

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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| <b>In the Matter of</b>                           | ) |                             |
|   | ) |                             |
| <b>Universal Service Contribution Methodology</b> | ) | <b>WC Docket No. 06-122</b> |
|   | ) |                             |
| <b>A National Broadband Plan For Our Future</b>   | ) | <b>GN Docket No. 09-51</b>  |
|   | ) |                             |

**REPLY COMMENTS OF THE STATE MEMBERS OF THE  
FEDERAL STATE JOINT BOARD ON UNIVERSAL SERVICE**

The State Members<sup>1</sup> of the Federal State Joint Board on Universal Service (State Members) submit these Reply Comments responding to the Federal Communications Commission (FCC or Commission) Further Notice of Proposed Rulemaking on potential reforms of the federal Universal Service Fund (USF) contribution methodology.<sup>2</sup> The State Members note with appreciation that the Commission has embarked on a concerted effort to reform the federal USF contribution mechanism. This effort is fully compatible with the advice that the State Members provided in their May 2, 2011 Comments<sup>3</sup> on the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, that eventually culminated in the FCC’s *USF/ICC Transformation Order*.<sup>4</sup>

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<sup>1</sup> State Members include four State commissioners nominated by the National Association of Regulatory Utility Commissioners and approved by the Commission and one State-appointed utility consumer advocate nominated by the National Association of State Utility Consumer Advocates. The current members are Commissioner James H. Cawley, Pennsylvania Public Utility Commission (State Chair), Commissioner John D. Burke, Vermont Public Service Board, Commissioner Anne C. Boyle, Nebraska Public Service Commission, Commissioner Randy Mitchell, South Carolina Public Service Commission, and Consumer Counsel William Levis, Colorado Office of Consumer Counsel.

<sup>2</sup> *In re Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, GN Docket No. 09-51, (FCC Rel. April 30, 2012), Further Notice of Proposed Rulemaking (FNPRM), available online at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-46A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-46A1.doc).

<sup>3</sup> *In re Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Comments by State Members of the Federal State Joint Board on Universal Service, May 2, 2011 (State Members’ Plan or State Plan), online at: <http://apps.fcc.gov/ecfs/document/view?id=7021344845> & <http://apps.fcc.gov/ecfs/document/view?id=7021344846>.

<sup>4</sup> *In re Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), available online at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-161A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.doc), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *appeals pending*.

### **State Interests and the Role of the Joint Board**

The preservation and advancement of national universal service policies continue to be joint enterprises between the States and the federal government.<sup>5</sup> Although the federal government and its federal USF mechanism collects and distributes the majority of the universal service funding in the country, the States frame, oversee, and enforce carrier-of-last-resort (COLR) obligations and policies for basic telecommunications services that are at the foundation of the national universal service concept.<sup>6</sup> State utility commissions carry out many regulatory tasks that assist or otherwise enforce federal universal service policies, *e.g.*, through the designation of eligible telecommunications carriers (ETCs) that can receive or otherwise participate in federal USF or Connect America Fund (CAF) support. The same entities also oversee the provision of federally supported Lifeline services. Most important, no fewer than twenty-one (21) States have their own USFs that provide high-cost support so that basic telecommunications services continue to remain affordable for end-user consumers.<sup>7</sup> Depending on the jurisdiction, such State USF support is also used for broadband capital investment by carriers with COLR obligations in rural high-cost areas.<sup>8</sup> Similarly, at least twenty-two (22) States and the District of Columbia have funds that provide specific support to Lifeline services and their end-user consumers.<sup>9</sup>

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<sup>5</sup> FNPRM, ¶ 6 at 4 (acknowledging the historic partnership with State governments to ensure universal service). *See also In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (FCC Rel. May 8, 1997), Report and Order, *slip op.* FCC 97-157, (*First USF Order*) (subsequent history omitted), ¶ 818 at 419 (indicating that “[w]e fully appreciate and support the continuation of the historical informal partnership between the states and the Commission in preserving and advancing the universal service support mechanisms envisioned by section 254. Indeed, we believe that section 254 envisions the continuation of this partnership”), available online at: [http://www.fcc.gov/Bureaus/Common\\_Carrier/Orders/1997/fcc97157.zip](http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1997/fcc97157.zip).

