelecom Petition at 8.

[80] *See, e.g., Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) ("excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market").

Commission's findings in support of its five-year glide path for competitive ETCs are equally applicable to price cap carriers: "a transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers" and the "five-year transition" will enable competitive ETCs "to adjust and make necessary operational changes to ensure that service is maintained during the transition." *Order* at ¶ 513.

D. The Commission Lacks The Authority To Require Price Cap Carriers To Use Their Frozen High-Cost Support To Deploy Broadband Service.

The Commission should grant USTelecom's request that the Commission eliminate any broadband build-out requirement attached to price cap carriers' frozen high-cost support.[81] Beginning in 2013, the Commission will require price cap carriers to use their legacy high-cost support to "build and operate broadband-capable networks . . . in areas substantially unserved by an unsubsidized competitor." *Order* at ¶ 150. In 2013, price cap carriers must spend at least one-third of their support toward deploying and operating broadband facilities in unserved areas. By 2014, this amount increases to two-thirds and, by 2015, price cap carriers must spend all of their legacy high-cost support for this purpose.[82] As USTelecom explains, this Commission decision is inconsistent with section 254 and Title I and must be reconsidered.[83] Instead, the Commission should *permit* price cap carriers to use their frozen high-cost support to build and maintain broadband facilities in unserved parts of their service areas but not compel them to satisfy specific build-out requirements.[84] This also means that price cap carriers that only

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[81] USTelecom Petition at 9-11.

[82] *Order* at ¶ 150.

[83] USTelecom Petition at 9.

[84] *Id.*

receive IAS are permitted to continue using this high-cost support to lower interstate access charges.[85]

AT&T agrees with USTelecom that the Commission's decision to compel price cap carriers to use existing support amounts, which were calculated based on these carriers providing affordable voice telephony service over their legacy TDM networks, to deploy broadband facilities in unserved areas is inconsistent with section 254(b)(5) and (e) of the Act.[86] The Commission failed to provide any analysis demonstrating that a price cap carrier could continue to satisfy its current ETC obligations while simultaneously using a significant amount of its frozen support to extend broadband networks in unserved areas.[87] Worse yet, the Commission compounded the effect of this problem by failing to relieve these carriers of their legacy ETC service obligations in those geographic areas where they receive no high-cost support.[88] As USTelecom explains, the Commission impermissibly bootstraps a broadband build-out obligation onto price cap carriers that only receive support to provide voice telephony service while "turning a blind eye to the sufficiency of the support necessary to satisfy this obligation."[89]

The Commission also lacked authority to impose a broadband build-out requirement as a condition for receiving legacy high-cost support. Broadband service is an information service

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[85] *See CALLS Order* at ¶ 201 (explaining how using high-cost support for this purpose is consistent with the principles of section 254(b) in that it "keep[s] rates affordable and reasonably comparable").

[86] As noted above, section 254(b)(5) and (e) of the Act require the Commission to establish universal service support mechanisms that provide "sufficient" support to achieve the intended purpose.

[87] USTelecom Petition at 9-10.

[88] *See* discussion *supra* at 3-9.

[89] USTelecom Petition at 10. We also agree with USTelecom that this bootstrapping creates an impermissible implicit cross-subsidy from voice to broadband services, which itself violates section 254(e). *Id.* at n.19.

regulated under Title I of the Act.[90] Section 3(51) of the Act prohibits the Commission from imposing common-carrier regulations on information services. 47 U.S.C. § 153(51). Specifically, it provides that a "telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." *Id.* This statutory provision thus precludes the Commission from imposing any common-carrier-type rules on the provision of broadband Internet access. Mandatory build-out obligations unquestionably constitute the type of common-carrier regulation precluded by section 3(51) – indeed, such obligations are one of the hallmarks of traditional Title II, common-carrier regulation.[91]

For these reasons, the Commission should amend its rules by eliminating broadband build-out obligations for price cap carriers receiving frozen high-cost support. Such action is consistent with the Commission's decision not to apply broadband service obligations on competitive ETCs whose legacy high-cost support the Commission also is eliminating.[92]

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[90] *Id.* at 11.

