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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	
ETC Annual Reports and Certifications	)	WC Docket No. 14-58
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

COMMENTS
of the
RURAL ASSOCIATIONS

NTCA – THE RURAL BROADBAND ASSOCIATION;
WTA – ADVOCATES FOR RURAL BROADBAND;
EASTERN RURAL TELECOM ASSOCIATION;
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
AND
COLORADO TELECOMMUNICATIONS ASSOCIATION;
ILLINOIS INDEPENDENT TELEPHONE ASSOCIATION;
IOWA COMMUNICATIONS ALLIANCE;
KANSAS RURAL INDEPENDENT TELECOMMUNICATION COALITION;
MINNESOTA TELECOM ALLIANCE;
NORTH DAKOTA ASSOCIATION OF TELECOMMUNICATIONS COOPERATIVES;
OKLAHOMA TELEPHONE ASSOCIATION;
SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION;
STATE INDEPENDENT TELEPHONE ASSSOCIATION OF KANSAS;
UTAH RURAL TELECOM ASSOCIATION;
WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSSOCIATION; and
WISCONSIN STATE TELECOMMUNICATIONS ASSOCIATION

August 8, 2014

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I. INTRODUCTION AND SUMMARY

On June 10, 2014, the Federal Communications Commission (Commission) released its *Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration and a Further Notice of Proposed Rulemaking*[1] in the above-captioned proceeding with the expressed intent to "continue the implementation" of the reforms contained in the 2011 *USF/ICC Reform Order*.[2] In particular, the Commission's *Further Notice*[3] proposes a number of "measures to update and further implement the framework adopted by the Commission in 2011."[4]

In these comments, the Rural Associations[5] first explain how their proposal for a support mechanism for Data-only Broadband (DOBB) Services fully satisfies the principles established

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[1] *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *ETC Annual Reports and Certifications*, WC Docket No. 14-58, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 14-54 (rel. June 10, 2014) (*Omnibus Order* or *Further Notice*).

[2] *Id.* ¶ 1, *citing 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 an 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 – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) (*USF/ICC Reform Order*).

[3] *See Further Notice* ¶¶ 138-331.

[4] *Id.* ¶ 10.

[5] As used in this filing the Rural Associations include NTCA – The Rural Broadband Association (NTCA), WTA – Advocates for Rural Broadband (WTA), Eastern Rural Telecom Association (ERTA) and the National Exchange Carrier Association, Inc. (NECA). NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to

by the Commission in the *Further Notice* and also presents the simplest and most straightforward way on the record for the Commission to implement a Connect America Fund (CAF) for rural, rate-of-return local exchange companies (RLECs) consistent with its goals in this proceeding. In contrast, conceptual frameworks that would seek to apply different support mechanisms to "old" and "new" investment, while having some appeal, are likely to raise a number of difficult problems in implementation, introduce complexity at a time when simplicity should be an objective of reform, and thus may have the ironic and unintended effect of delaying and complicating implementation of a CAF for areas served by smaller carriers.

The Rural Associations also believe the Commission's proposal to increase the minimum broadband speeds it seeks to achieve with universal service funding to 10 Mbps downstream[6] appears reasonable, provided there are clear guidelines governing reasonable requests for such services and availability of predictable and sufficient funding as required under the Communications Act of 1934, as amended (the Act).[7]

Proposals in the *Further Notice* regarding adjustments to support in areas served by unsubsidized or "qualifying" competitors using alternative technologies raise substantial public interest questions. All potential support recipients must meet the Commission's standards for

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their communities. WTA is a national trade association that represents more than 250 rural telecommunications carriers providing voice, video and data services. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities. ERTA is a trade association representing rural community based telecommunications service companies operating in states east of the Mississippi River. NECA is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally*, 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). The various state associations participating in these comments represent RLECs within their particular states.

[6] *Further Notice* ¶ 138.

[7] 47 U.S.C. § 254(b).

universal service on a sustainable basis. Moreover, as explained herein, the Commission should reject the "qualifying competitor" concept and focus on determining where unsubsidized competitors actually provide service meeting the Commission's pricing and performance standards in areas that are sufficiently "economic" to enable provision of service without support. The Commission must carefully examine how potential subdivisions of RLEC study areas into supported (noncompetitive) and unsupported (competitive) portions will impact USF distribution rules and even the USF budget itself.

The Rural Associations do not oppose the Commission's proposal to freeze the National Average Cost Per Loop (NACPL),[8] provided the Commission remains mindful of the impacts such approaches may have on relatively higher-cost companies.

As for plans that propose voluntary approaches to model-based support, the Rural Associations are already on the record as supporting such options, but they urge the Commission to carefully consider the specifics of such plans to ensure that companies refraining from choosing model-based support are not adversely impacted by budget implications likely to arise when other companies choose the voluntary plan.

The Rural Associations agree support for high "middle mile" costs is important in the long-run to assure rural consumers have access to high-quality broadband services at reasonably comparable rates. In a world without universal service budget constraints, the Rural Associations would suggest the Commission address the real challenges of middle mile distance in short order. But given the reality of a constrained budget target at the present time and the substantial amount of costs associated with deploying and operating local network infrastructure, the Rural Associations urge the Commission to focus first on the more urgent need for a

[8] *Further Notice* ¶ 262.

mechanism, such as the Rural Association DOBB proposal, that will support such local infrastructure. Notwithstanding this, the Rural Associations do support the Commission's decision to focus initially on supporting middle mile infrastructure in Alaska and Tribal lands, and to consider over time how to address important and increasing middle mile challenges in other rural and remote areas.[9]

The Rural Associations have no objection to the Commission's proposed amendment of section 54.313 of the rules, relating to reasonably comparable rate certifications for broadband, as long as the benchmark is calculated in a reasonable manner and takes into consideration the fact that broadband service rates and federal high-cost support are becoming the predominant revenue sources for RLECs (such that limitations on one are likely to require increases in the other).[10] While the Rural Associations appreciate that the proposed rules relating to reductions in support for late filings are more reasonable than current rules, for the reasons stated herein, the Commission should delete sections 54.313(j) and 54.314(d) rather than modifying them, and clarify that the Enforcement Bureau will handle future late filings of reports and certifications.

Finally, with regard to potential reductions in support for non-compliance with service obligations, the Rural Associations believe the Commission needs to establish a separate set of performance compliance standards and procedures for RLECs and that a reasonable period of time be allowed for RLECs to meet such standards before any reductions in support take place.

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[9] *Id.* ¶¶ 300-308.

[10] *Id.* ¶ 310.

II. THE RURAL ASSOCIATIONS' PROPOSAL FOR DATA-ONLY BROADBAND SUPPORT PROVIDES THE SIMPLEST AND MOST STRAIGHTFORWARD PATH TOWARD ESTABLISHING A CONNECT AMERICA FUND FOR AREAS SERVED BY RLECs AND ACCOMPLISHING THE COMMISSION'S REFORM OBJECTIVES.

To reform existing support mechanisms for RLECs over the long term, the *Further Notice* proposes replacing existing HCLS and ICLS mechanisms with a new CAF mechanism for RLECs. The Commission suggests the new mechanism could apply to all new investment on or after a date certain, while existing HCLS and ICLS mechanisms would support only investment occurring prior to that date.[11] Eventually, all new investment by RLECs would be recovered through a new CAF "specifically designed to meet the Commission's overall objective to support voice and broadband-capable networks in areas that the marketplace would not otherwise serve and to ensure that consumers in rural, insular and high-cost areas have access to reasonably comparable services at reasonably comparable rates to consumers living in high-cost areas."[12]

The *Further Notice* states that any RLEC-specific CAF mechanism must be designed to meet four objectives: "(a) calculate support amounts that remain within the existing rate-of-return budget; (b) distribute support equitably and efficiently, so that all rate-of-return carriers have the opportunity to extend broadband service where it is cost-effective to do so; (c) distribute support based on forward-looking costs (rather than embedded costs); and (d) ensure that no double recovery occurs by removing the costs associated with the provision of broadband Internet access service from the regulated rate base."[13] The Commission specifically seeks comment on what rules or rule parts would need to change to implement such a mechanism, and

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[11] *Id.* ¶ 267.

[12] *Id.*

[13] *Id.* ¶ 269.

whether it should be designed in a way that provides support based on locations or total network costs, rather than subscriber access lines. The Commission also seeks comment on whether such a mechanism should be designed to support lines where a consumer also subscribes to voice service, and whether collected-but-not-yet-distributed funds in the CAF reserve account should be used to "kick start" such a mechanism.[14]

The *Further Notice* notes the Rural Associations have previously submitted a proposal for a RLEC CAF mechanism.[15] This proposal was designed primarily to achieve several important objectives:

1. ***Solve the Core Problem of Consumer Choice:*** Under the Rural Associations' proposal, support would be received for networks regardless of whether the consumer chooses to take voice, voice and data, or data-only broadband. The choice is the consumer's, not the carrier's.

2. ***Avoid Complex or Cumbersome Rule Changes:*** Under the Rural Associations' proposal support would not change from current mechanisms where a consumer chooses to take voice or both voice and data. Support would change only in those

[14] *Id.* The Rural Associations support the idea of using USF reserve amounts, earmarked for RLEC areas, to "kick-start" any mechanism for DOBB support which will result in increased broadband deployment and investment in IP capable infrastructure. Alternatively, as discussed further elsewhere herein, the Commission might consider utilizing reserves to establish an initial program to support middle mile network needs, and thereby conserve more "budget" resources for support of local network infrastructure deployment and operation.

[15] *Id.* ¶ 270. Over the past few years the Rural Associations have engaged in numerous discussions with the Commission regarding the Rural Associations' DOBB Support proposal and have submitted over 30 filings on the record regarding the proposal. *See, e.g.,* Initial Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al.,* at 22-24 (filed Jan. 18, 2012); Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Feb. 22, 2013); Reply Comments of NECA, NTCA, ERTA, and WTA, WC Docket No. 10-90, *et al.*, at 3-9, Attach. (filed July 15, 2013) (Rural Associations' July 15, 2013 Reply Comments); Letters from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Feb. 19, Mar. 31, 2014). In particular, the Rural Associations have previously filed detailed rule changes that would be required by the proposal as well as the projected impact of the proposal on the USF budget. *See* NTCA, NECA, WTA, and ERTA Comments, WC Docket No. 10-90, at 3-10, Attach. (filed June 17, 2013) (Rural Associations' June 17, 2013 Comments); Letters from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Sept. 12, Nov. 26, Dec. 16, 2013).

instances where a *consumer* chooses to take DOBB Service. As the IP transition progresses, customer demand for DOBB services will increase, causing reductions and eventual elimination of the ICLS and HCLS mechanisms under the Rural Associations' proposal. Put another way, simplicity should be a cornerstone of any universal service reform; if a particular suggested reform makes the calculation or monitoring of USF eligibility and distribution more complex rather than less, or if a particular reform concept is so complex that it cannot be "operationalized," there should be a predisposition against its use.

3. ***Preserve and Advance Universal Service:*** The mechanism strikes a carefully constructed balance between providing the ability to recover prior investments in accordance with rules in place at the time those investments were made, and the need to advance universal service by permitting new investment over time. Indeed, the Rural Associations' proposal includes a forward-looking component specifically designed to allow more support dollars to flow over time to new investment as existing networks depreciate.

4. ***Avoid Flash-Cut or Massive Disruptions to Existing Support:*** As noted above, the Rural Associations' plan migrates support from existing mechanisms over time, as driven by consumer demand for broadband. As consumers migrate to DOBB services, carriers will see their legacy HCLS[16] and ICLS support amounts decrease, while support for network components over which DOBB Service is provided increases.

The *Further Notice* nonetheless expresses several concerns regarding the Rural Associations' proposal, including: whether funding under the proposed method will stay within budget levels; whether funding should rely on existing accounting methods (as opposed to use of a model or some other as-yet unspecified method of determining costs);[17] whether the budget estimates provided for the Rural Associations' proposal sufficiently account for line losses; whether the proposal successfully avoids double recovery of costs due to timing differences

[16] As noted above, HCLS will also continue to decline each year based on the operation of the Rural Growth Factor. To the extent customer demand for DOBB services increases, the line loss reflected in the Rural Growth Factor will further accelerate the reduction and eventual elimination of the HCLS mechanism under the Associations' proposal for DOBB funding.

[17] *Further Notice* ¶ 270.

between payments under the new mechanism and payments under existing rules;[18] whether the assumed broadband subscriber line charge of $26 is sufficient given the funding benchmark of $52.50 applicable in price cap areas;[19] whether the proposal will provide incentives for carriers to make efficient expenditures; and whether the proposal will subsidize new investment in areas served by an unsubsidized competitor.[20]

As shown below, the Rural Associations' DOBB Support mechanism indeed meets the four principles set forth in paragraph 269 of the *Further Notice*, and it has been tailored to address each of the specific concerns described immediately above. The Rural Associations' proposal can also be implemented quickly and simply, and for reasons discussed below, will accomplish the Commission's goal of transitioning support from legacy mechanisms to a new forward-looking RLEC CAF broadband mechanism far more rapidly and simply than any other approach that the *Further Notice* appears to contemplate. In the following subsections, the Rural Associations explain precisely how the DOBB plan meets each of the four objectives specified in paragraph 269 and addresses each of the other concerns raised by the Commission in the *Further Notice*.

A. The DOBB Proposal Can Be Configured to Ensure That Support Amounts Under the Rural Associations' Proposal Conform to the Commission's Overall Budget Objective for RLEC CAF Payments.

The Rural Associations' DOBB support mechanism will cause support payments under existing HCLS and ICLS support mechanisms to be reduced as data-only broadband services displace traditional voice/data telecommunications services, while funding under the new DOBB

[18] *Id.*

[19] *Id.* ¶¶ 271-272.

[20] *Id.* ¶ 274.

mechanism would gradually increase.[21] The rate of such change for individual RLECs and for fund mechanisms in total would depend on the speed and degree to which individual consumers and businesses discontinue purchasing traditional voice/data services in favor of DOBB services, as well as a variety of other factors. Assuming conversion to data-only broadband occurs at a pace of 2.5% or 5% per annum, however, the budgetary impact of the Rural Associations' proposed mechanism would be *de minimis* in the near future.[22] If high-cost budgets were adjusted to accommodate historical levels of inflation (as they should be),[23] for example, the Rural Associations' proposal can be expected to stay within budgetary targets through at least 2017 assuming a 5% annual DOBB conversion rate.[24] Even without an inflationary factor, the DOBB proposal would likely exceed a $2 billion "budget target" in 2017 by an amount that is

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[21] *See supra* note 15, Rural Associations' June 17, 2013 Comments at 8-9, and November 26, and December 16, 2013 Letters.