<sup>6</sup> *First USF Order*, ¶ 817 at 418-419 (noting that “the traditional core goal of universal service has been to ensure that basic residential telephone service, which is primarily in intrastate service, is affordable” and that “[i]n section 254(b), Congress made affordable basic service a goal of federal universal service”).

<sup>7</sup> Sherry Lichtenberg, Kafui Akyea, Phyllis Bernt, *Survey of State Universal Service Funds 2012* (National Regulatory Research Institute, Silver Spring, MD, July 2012), at 3 (NRRI 2012 State USF Survey), available online at: <http://www.nrri.org/documents/317330/e1fce638-ef22-48bc-adc4-21cc49c8718d>.

<sup>8</sup> *See generally* Comments of the Nebraska Rural Independent Companies (NRIC), WC Docket No. 06-122, GN Docket No. 09-51, July 9, 2012, at 2-3 (NRIC Comments), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984742>.

<sup>9</sup> NRRI 2012 State USF Survey at 3.

The preservation and future viability of these State-specific USFs and their parallel operation with a reformed federal USF are of critical importance for the advancement of the universal service principles contained both in federal and independent State law, which federal principles were expanded to direct federal USF support where possible to networks that provide advanced services as well as voice services in the *USF/ICC Transformation Order*.

The State Members are deeply concerned that, if the Commission were not to take certain affirmative steps in the contemplated reform of the federal USF contribution base, the on-going viability of State-specific USF mechanisms will be seriously threatened.

The Federal-State Joint Board on Universal Service (Joint Board) has played an important role in the formulation of universal service principles and policies since its creation through the enactment of the federal Telecommunications Act of 1996 (Act or TA-96). The Joint Board has explicit authority to recommend “from time to time” modification of the definition of supported services, a responsibility that extends indefinitely into the future.<sup>10</sup> In addition, the Act requires that the Commission act within one year on any recommendation received from the Joint Board, regardless of when that recommendation is delivered.<sup>11</sup> The Joint Board also has a continuing statutory responsibility to ensure that federal universal service policies are based on a list of articulated principles.<sup>12</sup>

In view of the strong and unwavering State interests in a universal service partnership with the Commission — where State USFs play a critical role — cooperation between the Commission and the States continues to be essential in implementing universal service reforms, including those contemplated for the contribution base of the federal USF. Meaningful collaboration between the Commission and the Joint Board in this regard continues to be of paramount importance. Since the contemplated reform of the federal USF contribution base is not the subject of an explicit referral to the Joint Board and the FNPRM has relied in part on the

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<sup>10</sup> 47 U.S.C. § 254(c)(2); *see also* 47 U.S.C. § 254(c)(1)(C) (“[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported ... shall consider the extent to which such telecommunications services ... are being deployed in public telecommunications networks by telecommunications carriers.”) (The text of Title 47 is available online at: <http://transition.fcc.gov/Reports/1934new.pdf>.)

<sup>11</sup> 47 U.S.C. § 254(a)(2) (after its May 8, 1996, deadline to implement the 1996 Act, “the Commission shall complete any proceeding to implement subsequent recommendations from [the] Joint Board ... within one year after receiving such recommendations.”)

<sup>12</sup> 47 U.S.C. § 254(b) (“Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles ...”)

recommendations put forward in the May 2, 2011 State Plan, the State Members hereby submit these Reply Comments.<sup>13</sup>

## **I. Jurisdictional Perspectives on the Contribution Base for Federal and State USFs**

### **A. Blurring the Jurisdictional Boundaries of the Contribution Base**

The FNPRM puts forward proposals for the reform of the federal USF mechanism that may blur the jurisdictional boundaries of the revenue contribution base that is used for the assessments and funding of the federal and State USFs.<sup>14</sup> This blurring of the jurisdictional boundaries can raise numerous legal and regulatory issues and has the potential of adversely impacting the on-going viability and operation of numerous State-specific USF mechanisms. The Kansas Corporation Commission pointed out the following:

The proposal that the FCC try again to assess intrastate revenues is flawed from a policy as well as legal perspective. From a policy perspective, a rule change that extends the FUSF [federal USF] contribution obligation to encompass intrastate revenues would result in providers in states with State USFs *making a double contribution to support universal service on their intrastate revenues — once to the FUSF, and once to the State USF*. By contrast, such providers would make a single contribution on their interstate revenues — to the FUSF. Such a regulatory regime would create a strong incentive for providers to classify an artificially high percentage of their traffic as interstate rather than intrastate. Because providers pass on their contribution costs, consumers would pay more for intrastate than interstate service, and have less incentive to purchase services still classified as intrastate. *The predictable result would be shrinkage in the State USF contribution base, less ability of the states to shoulder part of the overall universal service burden, and so transfer more of that burden to the FUSF.*<sup>15</sup>  
{emphasis added}

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<sup>13</sup> The Massachusetts Department of Telecommunications and Cable observed that: “Since 1996, the Commission has sought the Joint Board’s input numerous times. In this rulemaking, however, the Commission has not chosen an approach that is in accordance with the well-established federal-state partnership and Congressional intent by failing to refer the matter to the Joint Board.” Comments of the Massachusetts Department of Telecommunications and Cable, WC Docket No. 06-122, GN Docket No. 09-51, July 9, 2012, at 14 (Mass. DTC Comments, footnote omitted), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021985078>.

<sup>14</sup> FNPRM, ¶ 127 at 51.

<sup>15</sup> Comments of the Corporation Commission of the State of Kansas on the Federal Communications Commission’s April 30, 2012 Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GN Docket No. 09-51, July 9, 2012, at 2 (Kan. CC Comments), online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984868>.

The National Association of State Utility Consumer Advocates addressed the Commission's focus on the size of the annual contribution assessment factors for the federal USF that currently involve carrier interstate and international revenues, and the potential ease of administration if intrastate carrier revenues were to become part of the contribution base:

It might be that such a system would be simpler to administer, but it would not be legal. In addition, from a policy perspective, the impact on states would be improper and unreasonable. First, in states that have USF funds, customers would be paying twice, i.e., customers would be assessed by the FCC and the states on the same (intrastate) revenues. State fund assessments are used to support service within the state. If the FCC assesses a surcharge on intrastate revenues, the money goes into the federal coffers. This would both unnecessarily drive up the cost to the customer and if the upshot was an effort to eliminate state funds, states that went to the effort to promote universal service within their borders would suffer. That is especially true given the FCC's "abandonment" of the PSTN [public switched telephone network], which states may decide still needs support. {footnotes omitted}<sup>16</sup>

The comments of regulated telecommunications industry members that extensively rely on both federal and State USF support for the provision of telecommunications and retail broadband access services in high-cost rural areas echoed similar concerns. These concerns also focused on the contribution assessment availability of retail broadband access revenues for *both* the federal and State USF mechanisms:

On the other hand, the *FNPRM* poses a wide range of questions that assume the Commission will continue to require a pre-assessment jurisdictional split. For instance, the Commission asks whether it should adopt a standard allocator for all voice revenues, regardless of technology (fixed or mobile, traditional telephony or interconnected VoIP). Under such an approach, the Commission might specify that voice revenues should be allocated according to a specified ratio, such as, for example, 20 percent interstate and 80 percent intrastate.

If the Commission decides that it continues to be necessary to split broadband revenues according to regulatory jurisdiction, NRIC cautions that the Commission should not claim an unduly large share of the assessment base for federal surcharges. Where a universal service resource is jurisdictionalized, that means a portion of the base becomes unavailable to each jurisdiction.

As the *FNPRM* notes, the Commission is considering an allocator lower than 100 percent interstate for contribution purposes, in order to preserve an assessable

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<sup>16</sup> Comments of the National Association of State Utility Consumer Advocates on the USF Contribution Mechanism Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GN Docket No. 09-51, at 15 (NASUCA Comments), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984557>.

revenue base for state universal service funds. For example, if the Commission were to determine that 90% of broadband revenue is “interstate” and subject to federal universal service surcharge, then the corollary would be that states could assess only ten cents of every dollar of broadband revenue. While the Commission might be tempted to claim a large interstate percentage in order to lower the federal rate, any such decision would cause great harm to state programs. NRIC recommends preserving a substantial share of the broadband base for the state funds because, for the reasons stated above, state programs have a substantial and continuing role in supporting provision of universal service. {footnotes omitted}.<sup>17</sup>