[91] *See id.* at n.22; AT&T *USF/ICC Transformation NPRM* Comments at 125 n.251.

[92] *Order* at n.172 ("Phased down competitive ETC support is not aimed at these objectives. Therefore, it is not subject to these broadband requirements."). The Commission offers no explanation for why legacy price cap carrier high-cost support, which could be eliminated on a flash-cut basis, is well-suited to "immediately narrowing broadband deployment gaps" (*Order* at ¶ 106) whereas phased down competitive ETC high-cost support is not. In fact, because of the short-term nature of legacy high-cost support for both categories of providers (price cap carriers and competitive ETCs), neither group is well-positioned to immediately narrow broadband deployment gaps using their legacy high-cost support. The Commission's failure to recognize this reality for one category of provider (price cap carriers) but not the other is arbitrary and capricious, and must be reconsidered.

E. Because The Commission Chose Not To Make Broadband A Supported Service, It Should Be Clearer About The Consequences Of This Decision.

Prior to adoption of the *Order,* AT&T and others encouraged the Commission to make broadband service, which the Commission previously concluded is an information service, a "supported service" under section 254 of the Act and explained its authority to do so.[93] Although the Commission declined to do so, it required most ETCs to deploy broadband as a condition of receiving high-cost universal service support. As USTelecom points out, the Commission's decision not to designate broadband as a supported service has several consequences, particularly for the states, that require clarification to avoid future disputes and incorrect audit findings.[94]

We agree with USTelecom that, because the Commission did not designate broadband as a supported service, states have no authority to impose additional conditions on an ETC's provision of broadband service.[95] Absent this clarification, a state may attempt to impermissibly regulate a provider's broadband service (e.g., requiring CAF ETCs to provide broadband at higher speed thresholds than required by the Commission) on the theory that it designated that carrier an ETC and under *TOPUC,* states are permitted to impose additional eligibility criteria on state-designated ETCs.[96] While the Fifth Circuit has concluded that states may impose additional eligibility criteria on ETCs under section 214(e)(2), it did so only with respect to supported services. As USTelecom notes, the court found that reading of the statute made sense

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[93] *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 Transformation NPRM* Comments at 111-20.

[94] USTelecom Petition at 24-26.

[95] *Id*. at 24-25.

[96] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 2001) (*TOPUC*).

"in light of the states' historical role in ensuring service quality standards for local [voice] service."[97] But, of course, states have no similar historical role regarding broadband service,[98] and nothing in the court's decision or the Act suggests that a state may impose conditions on non-supported services under section 214. Accordingly, the Commission should clarify that states may not impose conditions on an ETC in connection with its provision of broadband. It also should clarify that, to the extent that a state imposes additional eligibility criteria on ETCs' voice telephony services, it must fully fund those obligations via a state universal service fund.[99]

Finally, the Commission should clarify, as requested by USTelecom, that ETCs may spend their high-cost support (legacy or CAF) to procure and deploy broadband facilities that are *capable* of supporting voice telephony (including VoIP), regardless of whether the provider actually uses those facilities to provide voice telephony service.[100] Second, while the Commission was clear that high-cost support recipients are required to offer voice telephony that is not bundled with broadband, the Commission should clarify that high-cost recipients may require their customers to purchase a voice telephony service offering that enables consumers to make local or long distance calls (as wireless ETCs do today). Moreover, it also should clarify

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[97] USTelecom Petition at 24-25 (citing *TOPUC*, 183 F.3d at 418).

[98] *Id.* at 25.

[99] *Id.*

[100] *Id.* at 25-26. *See also* 47 C.F.R. § 54.7(b) ("The use of federal universal service support that is authorized by paragraph (a) shall include investments in plant that *can*, either as built or with the addition of plant elements, when available, provide access to advanced telecommunications and information services.") (emphasis added).

that ETCs that receive no high-cost support are under no obligation to provide their customers with "voice telephony as a standalone service."[101]

F. The Commission Should Clarify That Broadband Deployment Deadlines Are Tolled For Delays Beyond The Control of The ETC.