[22] *Id.* In response to the allegation that the proposal "does not appear to account for the fact that when a line is lost . . . HCLS and ICLS will likely increase on a per-line basis," the Rural Associations note first that they provided "budget estimates" that expressly *included* line loss assumptions at the request of the Bureau. Specifically, budgetary impact projections previously submitted by the Rural Associations demonstrate that annual line loss of one percent resulted in relatively minor impacts, which on average equaled less than $18 million per year through 2017 when transition to DOBB occurs at the rates of 2.5%, 5% and 10% per year. *Id.* Moreover, for purposes of clarification, there will be no per-line increase in HCLS and ICLS amounts when a consumer moves from voice or voice/broadband to DOBB service – in that case, as the rules filed previously by the Rural Associations to implement the plan make plainly clear, *both* the line/connection *and* the costs move to the DOBB mechanism and *both* are extracted from HCLS and ICLS calculations..

[23] Similar adjustment mechanisms are incorporated in other USF programs and cost limitation mechanisms within the Commission's rules. *See, e.g.*, 47 C.F.R. § 54.307(a)(1) (provides quarterly adjustment to Schools & Libraries Fund); 47 C.F.R. § 54.1303(a) (GDP-CPI chained price index portion of Rural Growth Factor applied to HCLS) 47 C.F.R § 54.1308(a)(4)(ii)(D) (inflation adjustment mechanism for corporate operations expense limit). Considering the Commission's consistent recognition of the need for funding levels to keep pace with inflation in other USF mechanisms, it is entirely unclear what basis exists for the Commission to fail to include at least a similar factor in any CAF mechanism designed to support rural broadband deployment.

[24] *See* Rural Associations' December 16, 2013 Letter.

less than the current CAF reserves.[25] Further, as the Commission recognizes, the Rural Associations' Plan recommends implementation of a Capital Budget Mechanism (CBM) designed to limit potential excess investment by individual companies (discussed below) in a manner that should meter any potential annual growth in costs eligible for universal service cost recovery.

Beyond these measures, however, recognizing the importance that the Commission places on the overall limits on fund sizes, the Rural Associations are actively considering methods to assure that DOBB support will conform to USF budget targets established by the Commission.[26] Such additional controls will assure any reforms to implement DOBB support do not cause "a budget issue" or adversely impact existing support provided under current ICLS and HCLS mechanisms pending the transition to an IP data-only broadband services environment.

For example, the Rural Associations suggest the Commission consider establishing a simple and straightforward mechanism that would offset budget overages (*i.e.*, amounts by which demand for DOBB funding exceeds a properly set budget target) by the equally-divided combination of a per-line adjustment (the equivalent of increasing the DOBB per-line charge described in the Rural Associations' proposal) and a proportional reduction of DOBB high cost distributions among all companies.[27] By utilizing both per line and percentage reductions applied to DOBB funding, this approach would help ensure that the effects of compliance with budget targets are borne on an equitable basis between relatively higher cost service areas and

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[25] USAC reports a CAF Reserve amount of $1.982 billion as of June 30, 2014. USAC Quarterly Federal Universal Service Support Mechanisms Fund Size Projections for Fourth Quarter 2014, at 11 (filed Aug. 1, 2014).

[26] *Id. Further Notice* ¶ 273 citing *USF/ICC Order* ¶ 126.

[27] Rural Associations' September 12, 2013 Letter.

relatively lower cost service areas, and thus avoid disproportionately impacting rural consumers living in the highest cost areas. Moreover, the application of any such "budget-driven" reductions only to DOBB support – and not to HCLS and ICLS – would help in making the transition smoother by avoiding disruptions to legacy mechanisms arising out of reforms.

More specifically, the Rural Associations suggest the Commission adopt a mechanism that would first require the Universal Service Fund Administrator (Administrator) to compare projected Fund demand levels to an annual budget target identified by the Commission. In instances where demand is expected to exceed that level, the Administrator would perform a series of calculations designed to reduce overall DOBB funding levels for that year by an equal combination of per-line and percentage budget controls as described above to ensure distributions for DOBB do not cause total distributions to exceed the then-applicable budget target.[28]

This approach would provide a fail-safe means for the Commission to ensure that any reforms to implement support for DOBB services will not have an adverse impact on properly established budget targets, and would also result in more equitable distributions of support reductions between relatively lower-cost and higher-cost RLEC service areas than approaches that rely on either overall support reductions or per-line increases alone. If this approach also appears viable to the Commission and interested parties in this proceeding, the Rural Associations would be pleased to work with Commission staff in developing specific rules and

[28] Basing the overall budget reduction on projected variances would permit the Commission and the Administrator to "true up" demand to actual costs, similar to the process used for ICLS under current rules. In this manner budget variances for a given year could be reflected in future period budget control calculations.

procedures to operationalize the proposed method, including submission of adjustments to draft rules previously submitted on the record.[29]

This being said, the Rural Associations continue to be concerned that any broadband funding mechanism that is configured exclusively or even primarily to manage "budget targets" will likely fail in its goal of achieving reasonably comparable services at reasonably comparable prices for customers and businesses located in rural areas.[30] Indeed, the Commission must, by law, ensure "sufficiency" in universal service support, and any "budget targets" must therefore be based not upon some arbitrarily chosen annual figure, but instead upon a careful, data-driven analysis of what support is needed to preserve and advance universal service. At an absolute minimum, any consideration of "sufficiency" in the universal service context must take into account the effects of inflation on spending power. A budget target set at $2 billion or some other number that might arguably be "sufficient" today by definition cannot be considered sufficient after even a few years, particularly if interest rates and inflation levels rise in the near future. As noted above, the Commission should look to its own precedent with respect to managing budgetary targets within other universal service programs and should certainly consider adjustments over time to reflect the effects of inflation on deployment of networks and

[29] *See* Rural Associations' September 12, 2013 Letter. As part of these rule changes, the Commission should also modify section 54.706 of its rules to clarify that any interstate end user charges recovering DOBB Title II transmission service costs (including the DOBB service charge described above and wholesale DSL tariff charges) are exempt from USF contribution base reporting to USAC. Doing so would resolve a significant discrepancy in the treatment of end user revenues for USF contribution purposes between price cap and RLEC companies, and remove a substantial impediment to DOBB adoption in RLEC areas.

[30] *See* Rural Associations' June 17, 2013 Comments at 6.

delivery of services.[31] Nevertheless, the Rural Associations' proposal, modified as discussed above, should completely address any concerns regarding adherence to budgetary targets, should satisfy fully the first objective enunciated in paragraph 269 of the *Further Notice*, and should therefore permit prompt adoption of the proposal as a reasonable way to move forward.

B. The Rural Associations' DOBB Plan Will Assure Equitable and Efficient Distribution of Support.

Next, the Commission seeks to assure that any new RLEC CAF mechanism distributes support "equitably and efficiently, so that all rate-of-return carriers have the opportunity to extend broadband service where it is cost-effective to do so."[32] Recognizing the importance of avoiding a "race to the top" and the need to permit companies that have so far been reluctant to deploy broadband facilities in high-cost areas (due to uncertainty regarding their ability to recover such investments), the Rural Associations' proposal incorporates a forward-looking CBM intended to assure that support is distributed to areas that are most in need of funds based upon age of plant.

The proposed CBM includes a simple and straightforward four-step framework for determining a budget for high-cost-supported future investment. First, the CBM would determine current loop investment (*i.e.*, total loop investment for each rate-of-return (RoR) carrier study area), adjusted for inflation. Second, the proposal would determine a "future allowable loop investment" for each RoR carrier based on the replacement of depreciated plant,

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[31] *See* S*chools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Sixth Report and Order, 25 FCC Rcd. 18762 (2010) ¶¶ 34-40.

[32] *Further Notice* ¶ 269.

precluding support to replace plant that is still "used and useful." Third, the CBM would use a trigger to identify potentially "inefficient" investments, and would make prospective offsetting adjustments to identified carriers' future allowable loop investment. Fourth, the CBM would establish an annual budget for each RoR carrier by dividing each carrier's future allowable investment by a period of years to establish a budget for supported additional investment in each year.[33]

Although the Rural Associations have provided substantial detail and working examples of how the CBM would operate, the Commission has understandably expressed concern that one component of the four-part plan does not yet include specific details – specifically, the Commission has expressed concern about the lack of concrete steps for the "trigger" mechanism described in step three above. The Rural Associations are actively considering carefully defined mechanism limits for "step 3" of the CBM that, if adopted, would seek to place more objectively defined "automatic" limits on the eligibility of certain costs for prospective recovery through CAF support without the need for additional Commission review or intervention once set (but which, of course, could be subject to waiver by the Commission for good cause shown). The Rural Associations are eager to work with the Commission to discuss and develop detailed rules governing this approach in subsequent filings consistent with the second objective enunciated in paragraph 269 of the *Further Notice*.

[33] *Id.*

C. The Rural Associations' Proposal Provides a Reasonable Path Forward Pending Development of a Reliable Model or Alternative Mechanism to Determine Forward-Looking Costs for RLECs.

The Commission continues to express a desire to implement a support mechanism for DOBB based solely on forward-looking costs (rather than embedded costs).[34] To the extent that "forward-looking" means "model-based," the Rural Associations have expressed multiple concerns with using existing model-based approaches to determining such costs for RLEC areas.[35] No reliable method to develop forward-looking costs is available for RLECs and the proposed DOBB Support mechanism, which bases DOBB loop costs on actual costs with several very simple but specific forward-looking controls on future investment levels, as described above, is the best and least complicated alternative to achieve the need for timely provision of broadband focused support to RLECs.

The Rural Associations have previously submitted data to the Commission demonstrating shortcomings in the Connect America Cost Model (CACM) as applied to RLEC study areas.[36] Under the CACM, many companies would experience drastic increases and decreases in support depending on individual circumstances. Difficulties associated with building a model – three years in the running – for just thirteen larger price-cap-regulated carriers strongly suggest that development of a CACM-like cost model for use with over 1,000 RLEC study areas, if feasible at all, will require a very significant work effort over an extended period of time.[37] The current version of the CACM, especially as it relates to a number of the cost inputs and other

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[34] *Id.* ¶ 269.

[35] *See, e.g.,* Rural Associations' June 17, 2013 Comments at 11; July 12, 2010 Joint Comments at 52; Comments of NECA, WC Docket No. 05-337 (filed May 31, 2007); Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Mar. 5, 2014).

[36] Rural Associations' March 5, 2014 Letter.

[37] *Id.*

assumptions upon which the model is built, along with embedded policy choices within the distribution model, make such a path inappropriate for most, if not all, RLECs in its current form.[38] While it may be possible to utilize the existing model as part of a voluntary path towards incentive-based regulation for certain RLECs,[39] smaller carriers generally require more detailed precision in any model-based support mechanism due to the fact they "generally lack the economies of scale that would allow them to tolerate the same margin of error in a model that may be acceptable to a price cap LEC that serves much larger areas, including more metropolitan as well as rural areas."[40]

One-hundred thirty-three members of Congress wrote to the Commission on a bipartisan basis earlier this year urging rapid movement on adoption and implementation of a Connect America Fund tailored for the operating circumstances of smaller carriers serving 40% of the United States landmass.[41] For the Commission to decline to implement a long-term CAF for RLECs pending examination and development of a forward-looking cost model that captures cost variability for 1,000 small businesses would run directly counter to these Congressional requests for immediate progress. The DOBB proposal is forward-looking in that it seeks to reorient USF for a broadband world, and the CBM component of that plan seeks to establish transparent forward-looking budgets for effective investment in broadband-capable plant over time. Particularly in light of several of the adjustments suggested in this filing, the Commission

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[38] Rural Associations' July 15, 2013 Reply Comments at 10.

[39] *See infra*, Section VI.

[40] Rural Associations' July 15, 2013 Reply Comments at 10, *citing* TCA at 5. *See also*, TDS at 5 (stating that "just as a yardstick is a poor tool for measuring machine parts that vary by millimeters, a CAF Phase II model designed for price-cap carriers may lack the fine-grained resolution needed to account reliably for important variations among rate-of-return carriers.").

[41] *See* Letter from Rep. Cory Gardner, *et al.*, to FCC Chairman Thomas Wheeler (May 6, 2014); Letter from Sen. John Thune, *et al.*, to FCC Chairman Thomas Wheeler (May 6, 2014).

can and should utilize this proposal as the simplest and most straightforward vehicle for effective implementation of an updated CAF program for RLECs consistent with the objectives described in paragraph 269 of the *Further Notice* and the desires expressed just in the past several months by one-quarter of Congress.

D. Support Payments Under the Rural Associations' Proposed DOBB Mechanism Would be Provided Only for Regulated (Title II) Services, and Would Not Produce Double Recovery of Costs.

The Rural Associations' proposed DOBB support mechanism is designed to provide support only for local loop network transmission investment and expenses associated with the provision of regulated Title II transmission services. The proposal focuses in the first instance on recovery of costs for the local loop from a mix of consumer rates and universal service support because the local loop is often the most costly element of offering services in high-cost areas. Moreover, the fact that local loop network transmission costs are already regulated means that they are most easily held subject to requirements to ensure accountability and transparency in the need for and use of USF support.[42]

[42] The *Further Notice* asks in this regard whether the Commission should modify its cost allocation rules to require that costs associated with multi-use facilities used to deliver broadband Internet access service be allocated between regulated and non-regulated activities based on an actual or potential revenue allocator such that "the amount removed from the regulated rate base would not exceed the amount of support received via a stand-alone broadband funding mechanism, or some other method." *Further Notice* ¶ 269. Since, as discussed above, the Rural Associations' DOBB support mechanism contemplates provision of support only for regulated costs there should be no need to use revenue allocations or other methods to exclude costs associated with non-regulated services. Costs related solely to the provision of non-regulated Internet access services by RLECs or their ISPs affiliates are already removed pursuant to existing Commission rules, are fully documented and also subjected to audits by the Universal Service Administrative Company (USAC), the Commission's Office of Inspector General (OIG), and others.