#### **B. Viable State USFs Should Function in Concert with the Operation of the Federal USF Mechanism**

The continuous existence of viable State USFs should function in concert with the operation of the federal USF mechanism. The continuous and robust viability of State-specific USFs preserves, enhances and complements the role of the federal USF mechanism — inclusive of the CAF parameters that are under development and implementation. Overall, the roles of the State and federal USF mechanisms cannot be viewed as separate and distinct even if such mechanisms may be respectively based on State-specific and federal statutory and/or regulatory foundations. The State Members note with approval the following perspectives in this regard:

Today, more than ever before, state and federal high-cost programs are logically, financially, and administratively intertwined. State and federal high-cost programs and policies are mutually reinforcing in many ways. *Interdependence of such programs will only increase with the large fiscal demands of universal broadband build-out.* The Commission has established budgets for high-cost programs, but at levels that are *not sufficient to preserve and advance universal service.* The Commission’s own publications have reported an “investment gap of approximately \$23.5 billion with regard to the capital requirements for building ubiquitous broadband networks in the United States, an estimate that NRIC believes understates the true cost. This cost *far exceeds the capacity of the current federal high-cost program budget.* This fiscal mismatch is exacerbated by the Commission’s plan to use major portions of federal support to address new financial demands, such as replacing some revenues lost to new intercarrier compensation changes. {emphasis added, footnotes omitted}.<sup>18</sup>

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<sup>17</sup> NRIC Comments at 10-11

<sup>18</sup> NRIC Comments, at 5-6

The States and their USF programs also provide additional forms of direct and indirect support to the federal USF mechanism and to the overall concept of universal service as the latter has been expanded by the *USF/ICC Transformation Order*. Such direct or indirect support includes, but is not limited to: (1) COLR obligations that the States have established, regulate, and enforce; (2) State USF support for intrastate intercarrier compensation reforms that lessen the burden on corresponding federal mechanisms including the CAF; (3) State-specific support for Lifeline services and programs; (4) State-specific statutory initiatives that mandate or otherwise encourage incentives-based deployment of broadband networks and services by carriers with COLR obligations.<sup>19</sup>

Thus, the preservation of viable and robust State USFs, where determined to be necessary, on a going-forward basis continues to play a fundamental role in maintaining and enhancing the national universal service goals. The state-federal partnership in this area should also be meaningfully and unambiguously protected and strengthened. Consequently, the Commission's contemplated reforms should explicitly adopt the principle that the *federal USF contribution mechanism should be compatible with, do no harm to, and promote state universal service contribution and support mechanisms where determined to be necessary*.<sup>20</sup> The adoption of this guiding principle and further affirmative actions of the Commission can overcome competing legal interpretations of federal law and arbitrage gaming of bi-jurisdictional universal service assessment contributions that have the potential of undermining the operational use and effectiveness of viable and robust State USF mechanisms.

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<sup>19</sup> See generally NRIC Comments, n. 15 at 6. The State high-cost and intrastate access reform USFs amount to no less than \$573.39 million annually or 12.74% of the federal CAF budgeted amount which does not include any amounts for Texas which is the largest state fund. NRRI 2012 State USF Survey at 51-53. At least thirty-one (31) States and the District of Columbia also have funds that support telecommunications relay services (TRS) for the hearing and/or speech impaired. *Id.* at 3. California, Maine, West Virginia, and Nebraska have explicit broadband funds. *Id.* at 53. Pennsylvania has a statutorily mandated incentive broadband deployment program for incumbent local exchange carriers (ILECs) connected with price cap regulation. 66 Pa. C.S. § 3011 *et seq.*

<sup>20</sup> NRIC Comments at 7. See also Comments of the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance, WC Docket No. 06-122, GN Docket No. 09-51, July 9, 2012 (Rural Associations Comments) at 43; *First USF Order*, ¶ 3 at 6 (acknowledging that the FCC may need to take future action “to ensure that we create sustainable and harmonious federal and state methods of continuously fulfilling universal service goals” and committing “to working in close partnership with the states to create complimentary federal and state universal service support mechanisms”), online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984886>.