We support USTelecom's request that the Commission clarify that it will toll broadband deployment milestones for delays outside the control of an ETC.[102] As the press recently reported, BTOP awardees have missed deployment milestones due to local zoning and permitting delays, franchise agreement disputes, and environmental and historic preservation reviews.[103] Such delays (including vendor delays) are commonplace and it would be unfair to CAF recipients if the Commission penalized them for circumstances beyond their control, as the Commission has long recognized in other contexts.[104] Absent the clarification sought by USTelecom, many otherwise willing CAF participants will sit on the sidelines out of concern that they will be unable to meet the deployment deadlines because of, for example, zoning and permitting delays.[105]

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[101] USTelecom Petition at 26 (citing *Order* at ¶ 80, which provides that "[*a*]*s a condition of receiving support*, we require ETCs to offer voice telephony as a standalone service throughout their designated service area") (emphasis added).

[102] *Id.* at 26-27.

[103] Yu-Ting Wang, *Franchise Fee Dispute, Delays in Getting Permits Slow Some BTOP Projects*, COMM. DAILY, Dec. 29, 2011, 2011 WLNR 26967649.

[104] USTelecom Petition at 27.

[105] *Order* at ¶ 618; 47 C.F.R. § 54.1006(f); *USF/ICC Transformation FNPRM* at ¶¶ 1110-116.

G. The Commission Must Reject Requests To Discriminate Against Certain Providers.

The so-called Blooston Rural Carriers ask the Commission to reconsider a number of aspects of the Mobility Fund. Among other things, the petitioners request that the Commission set aside a "significant percentage of Mobility Fund dollars" for small wireless providers, exclude Tier 1 providers from the Mobility Fund, and prohibit any wireless carrier from participating in the Mobility Fund if it "participate[s] in exclusive arrangements for the design and/or procurement of handsets and other equipment."[106] The Commission must reject out-of-hand any request, like all of the requests mentioned above, for the Commission to use universal service funding to discriminate against certain providers. Notably absent from this petition is any discussion about how any of these requests are consistent with section 254 of the Act. This omission is not surprising because petitioners' requests cannot be reconciled with the Commission's statutory requirements.[107]

In support of its request that the Commission set aside a "significant percentage" of Mobility Fund support for small wireless carriers, the petitioners assert that, if the Commission is going to use a reverse auction to distribute universal service support, it is obligated to satisfy some statutory objective of spectrum auctions.[108] This proceeding, of course, does not involve a spectrum auction and Congress did not include language similar to that cited by petitioners in the statute that is relevant to the subject matter at hand – universal service. Additionally, as a

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[106] Blooston Rural Carriers Petition for Reconsideration at 5-12, 14-15.

[107] For example, petitioners' requests violate the Commission's competitive neutrality principle (*see First Universal Service Order* at ¶ 47, where the Commission established a new principle under section 254(b)(7)), and, if adopted, they are likely to result in less competitive (and thus higher) bids. As noted above, the courts have concluded that excessive support could violate the Commission's sufficiency and affordability obligations contained in section 254(b)(1) and (5). *See supra* at n.80.

[108] *Id.* at 6-7 (citing 47 U.S.C. § 309(j)(3)(B)).

number of courts have concluded, "the purpose of universal service is to benefit the customer, not the carrier."[109] By contrast, granting petitioners' request will benefit only the petitioners: With little competition, winning bids will be higher than necessary (and, thus, "excessive" in contravention of section 254(b)(1) and (5)). This means that the Commission will be able to fund fewer bids, thus delaying mobile broadband build-out in unserved areas. The petitioners also are incorrect to state that a small business set aside is necessary because only small wireless carriers can ensure that the "needs of their citizens, communities and anchor institutions" – or, as we call them, our customers – are met.[110] All winning wireless carrier bidders, large or small, will have the same service obligations and so this assertion is without merit.