The Further Notice also expresses concern the Rural Associations' proposal might lead to "double recovery" of costs due to timing differences between current HCLS support mechanisms, which are based on historic line data, and the proposed use of projected costs for purposes of calculating DOBB support. This concern is unfounded because the Rural Associations' DOBB proposal mirrors the current ICLS mechanism in terms of the use of projections of support and subsequent true up of support based on actual costs. This "ICLS-based" methodology has been in use for 12 years without any allegations of double recovery and is based upon stable and existing Commission rules. Additionally, RLECs receiving support through the ICLS mechanism have been fully subject to multiple audits by USAC and/or the Commission, without negative findings. Under the Rural Associations' DOBB proposal, when a customer discontinues its voice service or voice-data service and orders data-only service, current Commission rules remove all "Category 1.3" loop-related costs associated with the former voice service from the ICLS and HCLS mechanisms and assign the data-only loop related costs to the interstate special access category.[43] Thus, existing Commission rules, well established and fully subject to audit, preclude double recovery under the Rural Associations' proposal between the proposed new DOBB funding mechanism and existing ICLS and HCLS mechanisms.

E. Use of a $26 Benchmark for Recovery of Regulated Costs Is Reasonable.

There appears to be a fundamental misunderstanding as to what the $26 regulated cost benchmark included in the Rural Associations' DOBB plan represents. To be clear, the $26

[43] *See generally* 47 C.F.R §§ 36.152 (a) and 36.154 (a-c); 47 C.F.R § 36.611; 47 C.F.R. § 69.304. (Note, effective August 8, 2014 certain Part 36 rules governing HCLS will be incorporated in Part 54 of the Commission's rules. *Omnibus Order* ¶ 58.

benchmark *does not* represent the retail rate that consumers would pay in rural areas for broadband Internet access services. Rather, the $26 benchmark represents *only a part of* what consumers would ultimately pay for retail broadband services. Specifically, the $26 benchmark represents a payment (or imputation) against *only* the regulated local loop transmission services that underpin retail broadband Internet access services, and thus would be eligible for DOBB support. Carriers would still need to recover many other costs – costs that are *not* supported and thus not subject to the $26 regulated cost benchmark – from consumers through retail broadband Internet access rates.

For example, the regulated cost DOBB support mechanism and the regulated cost benchmark would not at this time provide for recovery of middle mile and other non-network ISP operational costs (some of which are recoverable through the price cap model). Costs for broadband transmission in the "second mile" and routing equipment/modems would also need to be recovered ultimately from consumers rather than through universal service support. Thus, there are a whole host of costs that must be recovered from the end user (and not through USF) independent of and beyond the $26 regulated cost benchmark.

The Rural Associations previously provided a chart to the Commission explaining the likely costs to end users under the Rural Associations' approach, as compared to existing rules.[44] A new version of that chart, updated to reflect 2014 annual tariff rates, is attached to these comments as Appendix A. The chart underscores that the $26 regulated cost benchmark is just one component of what the consumer must ultimately pay for retail broadband Internet access service, and further explains that the average consumer in a RLEC-served area would likely pay

[44] Rural Associations' July 15, 2013 Reply Comments, Attach.; Rural Associations' Letters (filed Sept. 12, Nov. 26, Dec. 16, 2013).

$51.39 (plus other ISP costs) per month if the DOBB support mechanism were adopted,[45] and $110.33 (plus other ISP costs) per month in the absence of such a support mechanism. In other words, a $26 regulated cost benchmark represents approximately *half* of what the average RLEC consumer is ultimately likely to pay for standalone broadband services on a retail basis. Thus, to be clear, increasing the benchmark by $4 or $6 or more would not mean that a consumer might pay $30 or $32 for broadband service instead of $26. Instead, increasing the regulated cost benchmark by such amounts would actually translate to consumers paying $56 or $58 or more for standalone broadband (rather than $52) – amounts that are far in excess of what the average urban consumer appears to pay for broadband[46] and an amount even higher than the benchmark used in the price cap model.[47]

The regulated cost benchmark under the Rural Associations' proposal must therefore not be viewed in isolation, as it does not even come close to capturing the full extent of what consumers would ultimately need to pay for retail broadband Internet access services. This mechanism would, however, help to ensure that such prices are more "reasonably comparable" to retail broadband Internet access service rates in urban areas by helping to cover a portion of regulated loop costs on the underlying broadband-capable network.

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[45] To the extent budget controls discussed above limit proposed DOBB funding, the average charge to be paid by the consumer will likely increase above this level.

[46] *See Wireline Competition Bureau Announces Posting of Broadband Data from Urban Rate Survey and Seeks Comment on Calculation of Reasonable Comparability Benchmark for Broadband Services*, Public Notice, WC Docket No. 10-90, DA 14-944, at 3 (rel. June 30, 2014) (*June 30, 2014 Public Notice*).

[47] *Connect America Fund*, WC Docket No. 10-90, *High-Cost Universal Service Support*, WC Docket No. 05-337, Report and Order, 29 FCC Rcd 3964 (2014) ¶164.

F. The Rural Associations' Proposed DOBB Support Mechanism Will Accomplish the Commission's Goal of Transitioning From Legacy Support Mechanisms to a New RLEC CAF More Simply and Efficiently Than Any Other Alternative.

The Rural Associations' DOBB proposal has been designed as a simple and straightforward way to transition smaller carriers from legacy support mechanisms to a new RLEC CAF mechanism, in a manner that would require only a few technical changes to existing rules without complex or disruptive shifts in support.[48] Under the proposal, as the Rural Associations have previously explained, loop cost funding for DOBB service would be calculated as the difference between the costs of providing broadband loop facilities and revenues obtained from the DOBB Service Charge discussed above. DOBB service loop costs would be developed based on projected costs, with a true-up to actual costs, using existing cost definitions specified in section 54.1308 of the Commission's rules, applied to total study area loops, mirroring the current methodology and timing associated with ICLS, as noted above. No changes would be required to the Commission's separations rules, and only limited changes would be needed to the Commission's Part 54 rules to define and govern support payments for DOBB service. Minor changes would also be needed to existing Part 69 rules, primarily to modify assignment of interstate DOBB transmission service loop costs from the Special Access element to the Common Line element for use in the calculation of DOBB support, and to govern development and assessment of the DOBB service charge.[49]

In the *Further Notice*, the Commission instead suggests a new funding concept that would rely in part on bifurcating RLEC investments between old and new investments as of

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[48] Rural Associations' July 15, 2013 Reply Comments at 4; *See also*, Rural Associations' Letters (filed Sept. 12, Nov. 26, Dec. 16, 2013).

[49] Rural Associations' July 15, 2013 Reply Comments at 4-5.

some specific future date.[50] The Rural Associations have devoted significant time to examining this concept and considering ways it might be converted from concept to concrete plan and then implemented. Unfortunately, while such a concept may seem on the surface to provide a clear and attractive break in transitioning from existing "legacy" mechanisms to a new RLEC CAF mechanism, careful review reveals a number of significant and challenging issues that render development and implementation of such a reform plan much more complex than the Commission may have anticipated.

First, the Commission would need to consider how long current HCLS and ICLS mechanisms would actually continue to apply under this concept, given the long depreciation lives typically assigned to investment in loop plant.[51] While offering the prospect of a "clean break" between old and new – if it can be "operationalized" – the lingering value of loop plant would still cause HCLS and ICLS to continue for decades even under a bifurcated approach.

Second, it is likely that both voice and broadband services (whether standalone or in combination with one another) will be provided by some combination of "old" and "new" investment for the foreseeable future. This would give rise to the need for some form of company-specific variable benchmarks not only within the new broadband support mechanism, but even for existing $6.50 and $9.20 Subscriber Line Charge (SLC) "benchmarks" utilized for ICLS. Interestingly, this is not the first time that the prospect of company-specific benchmarks has been floated in the dialogue over how to implement CAF reforms for RLECs. In fact, the Rural Associations proposed a form of company-specific variable benchmarks in their 2011

[50] *Further Notice* ¶ 267.

[51] Assuming a conversion to data-only broadband at the rate of somewhere between 5% and 10% per year, transition away from legacy USF programs under the Rural Associations' DOBB plan would be complete by 2033. *See* Rural Associations' Letters (filed Nov. 26, Dec. 16, 2013).

"RLEC Plan."[52] But in the FNPRM accompanying the *2011 USF/ICC Order*, the Commission expressly observed and sought comment on the challenges of setting "a company-specific component of the benchmark" as suggested by the RLEC Plan.[53] Recognizing the complexity of such a proposal and the legitimate concerns raised by the Commission in that regard, the Rural Associations thereafter made the conscious decision to move away from such complexity and instead focused on the development of a more simple and straightforward support proposal in the form of the DOBB mechanism. Moving back toward such complexity now would likely do little to advance the prospects of reform in the near future.

Third, the concept of bifurcating support between "old" and "new" investment is likely to raise substantial questions regarding the allocation of CapEx and OpEx expenditures between legacy mechanisms and a CAF designed only to fund new RLEC investments. The Rural Associations and many other commenters have previously described to the Commission the crippling effect regulatory uncertainty has had on broadband deployment in recent years.[54] That uncertainty can be expected to continue unless the proposed approach makes clear what investments will be supported and how such support will be operationalized under a new RLEC CAF mechanism. Questions will also likely arise as to whether double recovery can occur under a bifurcated approach, insofar as it may not be clear what costs associated with given

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[52] *See* Comments of NECA, NTCA, OPASTCO, WTA, WC Docket No. 10-90, *et al.* (filed Apr. 18, 2011) (Rural Associations' April 18, 2010 Comments).

[53] *USF/ICC Order* ¶ 1040.

[54] *See e.g.*, Reply Comments of NECA, NTCA, OPASTCO, WTA, WC Docket No. 10-90, *et al.*, at 4-7 (filed Feb. 17, 2012) (Rural Associations' February 17, 2012 Reply Comments).

investments will be treated as "old" or "new" under the Commission's proposed plan.[55] Moreover, a plan that introduces the complexity of bifurcation will almost certainly give rise to the need for more compliance costs rather than less, as carriers will be compelled to seek out the help of consultants and experts who can help navigate thorny questions surrounding assignment of plant and allocation of operating expenses to different categories. Indeed, it is quite possible such a plan could require carriers to maintain multiple sets of books, and perhaps even prepare multiple cost studies, simply to help track allocation and assignment decisions as they are made over time.

Fourth, the Commission would need to consider the rather odd support results – and even consumer confusion – that could flow from a strict bifurcation of investment based upon a date certain. For example, many companies have already invested substantial amounts in modern, broadband-capable plant. Under the bifurcated approach, how would such a company that has already completed deployment of fiber-to-the-premise (FTTP) prior to the "cutoff date" be able to get DOBB funding under the new CAF mechanism since its investment is "locked into" grandfathered HCLS/ICLS mechanisms until fully depreciated? Put another way, a consumer whom one might expect to benefit most from transitioning to standalone broadband services on all-fiber plant could be denied the promise of doing so simply because his or her carrier happened to make those fiber investments prior to the date certain for eligibility for "new" support – instead, that consumer would, for reasons that would almost assuredly be baffling to him or her, continue to be "stuck" with higher retail broadband rates unless he or she buys local exchange voice service as well.

[55] Many of these questions were raised in the Rural Associations' ex parte meeting on July 8, 2014. *See* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 9, 2014).

Fifth, it remains unclear what impact the bifurcation approach would have on budget levels, and it is even more unclear how one could reasonably project such budget impacts. The projections provided to the Commission for the Rural Associations' plan are based on established actual costs under current rules and can be adjusted to accommodate differing assumptions as to growth and consumer migration patterns as desired by the Commission. By contrast, it remains unclear how support under the bifurcated approach could be projected and apportioned among companies seeking to make new investments in developing any estimates of the "budget impacts" of such a concept. As described above, the Rural Associations' plan avoids concerns of these sorts, while achieving the four goals stated in paragraph 269 of the *Further Notice,* including the objective of moving away from legacy HCLS/ICLS mechanisms as consumers move towards broadband service and the creation of a workable, forward–looking, broadband-focused RLEC CAF mechanism.

G. The Commission Should Not Delay Implementation of a Connect America Fund for Areas Served by RLECs Pending Further Development of Methods to Reduce Support in Areas Served by Unsubsidized or Qualifying Competitors.

The Commission notes that the Rural Associations' proposal does not have a mechanism to ensure that support is not provided for new investment in areas served by an unsubsidized competitor.[56] As discussed in more detail below, proposals to reduce or eliminate support in RLEC areas served by unsubsidized competitors require careful examination by the Commission prior to implementation and a substantial process thereafter. Moreover, the Rural Associations have previously pointed out that competitive providers "have very little presence in rural areas,

[56] *Further Notice* ¶ 274.

and virtually never extend their offerings outside of the towns and small cities that dot the much broader rural landscape."[57]

In any event, resolution of these issues should not bog down progress towards developing a workable CAF support mechanism for RLECs.[58] Specific proposals based upon the challenge process used in price cap census blocks but tailored for RLEC study areas are provided below in these comments, and these matters can and should be considered in parallel. The Commission should start with implementation and assessment of the impacts of "the 100% competitive overlap rule" that it has just recently codified even as it implements a CAF solution for RLEC-served areas, rather than holding up CAF reforms in RLEC areas altogether pending implementation of that initial rule *and* consideration of further steps.

Consumers living in RLEC territories need the ability *now* to purchase DOBB services at reasonably comparable prices. Delaying or deferring implementation of a workable support mechanism pending resolution of thorny problems associated with altering support flows based on partially competitive areas will run counter to universal service statutory mandates, defy consumer preference, and continue to harm consumers and businesses located in RLEC areas without producing any corresponding benefits to the overall Universal Service Fund (USF). To the extent necessary, modifications to the USF mechanisms to address further concerns about unsubsidized competition could be addressed after the Commission adopts and implements a CAF mechanism for RLEC-served areas in the first instance.

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[57] Rural Associations' July 15, 2013 Reply Comments at 9.

[58] *Id.*

III. THE COMMISSION'S PROPOSAL TO INCREASE SPEED REQUIREMENTS APPEARS REASONABLE, PROVIDED CLEAR GUIDELINES ON FUNDING AND "REASONABLE REQUESTS" ARE IN PLACE.

The Commission has recognized that RLECs "play a significant and vital role in the deployment of 21st century networks throughout the country."[59] Concerted efforts of RLECs to serve their communities not only have brought telephone service to many rural and remote areas of the country where it would not otherwise exist, but have also made great strides in transforming their former voice-centric telephone networks into the multi-use, broadband-capable networks that are so urgently needed now and in the future by their rural customers. Most RLECs are locally owned and/or locally managed, and want nothing more than to provide families, friends and neighbors within their rural service areas with access to sustainable broadband telecommunications and information services that are reasonably comparable in quality and price to the broadband services available to those in urban areas. They understand that this is the most effective and efficient way to minimize and overcome the disadvantages of distance, isolation, and sparse population that hamper most rural residents and communities.