### C. The FCC Can Forestall Alternative Interpretations of Federal Law

The FCC can affirmatively and conclusively forestall varying interpretations of federal law that can negatively affect the continuing viability and robustness of State USF mechanisms. The Commission can take such affirmative actions in the present context of addressing the federal USF contribution base whether or not the FCC continues with a reformed method based on revenues, numbers, or connections.<sup>21</sup>

The May 2, 2011 State Members' Plan observed the following:

State Members conclude that regulatory jurisdiction over a service should not determine whether that service contributes to universal service. To the extent that federal or State support induces carriers to install and maintain communications facilities in the public communications network, the benefits flow to all regulated and unregulated "telecommunications services" (interstate and intrastate) and "information services" that traverse that network. The narrowband voice network continues to evolve toward a ubiquitous, multipurpose broadband network capable of delivering the "triple play" consistent with new universal service goals that have been announced by the FCC. Those who benefit from the universal service funding in the future should contribute equitably to its ongoing deployment.

State Members recognize that the 1999 federal court decision in *TOPUC v. FCC* limits the FCC from imposing universal service surcharges on intrastate [sic] telecommunications services.<sup>191</sup> *TOPUC* was based on 47 U.S.C. § 152(b), which prohibits the FCC from establishing any charge in connection with intrastate service. The court held that Section 152(b) creates a "presumption" that the FCC cannot set any charges on intrastate services, including USF surcharges. The court rejected the FCC's argument that the FCC was assigned primary responsibility for ensuring the sufficiency of universal service.<sup>192</sup>

State Members believe that *TOPUC v. FCC* was wrongly decided. The terms of Section 254 are clear. The FCC can impose equitable and nondiscriminatory surcharges on any or all services provided by any "telecommunications carrier that provides interstate telecommunications services."<sup>193</sup> Likewise, any State can impose equitable and nondiscriminatory surcharges on any or all services provided by any "telecommunications carrier that provides intrastate telecommunications services."<sup>194</sup> Both statutes are clear regarding who must contribute, and both are silent on the amount of the contribution or the base on which that amount is calculated. Moreover, we disagree with the *TOPUC* court's conclusion about the FCC's role. The FCC does indeed have primary responsibility under the law for ensuring the sufficiency of universal service. If a rural State has high costs and high rates, only federal support can achieve the goals of universal service without creating a burden on that State's ratepayers that would

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<sup>21</sup> The State Members believe that a reformed contribution assessment method based on revenues is the preferred alternative. See further discussion *infra*.

prevent rates from being comparable to urban areas. Yet today's narrow federal contribution base and the high federal surcharge rate are increasing the risk that the statutory purposes cannot be achieved.

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<sup>191/</sup> *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

<sup>192/</sup> *Id.* at 447.

<sup>193/</sup> 47 U.S.C. § 254(d).

<sup>194/</sup> 47 U.S.C. § 254(f).

*State Members' Plan*, at 123-124. See also FNPRM ¶ 130, at 52.

The State Members fully comprehend the reasons for advancing the continuous adherence to a strict interpretation of the *TOPUC* ruling.<sup>22</sup> However, even strict adherence to the *TOPUC* ruling coupled with a reformed revenue-based method for contribution assessments to the federal USF may not preserve the viability and robustness of State USF mechanisms on a going forward basis absent additional and affirmative actions on the part of the Commission in the context of the present FNPRM. For example, retail wireline and wireless broadband access services are not usually subject to State utility commission regulatory jurisdiction and, thus, not subject to intrastate revenue contribution assessments for State USF purposes. Furthermore, it has taken an explicit FCC ruling to clarify that States can implement assessment contributions on nomadic interconnected Voice over the Internet Protocol (VoIP) service providers under certain conditions.<sup>23</sup> Specific State statutes may also affect the jurisdiction of State utility commissions over retail broadband access services and retail IP-based services such as VoIP with potentially negative inferences for State USF contribution assessments unless such State statutes contain specific exceptions.<sup>24</sup> In the absence of explicit and affirmative FCC actions in the context of the present FNPRM, the uncertainty regarding the proper legal boundaries of the contribution base for State USFs is likely to continue. Such uncertainty will most likely result in unproductive

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<sup>22</sup> See generally Kan. CC Comments at 2-4; NASUCA Comments at 14 and n. 67.