Petitioners' request that the Commission bar Tier 1 wireless carriers from participating in the Mobility Fund also misses the mark. Petitioners claim that Tier 1 carriers do not require any financial assistance to complete their build-outs and so awarding any of these carriers Mobility Fund support would be akin to "corporate welfare."[111] But the fact of the matter is that, if it were economical for *any* wireless provider to deploy a 3G or better network in the high-cost areas that remain unserved today, some provider already would have done so. The fact that they have not done so shows that market forces alone are insufficient to incent private investment by any provider – Tier 1 or otherwise – in those areas. The whole point of a Mobility Fund is to address this situation: Through Mobility Fund support payments, the Commission will alter the economics and finally tilt the balance in favor of mobile broadband deployment in these high-

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[109] *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Alenco*, 201 F.3d at 621).

[110] *Id.* at 8.

[111] *Id.* at 12.

cost unserved areas. Nothing in the statute permits, much less requires, the Commission to tilt this balance only for providers of a certain size, as petitioners request. Indeed, the Commission's obligation to minimize the burden of universal service on consumers generally counsels strongly against any such requirement.

Similarly, the petitioners' request that the Commission prohibit any provider with an exclusive equipment arrangement from participating in the Mobility Fund[112] is nothing more than a thinly veiled effort to bar larger wireless providers from competing for Mobility Fund support. But, as with petitioners' request to prohibit Tier 1 providers from participating in the Mobility Fund, this request cannot be squared with section 254 of the Act. For these reasons, petitioners' requests that the Commission discriminate in favor of small wireless providers must be rejected.

H. The Commission Should Consider Requests To Modify Its Definition Of "Unsubsidized Competitor" And Reconsider How It Will Measure Reasonable Comparability Of Usage Limits.

Both NTCH and ViaSat ask the Commission to reconsider its definition of "unsubsidized competitor"[113] by broadening it to include any type of residential voice and broadband service provider that meets the minimum service thresholds.[114] AT&T agrees with these petitioners that, if an unsupported provider demonstrates it can satisfy the service obligations for the CAF in a particular geographic area, the Commission should consider that provider an "unsubsidized competitor," no matter what technology the provider uses to meet those service standards (e.g.,

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[112] *Id.* at 14.

[113] *See* 47 C.F.R. § 54.5 ("An 'unsubsidized competitor' is a facilities-based provider of residential fixed voice and broadband service that does not receive high-cost support").

[114] NTCH Petition for Reconsideration at 13; ViaSat and WildBlue Petition for Reconsideration at 9-11 (ViaSat Petition).

satellite or wireless).[115] Identifying where such providers are offering voice and broadband at the minimum thresholds may be beyond the capability of the Commission's current broadband availability maps. In that case, the Commission will have to rely more heavily on the challenge process to assist it in determining whether these unsubsidized competitors exist in a particular geographic area that otherwise may appear to be unserved. However, as ViaSat explains, any additional burden "would be more than offset by the cost savings to the CAF from the elimination of unnecessary support, and the benefits of unfettered competition in a given geographic market."[116]

AT&T also agrees with ViaSat that the Commission's approach to capacity allowances misguidedly focuses on usage *limits* rather than *actual* consumer usage levels, which, according to the Commission's own estimates, will be far beneath its suggested usage limit of 250 GB for the next several years.[117] We agree with ViaSat that the Commission's decision to tie usage to a limit imposed by some broadband providers to address the issue of excessive video downloading by a small percentage of their customers seems incorrect. Establishing a usage limit based on a large allowance for video downloads is likely to increase the amount of support demanded by CAF participants. At the end of the day, the Commission needs to decide whether guaranteeing consumers in high-cost areas a large video allowance is consistent with the principles of section 254(b) of the Act. AT&T agrees with ViaSat that such a guarantee is unwarranted.

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[115] *See* ViaSat Petition at 10 (noting that failing to treat a satellite provider as an "unsubsidized competitor" would "fail to preclude . . . wasteful spending and market-skewing effects"). We believe this same rationale also extends to mobile wireless providers.

[116] *Id.* at 11.

[117] *Id.* at 16-17.