If universal service and capital expenditure budgets were not an issue, the most cost-effective way of deploying broadband would be to install fiber-to-the-home (FTTH) or fiber-to-the-curb (FTTC) as far out into rural networks as practicable. Rather than incurring the duplicative costs of doing portions of a project separately over multiple years, it is generally less expensive in the long run to plan a single, integrated fiber network, obtain the necessary zoning and right-of-way approvals at one time, negotiate single loan and equipment purchase agreements, and bring in construction crews and equipment one time only. Given that there is

[59] *Further Notice* ¶ 258.

already talk of 100 Megabits per second (Mbps) or even 1 Gigabit per second (Gbps) service in some urban areas, it would be very advantageous to have scalable FTTH and FTTC networks in place in RLEC service areas so that broadband speeds could be increased more readily when necessary by switching out electronics rather than undertaking major additional construction projects.

In this context, subject to a few important caveats noted below, the Rural Associations cautiously support the Commission's proposal to increase the minimum broadband speed that it will seek to achieve with universal service support from 4 Mbps to 10 Mbps downstream. The Rural Associations concur with the Commission's findings that 10 Mbps downstream speeds are becoming more and more prevalent in urban areas,[60] and they want their rural customers to be able to utilize the same content and applications as their urban counterparts. (Indeed, the law requires such "reasonable comparability" in service quality and price.[61]) Some RLECs have deployed FTTH or FTTC in some or all of their exchanges, and are already able to provide 10 Mbps or better downstream service. However, most RLECs employ hybrid fiber-copper distribution facilities, and have been gradually extending the fiber portion of their plant further into their networks to allow them to provide higher-speed digital subscriber line (DSL) services over time at greater distances from their central offices. A number of RLECs can presently provide 10 Mbps downstream service to customers located close to the fiber termination points, but will have to extend their fiber lines and reconfigure their electronic terminals in order to offer 10 Mbps DSL services to more distant customers.

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[60] *Omnibus Order* ¶ 130.

[61] 47 U.S.C. § 254(b)(3).

Although RLECs certainly want to continue upgrading their broadband facilities and achieve target speeds of the kind now being considered by the Commission, this simply cannot be achieved in high-cost areas without sufficient funding. The Rural Associations understand the Commission is extremely reluctant to increase its current $2.0 billion annual budget target for RLEC high-cost support through 2017, but this does not change the fact that the $2.0 billion distributed to RLEC networks during 2011 is not enough to support the substantial additional fiber plant extensions and network reconfigurations that will be needed by most RLECs to increase their broadband service downstream speeds to 10 Mbps, especially considering this budget target now includes CAF Intercarrier Compensation (ICC) funding associated with material access charge reductions to IXCs. The ICC revenue stream reductions of RLECs are now in the third year of annual five percent (5%) reductions, and will continue to decrease at that pace until they are terminated.[62]

For hybrid fiber-copper systems, increasing upstream speeds is a more complex and expensive undertaking than increasing downstream speeds. At the present time, many RLECs with hybrid fiber-copper networks have been working to increase their upstream speeds from 768 kbps to 1 Mbps, and have not yet noted significant demand by their customers for upstream speeds of 1 Mbps or more. This may change as more users begin to upload more and more substantial video content.

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[62] The Rural Associations, together with ITTA, Frontier and Windstream, recently filed an emergency petition requesting the Commission waive the application of section 51.913(a) of its rules and thereby pause, effective June 30, 2014, any reductions in ICC rates for originating intrastate toll Voice over Internet Protocol traffic until full implementation of the "CAF" Phase II mechanism, in the case of price cap carriers, or a tailored CAF mechanism for RLECs, respectively. *See* Emergency Petition for Waiver of NTCA, NECA, ITTA, ERTA, WTA, Frontier, and Windstream, WC Docket No. 10-90, *et al.*, at 2 (filed July 7, 2014).

The Rural Associations are encouraged by the Commission's statements that: (1) the primary focus of its proposed increased broadband speed standard is new deployments of broadband capable infrastructure;[63] (2) the Commission expects the new speed standard to be achieved over a number of years rather than immediately;[64] (3) there will be no immediate consequence (and, particularly, no loss of universal service support) to the extent that an existing ETC proves unable to meet the current or increased speed standard throughout its service territory;[65] and (4) RoR carriers will only be required to meet the proposed new speed standard upon reasonable request.[66] The Rural Associations look forward to these conditions and restrictions being clearly and explicitly included in any Commission rules, policies and decisions related to higher broadband speeds.

Limiting the proposed increased speed standard to new deployments is a reasonable approach. Where an RLEC is able to obtain financing for a significant broadband deployment or upgrade, it will almost certainly want to install enough fiber to attain at least 10 Mbps downstream service in the affected area. Likewise, it is a relatively common practice for carriers and developers to work together to install underground fiber facilities under the streets and into the homes and businesses of retirement communities and other residential developments while they are being constructed, thus enabling the efficient deployment of FTTH facilities and allowing the future residents to obtain 10 Mbps or better broadband service speeds.

The Rural Associations understand the "achieved over a number of years" and "no immediate consequence" criteria to mean that no RLEC will be required to upgrade its entire

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[63] *Further Notice* ¶ 142.

[64] *Id.*

[65] *Id.* ¶ 143.

[66] *Id.* ¶ 144.

existing network or substantial portions thereof within the foreseeable future, and that no RLEC will suffer any reduction of its federal high-cost support for failing to undertake such a substantial upgrade of its current network. Moreover, as to RLEC-served areas specifically, the Rural Associations understand that, except where they receive "reasonable requests" for 10 Mbps downstream service, as that term was clarified in the most recent *Order*, RLECs will be able to continue to upgrade their networks at their own pace in accordance with the needs of their customers and their financial resources.

The Rural Associations accordingly support the Commission's clarification of a "reasonable request" for service as one where the carrier needs to consider whether it can "cost-effectively extend a voice and broadband-capable network to [a particular] location," including whether its anticipated end-user revenues from the voice and retail broadband Internet access services to be offered over the extended facilities, plus other sources of support such as federal and state universal service funding, will cover the cost of the service extension.[67] Although the amount of future federal universal service funding to be included in this calculation will remain uncertain until questions swirling around establishment of a CAF mechanism for RLEC-served areas are finally resolved, the Rural Associations find that a standard that focuses upon the specific contemporary and reasonably foreseeable circumstances of the affected carrier is generally reasonable, and should allow for a reasonable transition to higher speeds over time where the confirmed availability of sufficient universal service funding permits. Of course, as noted above, it is also important that universal service support continues to flow for such locations in the interim to enable the delivery of services and operation of networks already in place there, even if those are not at the higher speed targets.

[67] *Id*. ¶ 144.

The Rural Associations also urge the Commission to take into consideration specific and unique rural circumstances in its consideration of timing and "reasonable request" issues. For example, many RLEC service territories contain national parks, national forests, other federal and state lands, and environmentally-significant areas. To build facilities in and through these areas often requires lengthy and expensive environmental analyses and approval proceedings and/or federal and state right-of-way negotiations and agreements. In addition, many RLECs in all parts of the country have encountered lengthy and expensive disputes and delays when they have sought rights-of-way to deploy lines at railroad crossings. These types of hurdles can significantly increase the incremental cost of a project and in some cases delay, for years, fulfillment of an otherwise potentially reasonable request.

Finally, the Rural Associations note that broadband speeds and latency are affected not only by local RLEC networks, but also by the middle mile facilities that transport traffic between RLEC networks and the Internet. In many cases, RLECs cannot obtain sufficient middle mile capacities they need at reasonable prices, and thus may be unable to meet certain Commission broadband speed or latency standards no matter how much they upgrade their own networks.[68]

[68] *See infra* Section VII.

IV. THE STATUTORY CHARGE TO PRESERVE AND ADVANCE UNIVERSAL SERVICE COMPELS: (1) DETAILED ANALYSES OF OSTENSIBLY COMPETITIVE LANDSCAPES; (2) REALISTIC ASSESSMENTS OF SERVICE AND TECHNOLOGY ALTERNATIVES OVER TIME; AND (3) REASONABLE EXPECTATIONS OF ACCOUNTABILITY FROM BOTH USF/CAF RECIPIENTS AND WOULD-BE COMPETITORS ALIKE.

A. ETCs and Would-be Competitors Must Both Meet the Commission's Basic Standards for Universal Service and Deliver Functionally Equivalent Services on a Sustainable Basis to Consumers.

Universal service is defined by law as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[69] The statute further requires that, in rural, high-cost, and insular areas specifically, such services should be "reasonably comparable" in quality and price.[70] In the *2011 USF/ICC Reform Order*[71] and the ensuing CAF *Phase II Service Obligations Order*,[72] the Commission and Bureau defined the minimum level of service quality standards and pricing requirements expected of CAF Phase II recipients to ensure "reasonable comparability" in a broadband world. The Commission and Bureau made clear that would-be competitors are likewise expected to meet those standards for purposes of determining whether an area is subject to "unsubsidized competition" such that it should be deemed ineligible for USF/CAF support.[73]

In addition to examining potential evolution of speed obligations applicable to CAF Phase II model-based support recipients, as discussed in the preceding section, the Commission

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[69] 47 U.S.C. § 254(c)(1).

[70] *Id*., § 254(b)(3).

[71] *USF/ICC Reform Order* ¶ 170.

[72] *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd. 15060 (2013) ¶¶ 45-46 (*CAF Phase II Service Obligations Order)*

[73] *Id.*

now proposes to apply the same fundamental public interest performance obligations to those entities that would receive CAF support through competitive bidding following a price cap carrier's decline of CAF Phase II model-based support.[74] The Commission also proposes to apply comparable standards to RLECs in their incumbent study areas.[75] The Commission further asks whether it should allow CAF Phase II recipients and competitors to use "alternative technologies" to satisfy those service and pricing standards. In particular, the Commission seeks input on the degree to which mobile or satellite providers might meet such standards.[76] Finally, the Commission rightly asks how it can take account of evolving standards for service and ensure sufficient connectivity for community anchor institutions.[77]

As a threshold matter, the statutory universal service mandate requires a thoughtful and detailed analysis of such questions rather than reliance upon untested presumptions, static "snapshots in time" of service capabilities, and self-asserted blanket claims regarding service delivery.[78] There is substantial question, for example, as to whether satellite-based communications can provide sufficiently robust capacity in the face of increasing consumer demand to support both voice *and* broadband service offerings that meet latency and other

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[74] *Further Notice* ¶ 149.

[75] *Id*. ¶ 152.

[76] *Id*. ¶ 155.

[77] *Id*. ¶¶ 157-159.

[78] *See Inquiry Concerning the Deployment of Advanced* Telecommunications Capability to All *Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, Tenth Broadband Progress Notice of Inquiry, FCC 14-113, ¶ 42 (rel. Aug. 5, 2014) (*August 5, 2014 NOI*).

important performance and pricing requirements.[79] The Commission presumably does not want a situation in which consumers cannot access 911 emergency services in the midst of heavy rain or snow simply because a given technology does not function reliably during bad weather.

Similarly, while mobile services are a useful and highly desirable complement to fixed broadband, recent experiences call into question whether such services can provide a truly functional equivalent for fixed voice and broadband even if the mobile offerings can otherwise meet some basic service performance criteria.[80] Further, it is important for the Commission to recognize the importance of wireline facilities in making alternative technologies, such as 3G or 4G mobile broadband services, a reality in rural areas.[81] Finally, even as there appears to be significant concern about the need to promote "an Open Internet" for the benefit of consumers,[82] it is noteworthy that any consumer obtaining Internet access through a mobile service has to date

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[79] *See, e.g.*, Letters from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Nov. 7, 2013), attaching Vantage Point study (NTCA November 7, 2013 Letter); Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (Dec. 18, 2013).

[80] *See, e.g.*, Letter from Jodie Griffin, Public Knowledge and Regina Costa, The Utility Reform Network to Marlene H. Dortch, FCC, GN Docket No. 12-353 *et al.*, at (filed May 12, 2014).

[81] *See, e.g.*, Rural Associations' February 17, 2012 Reply Comments at 14. *See also* Letter from Larry Thompson, Vantage Point, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Oct. 2, 2013) ; "The Truth About Wireless Broadband: The Myths and Challenges of Wireless Technology in Rural America", jointly developed for the Foundation of Rural Service by John Staurulakis, Inc, Monte R. Lee and Company, and Palmetto Engineering and Consulting, July 2011, at 6, http://www.palmettoeng.com/sites/default/files/truth.pdf (last visited August 6, 2014); "Updated Capital Spending Data Show Rising Broadband Investment in Nation's Information Infrastructure" Patrick Brogan, Vice President of Industry Analysis, USTelecom, November 2014, at 3, (http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf (last visited August 6, 2014).

[82] *See Statement by Chairman Wheeler Regarding Public Comment on the Open Internet Proceeding*, News Release (July 18, 2014).

been ineligible for the more robust level of protections required on a fixed network.[83] Should this divergence of responsibility and protection persist in the formation of any new rules, it is unclear how a mobile service could ever be deemed a functionally equivalent competitor to a fixed service given the importance that the Commission has placed on net neutrality obligations to date.[84]

Thus, the question of whether "alternative technologies" provide truly substitutable functional equivalents for voice *and* broadband services over fixed terrestrial platforms requires a "deeper dive" than mere review of self-reported performance claims and overly quick and facile comparisons against basic service criteria. Instead, it is important to peel back the layers on claims of service capability, examine the sustainability of reasonable comparability over time, and consider whether universal service can truly be assured through the use of any particular platform or technology.

This being said, the Commission certainly can and should establish *a baseline* set of service performance criteria by which to *start* a detailed and thorough analysis of whether USF/CAF recipients and would-be unsubsidized competitors are indeed delivering (and can remain capable of delivering) on the mission of universal service. The service performance

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[83] Treatment of mobile broadband in the Commission's Open Internet proceeding is one example of how mobile and fixed broadband services are treated differently. *See Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 ¶¶ 93-96 (2010) (*Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 14, 2014). Even as the Commission moves on towards an Open Internet solution, it still proposes to hold mobile broadband to different standards. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 ¶¶ 105-108 (rel. May 15, 2014) (*2014 Open Internet NPRM*).