<sup>23</sup> NRIC Comments at 15 and n. 32; Kan. CC Comments at 5 and n. 9, citing *In re Universal Service Contribution Methodology – Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, (FCC, Rel. Nov. 5, 2010), Declaratory Ruling, slip op. FCC 10-185, 25 FCC Rcd 15651 (2010) (FCC Kansas-Nebraska Declaratory Order), available online at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-185A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-185A1.doc). Contrast *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009). Also available online on the Court's website at: <http://www.ca8.uscourts.gov/opndir/09/05/081764P.pdf>.

<sup>24</sup> See generally 73 Pa.C.S. §§ 2251.4 and 2251.6(1)(iii). No less than nine (9) States have USF contribution assessments for VoIP providers while in three (3) states some VoIP providers voluntarily contribute to State USF mechanisms. NRRI 2012 State USF Survey at 6, 10.

litigation that will involve numerous States, the Commission, and/or federal courts of appropriate jurisdiction that may or may not reach consistent interpretative rulings of applicable federal law and individual State actions.

A potential solution is presented in the NRIC Comments. The Commission under Section 254(d) of TA-96, 47 U.S.C. § 254(d), can utilize its “permissive authority” to “require contributions from ‘any other provider of interstate telecommunications’ if the public interest so requires.”<sup>25</sup> If the Commission “itself shifts its contribution basis to include intrastate revenues, to connections, or to numbers... the Commission should also construe subsection 254(f) so that states may impose similar state surcharges, on the same basis, to support state universal service programs.” The “Commission should declare that a state may adopt regulations prescribing additional definitions and standards that impose surcharges on broadband connections or services on the same basis that the Commission ultimately imposes surcharges on those connections or services” and to the extent that the service provider has intrastate operations.<sup>26</sup>

The NRIC Comments also identify additional risks that may be posed for State USF mechanisms as the Commission reforms the contribution base of the federal USF. These are posed because of the requirements of Section 254(f) that “state contributions be collected ‘on an equitable and non-discriminatory basis’,” and that no associated “state regulation may ‘rely on or burden Federal universal service support mechanisms’.”<sup>27</sup> The “equitable and non-discriminatory” standard of Section 254(f) has been interpreted to restrict the ability of a State commission to assess contributions on both the intrastate and interstate revenues of a carrier with intrastate operations.<sup>28</sup> The resulting risk to State USF mechanisms can be minimized “once the Commission has established the future assessment basis for federal contributions,” with the FCC affirmatively declaring “that state universal service programs may impose contribution requirements under subsection 254(f) on the same basis as the federal program’s contribution require-

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<sup>25</sup> NRIC Comments at 9.

<sup>26</sup> NRIC Comments at 9-10 and n. 22.

<sup>27</sup> NRIC Comments at 11-12.

<sup>28</sup> NRIC Comments at 12, and n. 29 citing *AT&T v. Pub. Util. Comm’n of Texas*, 373 F.3d 641 (5<sup>th</sup> Cir. 2004). That Court opinion is online at: <http://www.ca5.uscourts.gov/opinions%5Cpub%5C03/03-50454-CV0.wpd.pdf>.

ments, and that to do so would not violate the equitable and nondiscriminatory language of the Act.”<sup>29</sup>

The Section § 254(f) requirement that State regulations relating to intrastate USF mechanisms cannot “rely on or burden Federal universal service support mechanisms” has also been used to “invalidate a state’s efforts to require contributions from intrastate carriers based on both interstate and intrastate revenue.”<sup>30</sup> The NRIC Comments suggest that the Commission can obviate the relevant risk for State USF mechanisms by an affirmative declaration “that state universal service programs may impose contribution requirements under subsection 254(f) on a portion of broadband service complementary to the federal assessment, and that to do so would not violate the ‘rely on or burden’ clause of the Act.”<sup>31</sup>

The State Members believe that the physical network facilities that provide retail broadband access services as well as telecommunications services are common carrier telecommunications facilities — even if the Commission has classified the retail broadband access services as “information services.” Both the federal and many of the State USF mechanisms are essentially designed to support ever evolving physical network facilities that are utilized for a number of purposes and by various types of traffic (e.g., inclusive of the wholesale transmission of information services traffic that is broadly characterized as a common carrier telecommunications service). The same national USF mechanisms also encourage the continuous future deployment of physical broadband capable networks. Thus, the Commission has sufficient statutory latitude to make the affirmative declarations that will preserve the future viability of robust State USF mechanisms under Sections 254(d) and 254(f), whether or not the retail broadband access services are or are not under some form of regulatory oversight in the federal or State jurisdictions, and have received a common carrier telecommunications or other classification.<sup>32</sup>

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<sup>29</sup> NRIC Comments at 12.