II. Petitions For Reconsideration Of The Intercarrier Compensation Provisions Of The *USF/ICC Transformation Order*.

A. The Commission Should Reconsider And/Or Clarify Certain Compensation Issues For VoIP-PSTN Traffic.

1. The Commission Should Reverse Its Conclusion That VoIP Providers Can Impose Originating Access Charges.

AT&T supports USTelecom's call for the Commission to reconsider its apparent determination that VoIP providers can assess originating access charges, including for 1-8YY calls, on a transitional basis. USTelecom Petition at 39. Section 251 prohibits that outcome. As the Commission acknowledges, it already has concluded that "origination charges are inconsistent with section 251(b)(5)." *Order* at ¶ 961 n.1976; First Report and Order, *Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16016 ¶ 1042 (1996) ("Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) *prohibits* charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.") (emphasis added). In light of the statutory language, the Commission stated that "we consequently do not believe that a permanent regime for section 251(b)(5) traffic could include origination charges" for VoIP-PSTN calls. *Order* at ¶ 961 n.1976.

Having properly made that determination, however, the Commission nonetheless authorized those same prohibited originating access charges on a transitional basis. But the Commission does not have authority to violate the statute even on a transitional basis. To be sure, section 251(g) permits the Commission to grandfather pre-existing charges and practices until they are superseded by regulations implementing the Act. But section 251(g) applies only to charges and practices that existed prior to the enactment of section 251. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002). Here, the Commission expressly refused to "address preexisting law," including whether VoIP was an information service subject to the ESP exemption or a telecommunications service, and chose only to determine the framework that will apply prospectively. *Order* at ¶ 945. Accordingly, 251(g)'s grandfathering provision cannot provide a source of authority to permit such charges, even on a transitional basis.

The Commission suggests that section 251(g) applies because LECs were entitled to compensation for providing exchange access in connection with VoIP calls prior to 1996 regardless of whether VoIP is a telecommunications service or an information service. *Order* at ¶ 957. But the D.C. Circuit already has rejected the Commission's attempt to construe section 251(g) that broadly. *Worldcom*, 288 F.3d at 433 ("The best the Commission can do on this score is to point to pre-existing LEC obligations to provide interstate access for ISPs."). The charges that would be due for VoIP calls under the alternative preexisting regimes would differ not only in amount (originating interstate access charges if VoIP were a telecommunications service versus SLC or special access if the ESP exemption applied) but also in the identity of the payor (carrier versus end user). Those are surely not equivalent obligations: if the pre-existing law clearly required that the SLC applied to VoIP calls, the Commission could not claim that by instead requiring a carrier to pay originating access charges, it was somehow merely preserving pre-existing obligations. The only route by which the Commission could rely on section 251(g) would be to first find that originating access charges applied to VoIP-PSTN calls under the pre-existing regime. Because the Commission expressly refused to make that determination, section 251(g) does not provide a basis for the Commission's decision to impose originating access charges on VoIP-PSTN calls on a transitional basis. And because such charges are otherwise admittedly prohibited by section 251(b)(5), the Commission's decision to impose those charges—even on a transitional basis—is unlawful and should be reconsidered.

2. The Commission Should Reject Windstream/Frontier's Claim That Intrastate Originating Access Charges Should Apply To Calls That Originate On The PSTN But Terminate To A VoIP Customer.

Windstream and Frontier seek to have *intrastate* originating access charges apply to calls that originate on the PSTN even if they terminate to a VoIP customer. Windstream/Frontier Petition at 21-29. The Commission should reject this request. Although Windstream and Frontier strain to string together various quotes from portions of the *Order* unrelated to the transitional scheme for VoIP-PSTN traffic to suggest this must have been what the Commission really meant, the Commission expressly said just the opposite. The *Order* broadly adopts a transitional compensation framework for all VoIP-PSTN traffic, which it defines as "traffic exchanged over PSTN facilities that originates *and/or terminates* in IP format." *Order* at ¶ 940 (emphasis added); 47 C.F.R. § 51.913(a) ("Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment."). And the Commission explicitly "decline[d] to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic." *Order* at ¶ 942; *see also id.* at ¶ 948. Thus, the Commission adopted a single, symmetric regime under which "[d]efault charges for 'toll' VoIP-PSTN traffic will be equal to *interstate* access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure." *Id.* at ¶ 944 (emphasis added).