[84] Comments filed in the Commission's Open Internet proceeding by mobile service providers themselves make clear these services lack the technical capabilities of landline for delivering broadband services. *See, e.g.*, Comments of Mobile Future, GN Docket No. 14-28, at 2 (filed July 15, 2014).

obligations established in the *2011 USF/ICC Reform Order* and further clarified in the CAF *Phase II Service Obligations Order* by and large provide a sound baseline for that start. In addition to regular re-evaluation of speed standards as discussed above, the Commission should ensure consistently that USF/CAF recipients and would-be unsubsidized competitors alike are meeting (and keep meeting) the same fundamental usage and latency standards defined in the prior *Orders* and as proposed in the *Further Notice*. Nor is there any valid reason to relax the standards expected of USF/CAF recipients in the context of "competitive bidding" or in any other context, for that matter. Indeed, to the extent that "relaxation" of standards as applied to either would-be unsubsidized competitors or competitive bidders is countenanced, such a measure would all but confirm that these new universal service policies are resulting in the very race to the bottom about which many commenters expressed concern years ago.[85] Furthermore, any relaxation of service performance standards would call into question the very accountability that the Commission established as a bedrock principle of reform in 2011.[86]

There is no reason to demand less of a would-be competitor or competitive bidder than is expected of an initial USF/CAF recipient. If universal service is defined by the Commission in the first instance by reference to fulfillment of a set of baseline performance and pricing obligations from the consumers' perspectives, and if a would-be competitor or competitive bidder is then "given a pass" on satisfying those Commission-defined obligations to the same degree as a USF/CAF recipient, then universal service by definition will fail in the areas where a

[85] *See e.g.*, Joint Comments of NECA, NTCA, OPASTCO, WTA, Rural Alliance, WC Docket No. 10-90, at 23 (filed July 12, 2010) (July 12, 2010 Joint Comments); Joint Reply at 26 (filed Aug. 11, 2010).

[86] *See USF/ICC Order* ¶ 568.

substandard competitor's presence results in the denial of USF support – and Commission policy would thereby relegate consumers in those areas to "unreasonably inferior" service.[87]

Moreover, precisely because universal service is defined as an "evolving" level of services, the Commission can and should take account of evolving standards in defining what will be expected both of ETCs and would-be unsubsidized competitors. For example, the Rural Associations have long asserted that any speed standard set merely to satisfy today's uses will be short-sighted and ignores the ways in which scalable networks are actually designed – that is, to serve foreseeable demand and to permit cost-effective upgrades over the life of the scalable networks being built to keep pace with changes in "reasonable comparability."[88] (Of course, as noted above, any evolution in such standards must be paired with predictable and sufficient support that in fact enables satisfaction of those standards,[89] or at the very least, subject to a proviso that bases the need to upgrade upon receipt of a "reasonable request," as defined in the most recent *Order*.[90]) But reasonable comparability – the hallmark of universal service – cannot be achieved if rural speeds and service characteristics remain pegged at today's most basic levels of expectation, even as we otherwise continue to witness increases in average speed demands

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[87] This being said, the Commission needs to confront concerns about lack of middle mile support and its implications for latency and other performance requirements. These are very real concerns both in Alaska and tribal areas, and also in other rural areas across the United States. In a "world without budgets," the Rural Associations would advocate equally for support for middle mile networks *and* last-mile infrastructure. Given the realities of "budget targets," as noted above, the Rural Associations urge the Commission to focus in the first instance on the most costly component of network deployment and operation – the last mile. But in doing so, there may then need to be consideration of what that could mean for performance expectations.

[88] *E.g.*, July 12, 2010 Joint Comments at 15-20.

[89] *See* 47 U.S.C. § 254(b)(5). Universal service support cannot be considered "sufficient" if it fails to make available the levels of support needed to enable, for example, an increase from 4/1 to 10/1 speed thresholds – or even greater increases (especially in upload speeds) in the future.

[90] *See Omnibus Order* ¶ 62.

and new service features nationally.[91] The same is equally true of other standards, including usage thresholds and latency objectives.

Finally, the Commission should ensure that all would-be ETCs and would-be unsubsidized competitors are held accountable for providing sufficiently robust connectivity not only to residential users and businesses, but also to anchor institutions, as proposed in the *Further Notice*. As NTCA found in several studies submitted recently to the Commission in connection with E-rate modernization, RLECs have already made substantial progress in deploying scalable networks and delivering high-speed broadband services to many rural anchor institutions.[92] While more surely remains to be done to connect some rural schools and libraries, and then to ensure that the services available to all such institutions remain reasonably comparable as standards evolve over time, the substantial success to date in many rural areas has been achieved through a combination of smaller carriers' private capital and their use of high-cost USF support to the benefit of the community *as a whole*. This success speaks volumes both as to the community-wide, solutions-oriented focus of RLECs and how high-cost USF support can enable so much more than service *just* to residential consumers or *just* to anchor institutions.

More study is required to ensure that any specific speed targets with respect to such anchor institutions are set properly.[93] But the Rural Associations generally support setting a

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[91] Certainly, universal service should be defined by foreseeable consumer demands, rather than contorted to match lower maximum attainable speeds offered across particular technologies or platforms.

[92] *See* Comments of NTCA and WTA, WC Docket No. 13-184, at 12-13 (filed. Sept. 16, 2013); Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 13-184 (filed July 7, 2014).

[93] Such a measure would obviate the need for consumption of E-rate resources for purposes of deploying outside plant to ensure community anchor institutions in high-cost areas have access to sufficient levels of broadband to satisfy their respective missions, and reflect precisely the kind of careful coordination that NTCA and WTA, among others, have called for between the E-

separate, higher speed threshold with respect to anchor institutions in rural areas for which high-cost USF support is provided, as well as a corresponding requirement that any USF/CAF recipient offer services of such speeds to most, if not all, anchor institutions in the supported areas. Moreover, as discussed further below, the Commission should ensure that any would-be competitor is likewise required to offer that same higher level of broadband service to anchor institutions throughout the affected service area before support is eliminated for the USF/CAF recipient operating in that area.

B. The Commission Should Not Consider Any New Rules With Respect to Limiting Recovery of Costs in Areas Served by Would-be Competitors Until It Has First Implemented and Then Assessed the Workings and Impacts of the "100% Competitive Overlap Rule."

1. The Commission Should Reject the Concept of "Qualifying Competitors" Outright, and Should Complete the Reconciliation of Study Area Boundaries Before Considering Any Further Modifications to Existing Competitive Overlap Rules.

The Commission seeks comment in the *Further Notice* on a proposal to exclude support for an area served by a "qualifying competitor," which is defined as a competitor that can satisfy the applicable performance obligations even if that competitor is using some form of support or

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rate and high-cost components of the USF programs. Comments of NTCA and WTA, WC Docket No. 13-184, at 2-5 (filed. Sept. 16, 2013). Instead, E-rate resources could then be more thoughtfully targeted toward their original intended purpose – that is, ensuring the affordability of services for anchor institutions, which in turn promotes both anchor institutions and RLECs' focus on their core missions and also the sustainability of underlying networks. *See Joint Explanatory Statement*, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 132 (1996) ("New subsection (h) of section 254 is intended to ensure that . . . elementary and secondary schools classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide . . . educational services to all parts of the Nation."); *see also* 141 Cong. Rec. S7984 (June 8, 1995) (statement of Sen. Snowe) ("By changing the basis for the discount from incremental cost to an amount necessary to ensure an affordable rate, the Federal-State joint board in conjunction with the FCC and the States have some flexibility to target discounts based on a community's ability to pay.").

subsidy to do so.[94] The Commission also proposes to preclude recovery of investments made after a date certain through HCLS and ICLS when such investment "occurs in areas that are already served by a qualifying competitor," and seeks comment on how to implement and enforce such a rule.[95]

As an initial matter, the Commission can and should reject the notion that a would-be competitor for purposes of disqualifying an area for USF/CAF support could be either "subsidized" or "unsubsidized." The purpose of the competitive overlap rules as adopted in the *2011 Order* was to identify those locations "where another voice and broadband provider is offering high-quality service without government assistance."[96] Although the Rural Associations have expressed – and continue to have – significant concerns regarding how such a policy affects Carrier of Last Resort (COLR) obligations and the needs of the most rural consumers, businesses, and community anchor institutions, there is at least some degree of logic to the notion that, where *an entire rural market* (*i.e.*, the totality of a study area rather than a singular census block or tract) is sufficiently "economic" to enable a competitor's investment and sustainable operations *throughout* that market without any support or cross-subsidy whatsoever, there may be no need for USF support in that area. By contrast, the *Further Notice* provides no reasoned explanation for departure from such a policy and a potential shift to allow even *subsidized* "qualifying competitors" to "knock out" USF or CAF support from another supported carrier.

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[94] *Further Notice* ¶ 178.

[95] *Id*. ¶¶ 263-266.

[96] *USF/ICC Order* ¶ 281.

Indeed, the only justification posited in the *Further Notice* for such a monumental policy shift is that the currently subsidized competitor whose identical support would be completely phased out during the term of model-based support under CAF Phase II could certify that it would continue to provide the same level of service following elimination of its identical support.[97] In other words, the very notion of universal service in such areas would hinge entirely upon the promise of a competitor currently receiving USF support regarding what it would plan to do several years later in isolated markets when that support finally runs dry. Adopting such a policy would represent an utterly unjustified and speculative predictive judgment that each and every market that happens to have multiple supported providers will in the future be "economic" to serve on its own without *any* carrier receiving support or utilizing cross-subsidy. Unfortunately, the most severe consequences if such promises and predictive judgments turn out to be false or mistaken will be borne by consumers. And in many ways, such a policy could be said to represent "the last, dying revenge" of an identical support rule that the Commission has long recognized has produced adverse and unforeseen consequences.[98] Rather than giving the identical support rule any further chance to confound the mission of universal service and treating the very notion of universal service as an experiment that leaves rural consumers hanging in the balance, the Commission should reject this "qualifying competitor" proposal given the widespread "false positives" it would generate in the form of ostensibly "economic" markets.

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[97] *Further Notice* ¶ 177.

[98] *See High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd. 20477 (2007) ¶ 35.

Moreover, both the "qualifying competitor" proposal and the separate proposal to preclude recovery of future investments in areas served by a would-be competitor come against a shifting and uncertain backdrop that makes implementation of them inadvisable and imprudent. The Commission is still in the throes of sorting through identification of the precise boundaries of study areas served by incumbents large and small, and as a result, it has not even yet implemented the "100% competitive overlap" rule adopted in 2011. As the Commission is well aware, this boundary reconciliation has not been easy, with an entire page on the Commission's website containing the litany of orders and public notices over the past two years devoted to sorting through boundary resolution questions.[99] Indeed, the Rural Associations understand that a number of RLECs were *still* receiving notices from the Commission as recently as one month ago – *after* the vote on the *Further Notice* – regarding the need for further work on boundary data conflicts with at least one large incumbent carrier. This ongoing review makes it difficult, if not impossible, to evaluate fully the implications of even the existing "100% competitive overlap" rule, never mind assessing the potential impacts of changes to or extensions of that rule. Thus, as a matter of good policy, the Commission should refrain from considering any changes to the existing rules governing "competitive overlaps" (including both the "qualifying competitor" change and any preclusion of recovery of new investment through USF support in ostensibly competitive areas) until it has completed the study area boundary reconciliation process and then, as discussed further below, implemented and assessed the workings of the existing "100% competitive overlap" rule as codified in the most recent *Order*.[100]

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[99] *See* http://www.fcc.gov/encyclopedia/study-area-boundary-data-collection.

[100] *Omnibus Order*, App. A, section 54.319, Elimination of High-Cost Support in Areas with 100 Percent Coverage by an Unsubsidized Competitor.

2. Once It Has Completed the Reconciliation of Study Area Boundaries, the Commission Must Adopt a Thoughtful Process to Assess and Validate the Presence of Would-Be Competitors as a Prerequisite to Implementation of the "100% Competitive Overlap Rule" in RLEC-Served Areas.

Once it has sorted through its study area boundary reconciliation process, the Commission still faces the challenge of determining precisely where "100% competitive overlap" exists for each residential and business location within an RLEC study area for purposes of applying that rule. No less care should be taken in identifying allegedly unsubsidized competitors than has been taken in defining the areas that carriers serve in the first instance. In particular, the Commission should adopt a carefully crafted process that tracks in significant part to the requirements already adopted for areas served by price cap incumbent carriers, but has been tailored for the workings of universal service in RLEC areas.

a. The Process for Identifying Unsubsidized Competition Should be Initiated by Petition of the Asserting Competitor, Rather than Placing the Burden of "Disproving" Competition on Small RLECs.

A data-driven process for identifying would-be unsubsidized competition should start from the petition of a would-be unsubsidized competitor that is served upon the Commission, the applicable state commission, the applicable state consumer advocate, and each affected RLEC. Although this differs from the "trigger" for consideration and disposition of claims with respect to unsubsidized competition in price cap-regulated carrier areas, such a process rightly places the onus to initiate, as well as the evidentiary obligation, on the would-be competitor – the party that should possess the most accurate and current information as to the scope and capabilities of its own network reach and service offerings. While reliance on more dated, self-reported mapping data and Form 477 indicators as proxies may be necessary to make model-based support function more "automatically" in price cap service areas, there is no reason to adopt evidentiary short-cuts or apply "presumptions to be disproven" in determining whether and to what degree a competitor

in fact offers facilities-based services at the performance levels and rates required by the Commission for purposes of universal service support in RLEC areas.

In fact, a process initiated by petition of a would-be competitor should be *more* efficient for all involved, including the Commission itself. Specifically, the Commission would only need to consider petitions as they are filed and, as discussed below, all of the evidence underpinning claims of unsubsidized competition should be contained within such petitions. This stands in stark contrast to the model-based process that requires dealing with hundreds, if not thousands, of individual challenges across the nation based upon piecemeal evidentiary records. Such a process would also properly place the burden of a showing the existence of unsubsidized competition on the party claiming as much, rather than putting smaller carriers in the position of having to scour for scant publicly available information to "prove a negative" with respect to the purported presence of competitive services that meet required pricing and performance standards at certain locations. The requirement that a would-be competitor file a petition also fits well with the Commission's proposed "safe harbor" in the *Further Notice* – that is, the notion that a RLEC would post notice of a plan to undertake new investment on its website and wait 90 days for any notification of a competitor's presence.[101] Certainly any "notice" provided by a would-be competitor pursuant to that "safe harbor" would need to be something more than a mere letter or e-mail "waving its hand" that there is a competitor allegedly in the area. The filing of a petition by the competitor containing the evidence to back up that assertion is a reasonable and appropriate means of vetting the would-be competitor's claims and reaching a result that ensures universal service objectives are satisfied in the study area, whether by the operations of a truly unsubsidized competitor or by virtue of USF support.