<sup>30</sup> NRIC Comments at 12-13 and n. 30 citing *AT&T Comm. Inc. v. Eachus*, 174 F.Supp. 1119 (D. Oregon, 2001).

<sup>31</sup> NRIC Comments at 13.

<sup>32</sup> *See also* NASUCA Comments n. 30 at 7 (“This is not the time or the place to debate the propriety of the Commission’s decision to classify retail broadband Internet access as an information service, or of the Commission’s decision that the USF can support such services”). The State Members’ Plan, at 120, observed the following:

## II. Reforming the Contribution Base of the Federal USF Mechanism

### A. The FCC Should Continue Utilizing A Revenue-Based Contribution Method

The State Members endorse continuation of a revenue-based, albeit reformed, contribution mechanism for the federal USF mechanism. The retention of a revenues-based contribution method is supported by numerous commenters. A revenues-based contribution method for the federal USF is also compatible with the corresponding contribution assessment methods that are used by State USF mechanisms. Numerous comments support the continued use of the revenues-based contribution method. NASUCA argued that “the current mechanism, which bases USF contribution on carriers’ revenues, despite problems, *works*, especially as a **gauge of how the network is used**” while “proposed substitutes for the revenues-based mechanism — basing assessments on telephone numbers or on ‘connections’ — charge companies and customers USF contributions for mere **access** to the network.”<sup>33</sup> The California Public Utilities Commission adopted the same position and states:

A revenues-based system is still preferable at this time to other proposed systems because it is more equitable than a numbers-based, a connection-based, or a hybrid-based system. Under a revenue-based system the burden is relative to the volume of the service consumed. Those consumers who use the most services have the greatest burden. According to Keep USF Fair Coalition (Coalition), which represents consumer advocacy groups, a change to a numbers or connections-based contribution methodology would most negatively impact low income, seniors, disabled, and rural Americans. {footnote omitted}<sup>34</sup>

The California PUC pointed out that a telephone numbers-based contribution assessment method “seems attractive, but implementation is problematic” because the “FCC’s proposed definition would limit ‘assessable’ numbers to those assigned to end users for certain specified

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(footnote 32 continued....) State Members are aware that the Commission has drawn a fundamental divide between “telecommunications services” and “information services,” and the Commission has placed broadband services in the latter group. Nevertheless, we do not believe that distinction will be particularly helpful in defining the contribution boundary for universal service, particularly when the fund is used to support both classes of service. If the “information service” concept is to be useful here at all as an exception from contribution requirements, it should be narrowed to a more traditional scope that excludes services like Westlaw but includes retail broadband service.

<sup>33</sup> NASUCA Comments at 1 (emphasis added, footnote omitted).

<sup>34</sup> Comments of the California Public Utilities Commission and the People of the State of California, WC Docket No. 06-122, GN Docket No. 09-51, at 8-9 (Cal. PUC Comments), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984994>.

purposes, potentially leaving millions of numbers out of the calculation for universal service assessment,” and “a numbers-only methodology would not encompass many broadband services.” Furthermore, many “different providers may seek special treatment for each category of numbers and if the Commission chose to grant these requests, there is the potential for market distortion,” and the “multiplicity of different categories of numbers shows how much more complicated the system would be to administer.”<sup>35</sup>

In contrast to a numbers or connections-based system, revenues continue to have standardized, more structured, and better understood definitions. As the Rural Associations pointed out, “revenues are easily verifiable through providers’ accounting statements,” while “neither numbers nor connections, however defined, are subject to the sort of known and standardized process by which revenues may be accounted as of specific periods and over time.”<sup>36</sup> The Rural Associations also indicated that the use of telephone numbers for the development of federal USF contribution assessments is likely to have “a regressive impact, potentially placing a relatively greater burden on consumers (many of whom have multiple telephone numbers) than on large enterprise users that procure ‘big pipes’ for data transmission,” e.g., where “a family has ten telephone numbers” as compared to “a business with five telephone numbers buying a 100 Mbps data service.”<sup>37</sup>