Windstream and Frontier offer no basis for the Commission to reverse course. As the Commission explained, the asymmetric regime that Windstream and Frontier advocate would "perpetuate—and expand" the "concerns about asymmetric payment associated with VoIP traffic today, including marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants." *Id.* at ¶ 942. Indeed, the Windstream/Frontier approach would create new asymmetries—for example, the same call would be subject to interstate charges on one end and intrastate charges on the other. The Commission rightly rejected this framework in the *Order*, and it should reaffirm that the default charges for calls that originate on the PSTN and terminate to a VoIP customer are *interstate* originating access charges (absent agreement of the parties to a different rate). At the same time, AT&T agrees with Windstream and Frontier that LECs should be permitted to use the recovery mechanism to recover access revenues that are lost as a result of assessing only interstate originating access charges for calls that terminate to a VoIP customer. Windstream/Frontier Petition at 28-29.

3. The Commission Should Confirm That Its Transitional Rates For VoIP-PSTN Traffic Do Not Supersede Carriers' Interconnection Agreements.

Onvoy and 360networks ask that the Commission clarify that, where carriers have already entered into an interconnection agreement to exchange VoIP-PSTN traffic on a bill-and-keep basis, that agreement should continue to govern and is not superceded by the default transitional rates adopted in the *Order*. Onvoy/360networks Petition at 1-4. AT&T generally agrees that the *Order* should not displace a contract between two carriers and that accordingly the *Order*'s default rates should not automatically displace a contractual bill-and-keep arrangement. By the same token, however, the *Order* should not displace any other provision in an existing contract between two carriers except as specifically provided under any applicable change-of-law provision in that contract. Thus, where the contract provides that a party can invoke such a change-of-law provision and opt into rates set by the Commission in the *Order* in place of those set forth in the contract (including an existing bill-and-keep arrangement), then the party should remain free to invoke that provision. Otherwise, the Commission would effectively be rewriting the contract by picking and choosing which terms of the contract remain valid and which do not. A change-of-law provision is as much a part of an interconnection agreement as its rate provisions, and just as Onvoy/360networks rightly state that the Commission should not be deemed to have superseded the latter, it should not supersede the former either.

B. The Commission Should Reconsider And/Or Clarify Certain Issues Related To The Call Signaling And Traffic Pumping Rules.

1. The Commission Should Create An Exception To The Call Signaling Rules For Technical Infeasibility.

AT&T agrees with Verizon that carriers should be granted relief from the call signaling rules adopted to address phantom traffic in situations in which compliance is technically infeasible. Verizon Petition at 8-12. Indeed, as the *Order* suggests (¶ 723), AT&T has already filed a petition seeking a waiver in the circumstances where compliance is technically infeasible using currently deployed equipment while AT&T investigates options to come into compliance where possible.[118] As explained in detail in that petition, in narrow circumstances AT&T cannot comply with the requirements to pass through (1) the Signaling System Seven Charge Number unaltered where it is different from the Calling Party Number, or (2) the number of the calling party (or the Charge Number) in the Multi-Frequency Automatic Number Identification Field. Verizon's petition for reconsideration also points to circumstances in which it and other carriers cannot comply with the call signaling rules due to technical infeasibility. Given that this issue affects a large number of carriers, the Commission should reconsider its refusal to include an

[118] Petition for Limited Waiver, *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.* (filed Dec. 29, 2011).

exception for technical infeasibility. Alternatively, the Commission should expeditiously grant AT&T's petition for a limited waiver of the rules.

2. The Commission Should Reject NECA's Call To Impose Additional Call Signaling Requirements.

The Commission should reject the call by the National Exchange Carrier Association (NECA) and its co-petitioners to require transmission of carrier identification information (CIC and/or OCN codes) as part of the call signaling rules. NECA, OPASTCO, and Western Telecommunications Alliance Petition at 37-39. As the Commission recognized, such requirements would introduce significant technical complexities that would be ill-suited for regulatory resolution. *Order* at ¶ 727. The Commission concluded that it should give time for the new rules to work and "revisit measures such as additional signaling mandates at a later date" if the new rules "prove inadequate to curb problems associated with phantom and unidentifiable traffic." *Id.* That is the proper approach. The new rules strike a careful balance and should be given time to work without the addition of new regulatory requirements that may well prove unnecessary. Over time, the Commission and the parties can evaluate whether the rules have achieved their intended purposes or whether additional requirements are needed.