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[101] *Further Notice* ¶ 265.

b. A Would-Be Unsubsidized Competitor Should Demonstrate in its Petition That the Service Locations at Issue Are in Fact "Served," as Measured by Criteria Like Those Employed in the Price Cap Challenge Process.

Much as in the price cap challenge process, any purported unsubsidized competitor should be required to demonstrate that it is offering both fixed voice telephony service and fixed broadband service (defined further, below) to consumers and businesses at individual specified locations within the study area in order for each such location to be deemed "Served." This demonstration of "Served" locations should be based upon the same three criteria adopted and already in place for the CAF Phase II program in price cap areas, but tailored for the fact that the process in smaller carrier areas would be initiated by petition of the would-be competitor and to reflect the fact that the "100% competitive overlap" rule focuses expressly upon serving each customer location in the RLEC study area, rather than census blocks.[102]

First, much as in the CAF Phase II challenge process, "Served" should be defined in this instance from the point of view of the consumer and his or her expectations at each given location. More specifically, when considering whether an unsubsidized competitor that holds itself out as "able and willing to provide voice and broadband to a given location"[103] is truly able to do so, the Bureau should consider "whether a consumer, examining the information available to her, would reasonably believe that she could order voice and broadband service from the

[102] The rightful focus in the new competitive overlap rule upon individual consumer locations throughout the study area – rather than looking to whether a given census block is completely served, partially served, or entirely unserved – also drives many of the specific modifications to the price cap challenge process suggested herein.

[103] *Wireline Competition Bureau Provides Guidance Regarding Phase II Challenge Process*, WC Docket No. 10-90, Public Notice, DA 14-864, ¶ 9 (rel. June 20, 2014).

provider at her address"[104] and have service up and running within a reasonable time at each location at issue.

Second, as in the price cap process, such a provider/petitioner should be required to establish that it owns or leases (from a party other than the incumbent) voice and broadband-capable physical network facilities that are in reasonable proximity to the specific customer locations it claims to serve.[105]

Third, much as in the price cap context, the petitioner/would-be competitor should be required to demonstrate that: (a) it currently, or at some recent time in the past, has actually served customers in the RLEC area where it claims "Served" locations are located; and (b) it is capable of using its owned assets or assets that it leases from some party other than the RLEC to deliver service within 7 to 10 business days of request by a consumer at any purportedly "Served" location within the subject study area without an extraordinary commitment of resources and without any special construction charge or construction fee.[106]

It is also critical that any unsubsidized competitor offerings be either *fixed* wireline or *fixed* wireless services. Mobile services certainly play a valuable role in enabling broadband access for many Americans, but they are only a complement to fixed access. They do not and cannot provide the robust experience that the Commission is clearly contemplating as it considers in this very same proceeding evolving speed standards, usage requirements, and other aspects of what it effectively defines as universal broadband. Indeed, as the Rural

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[104] *Id*. This means that the petition must contain identification of specific locations served, rather than merely asserting coverage of all locations within the study area. The latter may result in claims of coverage, but miss or omit specific locations that the would-be competitor has overlooked or ignored.

[105] *Id*.

[106] *Id*.

Associations[107] and the Commission have stated,[108] and as the mobile wireless industry itself admits,[109] mobile wireless services are subject to significant limitations that make them ill-fitting substitutes for fixed broadband services, especially over the lifespan of a network being supported by USF dollars. These limitations include speed, capacity, latency, use of third party devices, and data usage caps, as well as congestion and other "operational constraints that fixed broadband networks do not typically encounter."[110] The statutory principle of "reasonable comparability" demands no less than truly substitutable services, not services that providers

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[107] *E.g.*, July 12, 2010 Joint Comments at 12-13; August 11, 2010 Joint Reply at 37; Rural Associations' April 18, 2010 Comments at 52; Comments of the Rural Associations, WC Docket No. 10-90, *et al.*, at 10 (filed Aug. 24, 2011); Rural Associations' January 18, 2012 Comments at 36.

[108] *See, e.g.*, *2014 Open Internet NPRM* ¶ 91 (explaining why the Commission imposed more limited open Internet obligations on mobile broadband providers); *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010) ¶ 95, *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (*2010 Open Internet Order*).

[109] Comments of CTIA, GN Docket No. 14-28, GN Docket No. 10-127, at 14 (filed July 18, 2014) (stating that "[m]obile wireless broadband remains fundamentally different given its unique technical, operational, and other characteristics" and noting that these differences include "unique capacity constraints"); *See also*, CTIA *ex parte* letter, GN Docket No. 12-268, GN Docket No. 14-28, WT Docket No. 13-238, PS Docket No. 07-114 (filed Jun. 18, 2014) (urging the Commission to "continue to recognize the unique technical, operational, and competitive differences that apply to mobile wireless broadband."). *See also*, Press Release, Ensuring the Optimal Wireless Experience, Verizon (July 25, 2014), http://www.verizonwireless.com/news/article/2014/07/network-optimization.html

[110] *2010 Open Internet Order* ¶ 95. Indeed, the Commission itself has acknowledged these differences, establishing lower levels of Open Internet protections for mobile broadband services and asking whether it should adopt lower speeds, latency requirements, data usage and other criteria for mobile services in the FCC's report to Congress on the deployment of "advanced telecommunications capability." *See Inquiry Concerning the Deployment of Advanced* Telecommunications Capability to All *Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, Tenth Broadband Progress Notice of Inquiry, FCC 14-113, ¶¶ 24, 26 (rel. Aug. 5, 2014).

themselves say face serious technical and operational challenges in delivering functionally equivalent experiences to consumers.

Thus, while mobile services play an important and useful role in enabling access to broadband "on the go" for millions of Americans, their limitations render them a complement, and not a substitute, for what the Commission is defining as universal broadband in this proceeding – particularly in rural areas where wireless coverage beyond major highways and town centers tends to be less reliable, if present at all.

Finally, a purportedly unsubsidized competitor should be required to certify that it does not directly or indirectly receive high-cost support of any kind, nor cross-subsidize its operations in serving consumers at each identified location with revenues from other areas of operation or sources. Otherwise, the Commission runs the risk of a "false positive" with respect to an area that may *appear* "economic" to serve, but which in fact is only "propped up" by cross-subsidization or support from high-cost USF or other programs.

c. As in the Price Cap Process, Purported Unsubsidized Competitors Should Demonstrate in Their Petitions That Their Voice and Broadband Services Will Meet Commission-Defined Pricing and Performance Standards.

A would-be unsubsidized competitor should be required in its petition to make certain showings regarding whether its voice and broadband services comply with Commission-defined pricing and performance standards, comparable to what is required of "competitive" services in the price cap process. Assuming the purpose of this exercise is to identify where a competitor can deliver on the mission of universal service without USF support or subsidy of any kind, the competitor must be required to show that it can achieve *and* continue to deliver on all of the things that the Commission defines in the first instance as universal service in setting ETC obligations. In short, just as in the price cap context, universal service from the consumer's

perspective should be defined the same way whether achieved by operation of the market through competition or via universal service support, and the same expectations should therefore apply to ETCs and would-be unsubsidized competitors alike in terms of performance and pricing requirements. Furthermore, just as for ETCs, each of these standards should be re-evaluated periodically to assure that rates remain reasonably comparable, that speeds and latency measures remain consistent with consumer expectations in urban areas, and that usage allowances are no more restrictive than what the average urban consumer confronts in obtaining broadband in urban areas.[111]

Reasonably Comparable Rates for Voice and Broadband: To establish that universal service can be fulfilled throughout a given study area even in the absence of high-cost support, an unsubsidized competitor should demonstrate that it will make available to the consumer at each "Served" location specified in its petition rates for voice and broadband services that are no higher than those offered by the incumbent provider – when each service is offered on a standalone basis.[112] Certainly, the withdrawal of high-cost support from an area purportedly served by an unsubsidized competitor should not result in an *increase* in voice and/or broadband rates for rural consumers.

Quality Voice: It is important to ensuring universal service that a purported unsubsidized competitor can make available a voice service that is reasonably comparable in terms of quality to that offered by the USF/CAF-supported carrier in that area. A showing should therefore be made that an unsubsidized competitor's voice service at each "Served" location will comply with all consumer protection, public interest, and public safety obligations expected of a USF/CAF

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[111] *See infra* Section IV(A).

[112] *See also, CAF Phase II Service Obligations Order* ¶¶ 45-46.

recipient, including for example: (a) access to Enhanced 911 and 911 network reliability requirements;[113] (b) *Communications Assistance for Law Enforcement Act requirements*; (c) USF contribution obligations; (d) call completion requirements; and (e) *Customer Proprietary Network Information requirements.*

Latency: Much as in the price cap process, a purported unsubsidized competitor should be required to demonstrate that the broadband Internet access service available to consumers at each "Served" location identified in its petition meets a latency standard that is sufficient for consumers to utilize real-time applications, such a VoIP service.[114]

Speed: To ensure that consumers are not relegated to subpar broadband service, purported unsubsidized competitors should not only be required to demonstrate that they can make available broadband service meeting then-applicable speed standards but also show that their networks and services are scalable such that they can satisfy reasonably foreseeable increases in demand based upon higher speeds and additional customers being added to the network.[115]

Usage Allowances: Purported unsubsidized competitors should be required to commit that consumers in the affected area will have access to at least 100 gigabyte (GB) minimum usage allowance,[116] which the Commission has determined in the price cap carrier context is the

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[113] *See Improving 911Reliability, Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 13-75, 11-60, Report and Order, FCC 13-158 (rel. Dec. 12, 2013).

[114] *See CAF Phase II Service Obligations Order* ¶¶ 19-36.

[115] *See Further Notice* ¶ 142, *id.* n. 321.

[116] *CAF Phase II Service Obligations Order* ¶¶ 14-18. *See also* ¶ 16 (stating that consumers in price cap areas that purchase service with a usage allowance should also have "the opportunity to obtain additional data usage at a reasonable price to the extent the price cap carrier chooses to offer a plan providing the minimum specified amount.").

minimum necessary to ensure that consumers served by such carriers have access to "reasonably comparable" services.[117]

Service to Community Anchor Institutions: Although it was not an explicit requirement in the price cap process, the Commission should expect and specifically obligate purported unsubsidized competitors to provide voice and broadband services to all community anchor institutions (*i.e.*, schools, libraries, universities, community colleges, hospitals, public entities, and local, state, and federal government installations) throughout the RLEC study area where they claim to have "Served" locations. These voice and broadband services should mirror the same performance and pricing requirements as described above that apply to USF/CAF recipients (because those reflect the Commission's definition of universal service), and as further noted in section IV(A), the Commission should consider the extent to which a separate, higher speed threshold should be required both of USF/CAF recipients and would-be competitors for services to anchor institutions. Such a requirement is consistent with the Commission's broader focus on the importance of community-wide access,[118] and is in fact essential to ensure that these community pillars can continue to deliver on their public missions even in the absence of a USF/CAF-supported COLR committed to serving those rural locations.

d. A Would-Be Unsubsidized Competitor Must Be Subject to Ongoing Compliance With the Performance and Pricing Standards Established by the Commission.

[117] *See id.* ¶ 14 (stating that "[u]nder the *USF/ICC Order*, Phase II recipients must provide broadband with usage allowances reasonably comparable to those available through comparable offerings in urban areas."). That minimum usage allowance was set at 100 GB. *Id.* ¶ 16.

[118] *USF/ICC Order* ¶ 51.

As the Commission recognized in the CAF Phase II challenge process, it is possible for a provider to "merely advertis[e] temporary or hypothetical service as a means of precluding Phase II funding for the price cap carrier."[119] To ensure that a purported unsubsidized competitor does not "merely satisfy the criteria during the pendency of [this] process,"[120] and to satisfy the accountability that the Commission established as a pillar of reform in 2011, any party asserting its status as an unsubsidized competitor should be required to provide *ongoing* visibility into whether it is fulfilling the mission of universal service. As discussed elsewhere herein, sustainability must be seen as a linchpin of universal service policy. By contrast, a finding of unsubsidized competition that relies exclusively on a one-time analysis of facts as of a date certain risks ignoring subsequent deterioration in service, increases in rates, or even market exit to the detriment of those consumers who already previously lost the benefits of access to universal service support.

Thus, any party that the Commission finds indeed qualifies as an unsubsidized competitor based upon an evidentiary standard of clear and convincing evidence should thereafter be required to submit to the Commission: (1) quarterly reports, with copies to the applicable state commission and state consumer advocate, containing evidence of continued service delivery consistent with the pricing and performance obligations described above; and (2) notification at least 60 days in advance of any market exit or cessation of its service offering(s) to any previously "Served" location. As to the latter requirement, the incumbent supported provider should also be permitted (and even encouraged) to notify the Commission, the state commission,

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[119] *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd. 7211 (2013) ¶ 16 (*CAF Phase II Challenge Process Order*).

[120] *CAF Phase II Service Obligations Order*, n. 98 (stating that "a would-be unsubsidized competitor theoretically could merely satisfy the criteria during the pendency of the challenge process, with no intent to continue meeting them after the challenge is resolved.").

and/or the state consumer advocate if, at any time, it anticipates that market exit on the part of the unsubsidized competitor is imminent or if a change in the petitioner's service offerings has resulted in harm to consumers and/or failure to meet applicable performance and pricing standards.

e. The Affected RLEC Serving the Area in Question Should Have 60 Days to Challenge the Petition.

Once a fully compliant petition containing all required information is filed and served by the would-be unsubsidized competitor, the affected RLEC should have a reasonable period of time – at least 60 days – to respond to the petition.[121] A petitioning would-be unsubsidized competitor should be required to make available the underlying supporting evidence upon which its petition is based, at a level of detail sufficient to judge the veracity of each claim made with respect to "Served" coverage and compliance with the performance and pricing standards described above. If this information is not accessible to the RLEC upon initial filing and service of the petition (*e.g.*, due to redaction), the clock for the RLEC's response should not start until confidentiality procedures can be resolved such that the RLEC can undertake a reasonable review and provide a meaningful response to the petitioner's claims.

C. The Experience of Implementing and Assessing the "100% Competitive Overlap Rule" May be Instructive as a Policy Matter, But Prior to Implementing Any Further Rule Changes, the Commission Will Also Need to Address Disaggregation and Allocation of Costs in RLEC-Served Areas – and Confront More Directly the Legal, Public Policy, and "Budget" Implications of Doing So.

Even following implementation and study of the effects of the "100% competitive overlap" rule on rural consumers and communities pursuant to the process described above, the

[121] *CAF Phase II Challenge Process Order* ¶ 21.