The Rural Associations also emphasized that “continuing the use of a revenues-based contribution mechanism also meets the Commission’s oft-uttered commitment to technological neutrality” since this method “best captures the value that consumers place on competing services that use underlying telecommunications networks without regard to the specific technology used to deliver the service.”<sup>38</sup> Furthermore, reliance on a revenues-based method “is effectively immune to changes in technologies or services that may arise from time-to-time.”<sup>39</sup>

Nevertheless, the State Members recommend that, in the event the Commission adopts a telephone numbers or connections-based contribution assessment system, it should still affirmatively act to preserve the viability and robustness of State USF mechanisms. The

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<sup>35</sup> Cal. PUC Comments at 10-11 (footnotes omitted).

<sup>36</sup> Rural Associations Comments at 36.

<sup>37</sup> Rural Associations Comments at 36-37.

<sup>38</sup> Rural Associations Comments at 37.

<sup>39</sup> Rural Associations Comments at 37.

Commission “should explicitly declare that a state contribution mechanism imposing a surcharge on 1) all end user telecommunications services without regard to regulatory ratemaking jurisdiction, 2) only intrastate end user telecommunications service, and 3) telephone numbers” or connections — where the telephone numbers or connections are defined in the same way as the federal telephone number or connection surcharge — “is equitable and nondiscriminatory, is not inconsistent with the Commission’s rules and does not rely on or burden Federal universal service support mechanisms.”<sup>40</sup>

### **B. Expanding the Contribution Base of the Federal USF Mechanism**

There is no need for the State Members to repeat here the proposals contained in the original State Plan and recounted in the FNPRM. As the FNPRM and numerous initial comments suggest, the expansion of the contribution base for the federal USF mechanism is an absolute and overdue necessity. The State Members view with skepticism proposals for the exclusion of various services from the contribution base of the federal USF — and potentially the contribution base for numerous State USFs as well — where such services depend on and use both wireless and wireline telecommunications networks but are portrayed as being “information services.”<sup>41</sup> The NASUCA Comments succinctly pointed out that the “public interest requires the broadest lawful class of contributors to the USF,” i.e., those “who benefit from a ubiquitous national network should contribute to the Fund, with as few exceptions as feasible.”<sup>42</sup> Furthermore, the inescapable conclusion reached by the *USF/ICC Transformation Order* is that “if the USF is to support broadband, then broadband must support the USF.”<sup>43</sup> Consequently, the “information services” rationale for barring federal and State USF contribution assessments cannot and should not be elevated to an unending series of convenient “exceptions” that will “swallow the rule” and undermine the expansion of the contribution bases for both the federal and the State USF mechanisms.

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<sup>40</sup> NRIC Comments at 16-17.

<sup>41</sup> See generally Comments of CTIA—The Wireless Association, WC Docket No. 06-122, GN Docket No. 09-51, at 22-26 (CTIA Comments), available online at: <http://apps.fcc.gov/ecfs/document/view?id=7021984998>.

<sup>42</sup> NASUCA Comments at 7.

<sup>43</sup> NASUCA Comments at 7.

### III. Future Involvement of the Joint Board

Regardless of the Commission's chosen method and service boundaries for the contribution base of the federal USF, numerous practical implementation issues will require appropriate consultation with State utility regulatory commissions. If the experience of implementing the *USF/ICC Transformation Order* is any guide (pending appeals notwithstanding),<sup>44</sup> such practical implementation issues are likely also to affect numerous State USFs that operate in concert with the federal USF mechanism. The Federal-State Joint Board on Universal Service is the appropriate, statutorily-founded vehicle for such consultations. The State Members urge the Commission to use it in a substantive and constructive manner.<sup>45</sup>

Respectfully Submitted,

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<sup>44</sup> See, e.g., *In re Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. May 14, 2012), Third Order on Reconsideration, ¶ 22 at 9-10 (clarifying what constitutes the local rate for purposes of the rate floor in response to a petition for clarification from the Vermont Public Service Board), available online at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-52A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-52A1.doc).

<sup>45</sup> See Mass. DTC Comments at 11-14 (urging the Commission to work closely with the States to reform contributions, including a referral to the Joint Board).