3. The Commission Should Eliminate Certain Loopholes In Its Rules To Better Ensure The Eradication Of Traffic Pumping.

Sprint and MetroPCS offer various proposals for clarification and/or reconsideration of the traffic pumping rules so as to eliminate loopholes and other gaps. AT&T generally supports these proposals and believes they will help ensure that parties can no longer engage in traffic pumping. AT&T in particular urges the Commission to adopt MetroPCS's proposal to outlaw traffic pumping via intrastate access charges. MetroPCS Petition at 16-20. MetroPCS rightly notes that the same arbitrage and other public interest concerns raised by traffic stimulation in the interstate access charge context arise with respect to intrastate access charges. And parties who have engaged in traffic pumping via interstate access charges will have strong incentives to migrate to intrastate access charges unless the Commission closes this loophole.

The Commission also should close a loophole that permits unscrupulous operators to engage in arbitrage and stimulate access revenues—the practice of "mileage-pumping." *See* USTelecom Petition at 35-36. For example, as AT&T previously explained, some LECs have inflated their switched access revenues by (1) designating as their point of interconnection a point far from their end offices even though they could practicably connect at a much closer point, and (2) billing IXCs distance-sensitive transport charges based on the additional mileage between their end offices and the distant geographic location they had designated as their POI. AT&T *USF/ICC Transformation NPRM* Comments at 30-35. In some cases, the traffic travels over the very same facilities along the same route, but access charges are higher due to the paper designation of a distant point of interconnection. *See id.* The result is to artificially inflate monthly access charges by millions of dollars. The Commission should make clear that such mileage-pumping schemes—which create the same harms as the other forms of traffic pumping the *Order* bars—are also prohibited.

In particular, in order to prevent mileage-pumping the Commission should clarify (or, to the extent necessary, adopt rules requiring): (1) that a LEC may not impose distance-sensitive transport charges for a distance that is any greater than the distance between the nearest tandem switch (of any tandem service provider) and the terminating end office; (2) that a connecting carrier can directly interconnect with the terminating LEC at the terminating end office if not already allowed; and (3) that a LEC engaged in traffic-pumping may only charge terminating access with no transport. While these rules will not necessarily prevent all mileage-pumping schemes, they will go a long way towards preventing unscrupulous LECs from designating points of interconnection far from their end offices solely to inflate their access charges. To the extent the Commission is concerned that such rules might prevent legitimate interconnection arrangements that would result in network performance or other efficiency benefits (however unlikely), it could, of course, permit terminating carriers to seek a waiver.

Finally, the Commission should not permit a LEC engaged in access stimulation to recover more than $0.0007 per minute for terminating access. USTelecom Petition at 36. The *Order* requires such a LEC to benchmark against the lowest interstate switched access rate of a price cap LEC in the state at issue. *Order* at ¶ 690. As AT&T previously explained, while this benchmark is an improvement over the existing rules, it is clearly excessive and would continue to encourage traffic stimulation. AT&T *USF/ICC Transformation NPRM* Comments at 15-17. For example, based on internal AT&T data, each of the largest traffic pumping CLECs in Iowa, Minnesota, and South Dakota handles volumes of traffic that exceed the traffic handled by the largest ILEC in those states by seven or nine times. *Id.* at 17. At the same time, the large ILECs in these states undoubtedly have significantly higher costs than the traffic pumping CLEC (e.g., for the loops used to reach their traditional customers). *Id.* It would not be appropriate to allow a traffic pumping LEC to charge the same rates as the ILEC even though the traffic pumping LEC has lower costs and higher volumes.

Instead, the Commission should set $0.0007 per minute as the benchmark for terminating access just as it did for dial-up ISP-bound traffic. In that latter context, CLECs chose to target ISPs as putative customers, sometimes offering free service to ISPs or even paying ISPs to be their customers. AT&T *USF/ICC Transformation NPRM* Comments at 16. These carriers then terminated extremely large volumes of traffic to the ISPs, and issued bills to other carriers, using a benchmark rate that did not reflect the truly minimal costs associated with routing such large volumes of terminating calls to ISPs. *Id.* There, the Commission determined that it was appropriate to set an interim benchmark rate of $0.0007 for the dial-up ISP traffic. Given the similarities of this situation to the ISP arbitrage schemes, that benchmark would also be appropriate for use in this situation.