Commission should not and cannot simply race forward to adopt, for example, any proposals to preclude recovery of new investments in ostensibly competitive areas and/or to otherwise reduce support based upon the partial presence of unsubsidized competitors. Instead, the Commission can and must take careful stock of how any potential "subdivision" of rural study areas into supported (noncompetitive) and unsupported (competitive) portions, and corresponding disaggregation of costs, might be implemented and what such efforts would mean both for USF distribution rules and the USF budget itself. If the Commission follows such a path, it would need by law to ensure that sufficient and predictable cost recovery is available to sustain service in "the donut" where competitors do not tread. As explained below, the process for doing so would be neither easy nor inexpensive.

Indeed, an initial complication with any attempt at adopting a policy to govern disaggregation is that the Wireline Competition and Wireless Telecommunications Bureaus in 2012 eliminated the very disaggregation rule that might have been used in part to carry out this task.[122] The elimination of this rule was driven by the fact that its original purpose – to isolate more accurately the costs in individually defined portions of study areas – was deemed no longer relevant given the Commission's decision to eliminate identical support.[123] In any event, prior to taking any steps to extend the current competitive overlap rule beyond complete overlap of "100 percent of residential and business locations in the study area,"[124] the Commission would first need to propose, seek comment upon, consider, and then implement specific and detailed disaggregation and cost allocation rules to address the division of costs, including rules to

[122] *Connect America Fund*, WC Docket No. 10-90, *et al.*, Order, 27 FCC Rcd. 605 (2012) ¶ 16.
[123] *Id.*
[124] 47 C.F.R. § 54.319.

address the sharing of any facilities or equipment, between ostensibly competitive areas (as identified pursuant to a process such as that in the preceding section) and noncompetitive areas.

Moreover, mandatory disaggregation of support – particularly where disaggregation would eliminate all USF support for a RLEC in certain portions of its study area – is tantamount to redefinition of the affected RLEC study area. Section 214(e)(5) of the Act, in turn, compels that any mandatory modification of a RLEC study area must be subject to review and recommendations on an individual case basis (for "such company") by the Federal-State Joint Board on Universal Service to the Commission and the state(s) in question.[125] Thus, the Commission must, pursuant to section 214(e)(5), seek the review and input of the Joint Board, and then work with the state(s) in question to determine whether and to what degree the study area can and should be modified to implement disaggregation.

It is also worth noting that, even if the Commission addresses these process matters, this process of disaggregation and cost allocations between old and new investments and operating expenses within and outside of (and also shared between) competitive and noncompetitive areas will give rise to substantial new accounting duties that will only exacerbate the burdens placed upon smaller carriers – likely requiring the maintenance of separate books and multiple cost studies where only one set of books and one cost study is required today.[126] At a time when

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[125] *See* 47 U.S.C. § 214(e)(5); *see also* 47 C.F.R. § 54.207 and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd. 6371 (2005) n. 134 (*2005 Universal Service Order*).

[126] Even if the Commission were to adopt the 90-day website publication "safe harbor" described in the *Further Notice* (at paragraph 265) as part of any rule precluding recovery of costs associated with new investment via USF/CAF support, the Commission would need to address these disaggregation and cost allocation questions to the extent that a competitor were to, in fact, "raise its hand" in response to a RLEC's website publication and the RLEC chose to proceed with the new investment nonetheless. The Commission would also need to address all of the process issues associated with how one verifies that a purported unsubsidized competitor in fact

consumer broadband demands are growing, broadband infrastructure investment needs are urgent, and universal service support dollars are limited, the primary focus really needs to be upon freeing up as many resources as possible for broadband deployment by minimizing (rather than increasing) accounting and associated regulatory requirements.

In addition to establishing the process by which disaggregation and cost allocations would be accomplished, the Commission would also need to consider the fact that eliminating the benefits of averaging supported costs by dividing study areas into competitive and noncompetitive zones and disaggregating/allocating costs might *increase* USF support needs and place *greater* pressure on the overall USF budget. In prior recognition of the significant "budget pressure" that arises as one changes the contours of study areas, the Commission decades ago adopted a "study area freeze" precisely because of concerns that carriers would seek to maximize high-cost support by setting up their highest-cost areas as separate study areas for purposes of USF distribution.[127] The so-called "parent trap" rule reflects another recognition of this dynamic still current in Commission policy. Under that rule, when a carrier with *lesser* ability to average costs (and thus a higher per-line USF figure) obtains high-cost exchanges from a carrier that has *better* ability to average costs (and thus a lower per-line USF figure because it served more densely populated areas in the same state), the acquiring carrier is limited to the selling carrier's

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meets the pricing and performance requirements established by the Commission; presumably the RLEC is not required to take at face value, without any further analysis or process, a purported unsubsidized competitor's letter or e-mail claiming to be such.

[127] *See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, Joint Board Recommendation, 49 Fed. Reg. 48325 (1984), Order Adopting Recommendation, 50 Fed. Reg. 939 (1985); *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd. 5974 (1990) (describing factors that led to the study area freeze and why the FCC is proposing a change).

USF receipts with respect to the specific exchange(s) in question.[128] In other words, the Commission long ago recognized that disaggregation of costs into relatively lower-cost and higher-cost zones increases USF distributions, and it ensconced this analysis in current federal policy. If this were not the case – if averaging costs across wider geographic areas (including partially "competitive" areas) did not *reduce* total costs of universal service – presumably the Commission could and should eliminate the "study area freeze" and lift the "parent trap" rule tomorrow with little concern as to the "budget" implications.

Some have argued that the establishment of competitive and noncompetitive areas for purposes of distributing USF support is necessary to protect ratepayers from bearing an unreasonable burden in "subsidizing" competition.[129] A more careful review reveals, however, that ratepayers might actually *suffer* from disaggregating costs and from eliminating the benefits of study area-wide cost averaging in the distribution of USF support. Competitors arguably and ironically suffer more too, to the extent that the incumbent receives *more* total support for serving the outlying rural areas than the incumbent would have in a study area that combined both donut and donut hole in USF distribution calculations. In fact, any "scale" or "efficiency" in the deployment of networks and delivery of communications services – a sound public policy objective for the Commission to pursue[130] – is all but lost when each individual noncompetitive

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[128] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997) ¶ 308, Erratum (rel. June 4, 1997), Erratum, 12 FCC Rcd. 24493 (1997), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility v. FCC and USA*, 183 F.3d 393 (5th Cir. 1999).

[129] *See* Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 29, 2011); Comments of TWC, WC Docket No. 10-90, *et al.* (filed Aug. 24, 2011).

[130] The Commission clearly still recognizes the value of scale and averaging in proposing to allow the tying together of individual census blocks in a competitive bidding process. *See Further Notice* ¶ 228 (endorsing a proposal for package bidding of geographic areas to enable

area is effectively treated as its own discrete operation for purposes of determining USF support. Thus, the Commission should evaluate more thoroughly the budget and public policy implications of disaggregation as well as the substantial burden of undertaking such an exercise prior to considering or taking any steps beyond initial implementation of the "100% competitive overlap" rule.[131]

D. ETC Designation and Ongoing Oversight is the Only Means of Ensuring Proper Accountability in the Use of USF Support; the Commission Should Accordingly Reject Calls of Those Seeking to Evade Altogether or Escape as Soon as Possible Such Accountability.

As noted earlier in these comments, universal service is defined not as a singular, one-time achievement of a certain level of service. Instead, universal service is defined in federal law as an "evolving" set of services that must be reasonably comparable in price and quality to those available in urban areas. This must be equally true both on the day a network is built and also years later. This must involve both ongoing evaluation of the standards that define universal service and compliance with those standards. Indeed, universal service resources should be considered inefficiently deployed and even wasted if they are put toward initial construction of world-class networks that within a matter of just a few years are woefully outdated, insufficiently maintained, or only capable of supporting high-priced services that no consumer can afford.[132]

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construction of "efficient networks" and to avoid leaving selected high-cost tracts available "without the scale to [serve them] effectively.").

[131] As just a few examples of public policy implications that must be considered, the Commission would need to address upon disaggregation how to absolve the RLEC of ETC obligations in the portion of the study area for which support is no longer received, and consider too the Part 36 rule amendments necessary to allocate the costs of compliance with any state-mandated COLR requirements to the intrastate jurisdiction.

[132] *See Further Notice* ¶ 142.

Sustainability of networks and affordable services must therefore be seen as a linchpin of universal service policy. While this cornerstone principle of sustainability can and should be fulfilled in part by making sure that sufficient and predictable support is available for the ongoing operation and maintenance of broadband-capable networks in rural areas,[133] another important component of sustainability is accountability – a concept that the Commission expressly adopted as a principle in the 2011 reforms.[134] Certainly, there needs to be a balance struck in the burdens of record-keeping and reporting, and oftentimes a look at the results should obviate the need for intrusive and onerous process, but ETC designation and basic ongoing oversight requirements must at least form the backbone of any accountability measures. These are "the hooks" by which the Commission can hold USF/CAF recipients responsible for use of program resources and have even some basic ability to monitor their continuing efforts to deliver on the mission of universal service.[135]

Given the need for sustainability and the prior expression of commitment to accountability, the Commission certainly should neither relax basic ETC designation obligations nor take actions that would undermine its ability and authority to hold USF/CAF recipients accountable in the future. Specifically, the Commission should not modify or curtail state

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[133] The need to ensure sustainability should also cause the Commission to revisit proposals that focus exclusively or predominantly on supporting capital investment to the near or total exclusion of any analysis of whether services will be "reasonably comparable" in price and quality over the life of the supported network. For example, there are several instances in the *Further Notice* where a short-term view seems to take hold with respect to what is expected of winners of competitive bidding processes or alternative uses of Mobility Fund II budgeted amounts. *See, e.g., Further Notice* ¶ 225 (proposing to use a "lowest cost per unit" in evaluating reverse auctions for USF support) and ¶ 247 (proposing to repurpose Mobility Fund II budget for "one-time support to those providers willing to extend mobile LTE to eligible unserved areas").

[134] *See USF/ICC Order* ¶ 568.

[135] *See* FCC Should Improve the Accountability and Transparency of High-Cost Program Funding, United States Government Accountability Office (July 2014).

commission oversight of the ETC process – a responsibility assigned to the states by the Act itself[136] – if states do not initiate a proceeding on a petition for ETC designation in 60 days of filing or complete work on such a petition within 90 days of initiating a proceeding.[137] Particularly, to the extent that an ETC is proposing to serve only portions of rural study areas and carve off individual lots of customers, there could be serious state interests and significant public policy implications associated with an ETC designation that should not be rushed through and rubber-stamped. Moreover, to the extent any ETC is a relatively new entity just recently formed to seek out and secure universal service dollars, the state may have legitimate, complex questions about the entity's financial, managerial, and technical capability to provide *sustainable* voice and broadband services that meet the Commission's (and the state's own) expectations with respect to reasonable price and service quality to consumers, as well as COLR responsibilities, in that jurisdiction.

Indeed, the Commission should – and must, by law – proceed with even greater caution in considering a possible short-cut (if not preemption) of state commission review of ETC designations in areas served by RLECs. Specifically, sections 214(e)(2) and (e)(6) of the Act provide that the Commission or a state commission, as applicable, must first find that any designation of an additional ETC in an area served by a rural telephone company is in the public interest.[138] This analysis necessarily requires an individualized, fact-specific analysis of the would-be ETC's capabilities and proposed service offerings, and cannot be achieved by, for

[136] 47 U.S.C. § 214(e)(2).

[137] *Further Notice* ¶ 182.

[138] 47 U.S.C. §§ 214(e)(2) and (6).

example, a reverse auction or a mechanical competitive bidding process.[139] Moreover, to the extent that any ETC seeks designation for less than the entirety of a RLEC study area, substantial caution and an additional layer of individualized public interest analysis are required to examine the impact on existing services and consumers in the affected study area.[140] As the only carriers serving the entirety of high-cost, rural areas, RLECs face significant risks to the extent new ETCs can "pick and choose" where they might serve or are able to bundle service areas together strategically into larger combinations of relatively lower cost service areas for purposes of deployment. This is of even greater concern now than in the past given that, as noted above, the Commission eliminated as part of the 2011 USF/ICC reforms the very voluntary "disaggregation rule" that it once cited as perhaps helping to lessen such concerns.[141] The need for such a granular public interest analysis here also precludes use of a reverse auction or simple competitive bidding for such USF distribution.

V. THE COMMISSION'S PROPOSAL TO FREEZE THE NACPL AND PROPORTIONATELY ADJUST SUPPORT PERCENTAGES APPEARS REASONABLE.

Under current rules governing payment of high-cost loop support (HCLS), the overall cap on HCLS payments has materially reduced HCLS due to the operation of the Rural Growth Factor.[142] Under current rules, these support reductions are implemented by adjusting the National Average Cost Per Loop (NACPL) upward, thereby reducing total payments to

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[139] *See 2005 Universal Service Order* ¶ 44.

[140] *See id*. ¶¶ 48-53.

[141] *See id*. ¶ 51.

[142] *See* 47 C.F.R §§ 36.603-36.604 (Note, effective August 8, 2014, certain Part 36 rules governing HCLS will be incorporated in Part 54 of the Commission's rules. *Omnibus Order* ¶ 58.

companies and reducing the number of companies eligible to receive payments. As part of its overall program to reform existing high-cost support mechanisms, the Commission now proposes to "freeze" the NACPL. Going forward, the cap would be implemented by adjusting reimbursement percentages for all carriers.[143] This would *reduce* support proportionately among all HCLS recipients. In addition, carriers presently close to the NACPL would no longer run the risk of "falling off the cliff" in terms of their receipt of HCLS support. The *Further Notice* proposes to implement this rule beginning January 1, 2015.[144]

Given the significant annual reductions occurring in HCLS, the Commission's proposal to freeze the NACPL and adjust support percentages proportionately among RLECs appears to be reasonable for the limited purpose of implementing the existing overall cap on HCLS. Under the current approach, companies close to current support thresholds see dramatic percentage shifts in support levels as a particular threshold is crossed, particularly in cases where a shift in the NACPL causes a company to fall below the 115% threshold level for eligibility. In these cases, support losses may be very high in percentage terms but relatively small in terms of dollars. Moving to the proposed percentage-based adjustment mechanism would avoid this "cliff" effect and assure that all companies experience the same reductions in terms of support percentages, but would also have the effect of causing greater dollar reductions to relatively higher-cost companies than under the current mechanism.

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[143] *Further Notice* ¶ 261.