C. The Commission Should Clarify The Application Of The ARC.

1. The Commission Should Clarify That The ARC Is An Interstate Charge But Recovers Both Interstate And Intrastate Revenues.

AT&T echoes USTelecom's call for the Commission to clarify the jurisdictional status of the ARC and the associated revenues. USTelecom Petition at 32-33. The ARC will be tariffed at the federal level and is an interstate charge. But it is designed to recover a mix of intrastate and interstate switched access revenue that will be lost as a result of the reforms in the *Order*. Thus, the revenues obtained from the ARC should be allocated between the federal and state jurisdictions. At the same time, as USTelecom explains, because the ARC is tariffed at the federal level, it should be subject to exclusive federal oversight, and states should not have a role in how it is calculated. That is all the more true given that the Commission provides incumbent LECs flexibility in allocating Eligible Recovery at the holding company level, which will spread recovery among customers in multiple states.

2. The Commission Should Reject The DC Commission's Proposal To Reduce The Flexibility For Recovery Of Lost Access Charge Revenues Through The ARC.

The Commission should reject the request by the Public Service Commission of the District of Columbia to reconsider the decision to permit the allocation of eligible recovery through the ARC at the holding company level. DC PSC Petition at 2-7. As the Commission explained, the flexibility to recover at the holding company level will enable carriers to more fully recover their lost access revenues and, as a result, place less burden on the CAF fund and help limit its size. *Order* at ¶ 910. At the same time, individual customers are protected from any excessive charges. *Id.* at ¶ 852. The Commission's rule allows carriers to spread recovery over a larger number of customers, thereby reducing the burden on any individual customer. Further, the $0.50 cap on the annual increase in the ARC and the $30 Residential Rate Ceiling limit the rate paid by customers and offer protection for those states that have already undertaken access charge reform. In addition, competitive pressures from wireless service, VoIP, and others will limit the ability of carriers to increase rates, including the ARC. *Id.* ("[W]e expect that not all carriers will elect or be able to charge the ARC due in part to competitive pressures."). Taken together, these factors mean that customers paying the ARC will be those who otherwise already benefit from low retail rates. Thus, the Commission has generally struck a carefully crafted balance to solve a national problem, and granting the DC PSC's request would upset that balance.

In one respect, however, the Commission's balance is skewed: its $30 Residential Rate Ceiling is too low because it includes state E911 and TRS charges. *Order* at ¶ 914. Those charges were not included in the ABC Coalition plan and for good reason. Those charges are often substantial and vary by state. In some states, the inclusion of those charges as part of the ceiling will preclude carriers from charging the ARC in whole or substantial part. That will undo some of the benefits noted above: it will mean lost access revenues can be spread among fewer customers, and it will push the recovery fund to be bigger than it would otherwise need to be. As a result, the Commission should not include state E911 or TRS charges in its calculation of the Residential Rate Ceiling (alternatively, the Commission should increase the $30 ceiling to offset the inclusion of these charges).

D. The Commission Should Permit Carriers To Use Billed Revenues For Determining The Baseline Revenues For Price Cap Carriers.

AT&T agrees with USTelecom that the Commission should use "billed" interstate switched access revenues, rather than revenues "received" as of March 31, 2012, when calculating "Price Cap Baseline Revenues." USTelecom Petition at 30-31. The use of revenues received or collected as of March 31, 2012, inevitably will understate actual revenues because it sometimes takes months or even years to collect revenues that were properly billed due to disputes or other factors. Moreover, as USTelecom notes, use of collected revenues would require manual and in some cases arbitrary allocations of revenues between originating and terminating access. The Commission should instead permit the use of the simpler and more predictable "billed" revenue figure for purposes of this calculation.

III. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission adopt an order on reconsideration that is consistent with the positions set forth in these comments.

Respectfully Submitted,

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