[144] *Id.* In conjunction with freezing the NACPL, the *Further Notice* also proposes to reduce the NACPL and continue to use the existing 65 and 75 percent reimbursement percentages whenever calculated support under those percentages will not exceed the indexed cap for HCLS in the aggregate. Thus, under the first part of the proposed rule, reductions in support would be spread proportionally among all recipients of HCLS. Under the second part of the proposed rule, if there are other changes that would otherwise result in a lowering of the NACPL, carriers will receive support based on existing percentage reimbursements. *Id.* at ¶ 262.

Thus, while the Rural Associations do not object to the specific proposal described in the *Further Notice solely for application to HCLS*, the Commission should be mindful that such percentage reduction methods may have unintended impacts on the ability of relatively higher-cost companies to continue providing universal service and thus may not be consistent with the statutory requirement that universal service support be "sufficient."

VI. PROPOSALS TO PERMIT RLECs TO VOLUNTARILY ELECT MODEL-BASED USF SUPPORT SHOULD BE CONSIDERED CAREFULLY.

In response to a plan submitted by ITTA, the Commission proposes to allow RLECs to elect to participate in a two-phase transition to model-based universal service support.[145] During the first phase, an electing carrier's ICLS and HCLS would be frozen at then-current levels, subject to existing service obligations, including broadband build-out requirements.[146] In the second phase, USF support would be based on an RLEC-specific model, subject to the same service and public interest obligations as price cap carriers receiving CAF Phase II model-based support.[147]

The *Further Notice* also seeks comment on whether RLECs should be allowed to transition on a voluntary basis to an alternative rate regulation approach for their intercarrier compensation (ICC), special access, and broadband Internet access services. Under this

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[145] Letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, Attach. at 1 (filed Feb. 27, 2014).

[146] *Id*.

[147] Model-based support would be made available for ten years. RLECs would be able to elect to participate at any time during either of the two phases of the plan, but those carriers choosing to participate in the second phase of the plan after it becomes available would be able to receive model-based support only for the remainder of the ten-year timeframe remaining. *Omnibus Order* ¶ 35. A participating carrier would also have the discretion to opt-in to model-based support for all of its study areas, or for a subset of its study areas. *Id*.

proposal, electing carriers would continue to implement the ICC switched access rate reductions specified in the *USF/ICC Order* and, if eligible, would continue to charge an Access Recovery Charge (ARC) and receive CAF-ICC support.[148] The *Further Notice* suggests that RLECs who continue to participate in the NECA pool for special access services could do so by employing costing approaches based on the average schedule process, and settle with the pool based on the interstate special access revenue requirement established by the retention ratio.

The Commission has previously sought comment on the idea of creating a voluntary pathway to model-based support.[149] In response, the Rural Associations suggested that a pathway to promote rural broadband through voluntary election of model-based support could be useful, but highlighted a number of specific issues requiring examination and resolution before a voluntary model-based support option could be adopted for smaller rural carriers. These concerns included the fact that the CACM is still being constructed for its primary purpose – distributing high-cost USF support to price cap carriers – and that there is no track record yet by which to evaluate whether the CACM (or any other model) could spur *sustainable* broadband investment in any rural area served by RLECs.[150] The Rural Associations also pointed out that there are a series of policy choices "baked in" to the distribution module of the model, and more broadly within the CAF Phase II framework, that require further examination and in some cases

[148] *Further Notice* ¶ 282.

[149] *Wireline Competition Bureau Seeks Comment on Options to Promote Rural Broadband in rate of Returns Areas*, Public Notice, 28 FC Rcd. 7201 (2013).

[150] *See* Rural Associations' June 17, 2013 Comments at 13. For example, the Rural Associations explained that while the CACM is theoretically capable of estimating costs and support levels for small rural carriers, it has not yet been designed or vetted for such purposes. Such testing is critical before the CACM could safely be applied to small carriers with substantially less tolerance for errors than large, diversified price cap carriers.

significant modification to ensure that a model-based approach will enable delivery of universal service by smaller carriers.[151]

The *Further Notice* seeks comments on a number of modeling-related issues as well as other questions raised by the ITTA Plan.[152] All deserve careful consideration by the Commission, with particular focus, however, on potential budget impacts associated with permitting carriers to "freeze" support at current levels. As the *Further Notice* recognizes,[153] carriers could be expected to opt for frozen support if it appears that their broadband investment levels are declining. The result may be to significantly reduce or squeeze funds available to other carriers for much-needed investment going forward, particularly if a "freeze" is permitted to become "an ice age" rather than "thawing" in relatively short order as the carriers opting for this path move into the model. The Rural Associations agree, therefore, that careful

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[151] *Id.* The Rural Associations have explained that the support distribution module of the CACM consists of a number of "dials" largely designed to fit support within a predetermined budget, regardless of estimates from the cost module or the actual underlying costs that any given company might incur to deploy and operate a rural broadband network and deliver affordable, high-quality broadband services. Adjustments made via such a "ratcheting" mechanism may assist the Commission in achieving budgetary objectives but have little, if anything, to do with the costs required to fulfill universal service. Such adjustments may be acceptable to larger carriers that are not so reliant on USF support, but could be a poor fit for small RLECs that serve exclusively rural areas.

[152] These include: the time frame for implementing the Plan; methods for re-basing the HCLS cap to reflect voluntary adoptions; whether elections should be restricted to the state level (as opposed to a study area–by–study area basis; methods for transitioning to model-based support; potential impacts on price cap and RLEC support "budgets"; whether changes should be made in the CACM to adapt it for voluntary use by RLECs; how special access costs and prices should be determined under the ITTA Plan; potential impacts on the NECA pooling process; the Plan's relationship to broadband Internet access service deregulation; impact on the switched access rate transition process and associated support mechanisms; and various other ratemaking and policy issues. *Further Notice* ¶¶ 284-299.

[153] *Id.* ¶ 289.

consideration must be given to ensuring that companies *not* electing the ITTA Plan are not adversely impacted by the budget implications of voluntary selections.

VII. A MIDDLE MILE SUPPORT MECHANISM FOR RATE-OF-RETURN CARRIERS SHOULD BE DEVELOPED AFTER LOCAL INFRASTRUCTURE SUPPORT NEEDS ARE ADDRESSED.

The Rural Associations agree that the cost of middle mile backhaul is an important component of the ability of RLECs to offer broadband services to their customers at rates and speeds that are reasonably comparable to similar offerings in urban areas.[154] In fact, the Rural Associations would go a step further and state that the availability and quality, as well as the cost, of middle mile transport are essential to the ability of RLECs to provide their rural customers with access to reasonably comparable telecommunications and information services.

Quality middle mile service is essential for local broadband service providers to provide their customers with the speeds they desire, with as minimal latency as possible. An initial complication arises from the currently unresolved questions regarding IP interconnection. The Rural Associations have previously demonstrated why the procedures and provisions of sections 251 and 252 of the Communications Act should apply to the negotiation, arbitration, terms, conditions and prices of IP interconnection agreements, as well as Time Division Multiplexing (TDM) interconnection agreements.[155] They are aware that other industry participants oppose the application of sections 251 and 252 (or any Title II regulation at all) to IP interconnection. The Commission's ultimate resolution of this and similar IP interconnection issues will

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[154] *Id.* ¶ 300.

[155] Comments of NECA and OPASTCO, GN Docket No. 12-353, at 7-8 (filed Jan. 28, 2013); Reply Comments of NECA, NTCA, OPASTCO, WTA, GN Docket No. 12-353, at 18 (filed Feb. 25, 2013).

determine, *inter alia*, whether RLECs will be able to connect with the Internet at technically feasible points of their selection, or whether they will have to arrange (and pay full freight) for the transport of their IP traffic to and from distant urban hubs that may be hundreds or thousands of miles away. The latter state of affairs would have a major impact upon middle mile services and costs, even for many RLECs that are participants or members in fiber transport networks. Put another way, if network interconnection issues are not resolved in a manner that accounts for the impacts of costly IP transport on universal service,[156] this is likely only to increase the urgency of establishing middle mile support *and* increase the amount of support needed to cover those middle mile costs.

A second complication arises from the fact that some RLECs are participating owners or members in statewide or regional fiber optic transport networks (such as Iowa Network Services and SDN Communications), while other RLECs are not. Where RLECs are not participants or members in a fiber transport network, they must often rely upon unrelated third party transport carriers that may offer lower capacity facilities (such as T-1s, DS-1s and DS-3s) rather than fiber optic lines. These third-party providers may decline to upgrade the quality and speeds of their transport facilities, and may charge very high rates for their services.

These complications have convinced the Rural Associations to focus at the present time upon the more urgent and universal needs for a new RLEC DOBB support mechanism that will provide effective incentives and sufficient funding for the loop-related broadband infrastructure investment and services that are so urgently needed in rural America. Given the prevailing budgetary concerns, the Rural Associations believe that it is prudent to proceed one step at a

[156] *See* Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 30, 2014).

time, and to complete the design, adoption and implementation of an appropriate RLEC broadband loop cost-related support mechanism before addressing middle mile support issues.

But this listing of current priorities should not be read to diminish the ultimate importance of middle mile networks in fulfilling our nation's universal service policies in a broadband world, nor does it mean that significant numbers of RLECs will not ultimately need support for their above-average middle mile costs. Many RLECs are far more remotely located, and far more dependent upon the pricing and terms of unrelated third party transport providers, than the price cap carriers that will soon be receiving some degree of middle mile support via the CACM model. Whereas completing high-speed local broadband networks constitutes a critical first step, high-capacity and reasonably priced middle mile transport will be necessary to ultimately provide rural customers in Alaska, on tribal lands, and in all sorts of rural and remote locations with broadband services that are reasonably comparable in quality and price to those available in urban areas.

During the interim, the Commission must be careful to distinguish the impacts of local RLEC broadband networks and middle mile facilities upon the attained speeds, latency and other performance characteristics of RLEC broadband services. As discussed above, RLECs should not be penalized in any manner for performance shortcomings due in whole, or in significant part, to the characteristics or deficiencies of middle mile facilities which they do not control. In addition, the Commission should strongly consider the adoption of policies or procedures that would give priority to the consideration of, and enable the rendering of prompt decisions to resolve, complaints by local broadband service providers against middle mile transport providers for slow and unreliable service, and/or for unjustified refusals to deploy higher-capacity transport

facilities upon reasonable request, on routes where there are no alternative high-capacity transport providers.

Finally, the Rural Associations support the Commission's decision to focus initially on supporting middle mile infrastructure on Tribal lands, including remote areas of Alaska. This presumes that such middle mile infrastructure would be constructed not only on Tribal and remote Alaska lands, but also along the routes necessary to connect the local Tribal and Alaskan broadband networks to the nearest technically feasible Internet node. The Rural Associations also agree that $10 million in one-time construction support is an appropriate amount to fund a couple of projects in what is basically an experimental program to assist Tribal and Alaskan areas, while giving the Commission some knowledge and experience with the distribution of middle mile support for RLECs. However, they urge the Commission not to weigh down program participants with substantial and expensive reporting, certification, default payment and oversight procedures and requirements. Ten million dollars is not a lot of money to construct several middle mile facilities, and program participants should be encouraged and enabled to use their funding to deploy middle mile infrastructure and not have significant portions of it eaten up in regulatory compliance costs.

VIII. ACCOUNTABILITY AND OVERSIGHT.

A. Certification Requirements for "Reasonably Comparable" Broadband Rates Appear Reasonable But May Raise Significant Practical and Financial Concerns for RLECs If Implemented.

The Rural Associations have no philosophical objection to the Commission's proposed amendment of section 54.313(a)(12) of its rules to include a new annual certification that the pricing of at least one of an ETC's offered broadband service plans is no more than the applicable reasonable comparability benchmark set by the Wireline Competition Bureau.

However, they do have practical concerns that such a benchmark cannot be calculated in an accurate and equitable manner with the data available at this time and that sufficient high-cost support may not be available to enable compliance by RLECs with a broadband rate ceiling.

In the *USF/ICC Reform Order*, the Commission indicated it would consider rural broadband rates to be "reasonably comparable" to urban broadband rates under section 254(b)(3) of the Act "if rural rates fall within a reasonable range of urban rates for reasonably comparable broadband service."[157] Whereas the Commission reiterated its presumption that a rural voice rate is within a reasonable range if it falls within two standard deviations above the national average,[158] it stated that it had never compared broadband rates for purposes of section 254(b)(3). Consequently, it directed the Bureau to "develop a specific methodology for defining that reasonable range, taking into account that retail broadband service is not rate regulated and that retail offerings may be defined by price, speed, usage limits, if any, and other elements."[159]

The Rural Associations have long supported services and rates in rural areas that are reasonably comparable to those available in urban areas, and continue to do so. They recognize that the universal service principle in section 254(b)(3) of the Act was intended to effectuate high-cost support mechanisms that are sufficient to achieve such reasonable comparability.

However, the Rural Associations are concerned with the potential for a future "revenue squeeze" between broadband rate ceilings and high-cost support limitations. Specifically, as ICC

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[157] *USF/ICC Order* ¶ 113.

[158] *Id.* ¶ 84.

[159] *Id.* ¶ 113. On June 30, 2014, the Wireline Bureau issued a Public Notice posting broadband data from its urban rate survey and seeking comment on its proposed calculation of a reasonable comparability rate benchmark for broadband services. *See supra* note 46. The Rural Associations are reviewing these data and may provide comments on the proposed methodology in that proceeding.

rates transition to bill-and-keep and CAF-ICC support is reduced by five percent (5.0%) annually, customer broadband rates and high-cost support will become the predominant revenue streams for virtually all RLECs. Given that RLECs cannot run long-term deficits, they will have no choice but to recover their broadband investments and operating costs from some combination of these two revenue streams. Hence, to the extent that customer broadband rates are capped at certain levels, RLECs will need sufficient high-cost support to amass the remaining dollars needed to repay their loans and pay their operating expenses. Similarly, to the extent that their high-cost support is limited, RLECs will need to make up the difference in consumer revenues and may be forced to exceed Commission-prescribed rate ceilings in order to remain going concerns.

In addition, the Rural Associations concur with the Commission's recognition that calculation of an accurate broadband rate benchmark is rendered very difficult and complex by the facts that "retail broadband service is not rate regulated and that retail offerings may be defined by price, speed, usage limits, if any, and other elements." Given that many broadband service providers are not required to post their rates, that many broadband service rates are hidden or obscured in multiple-service bundles, and that factors such as variable speed levels and data caps preclude apples-to-apples comparisons, the Rural Associations note that it appears extremely difficult and unlikely that the Bureau can obtain the data necessary to calculate accurate and equitable broadband rate benchmarks at this time.

Hence, the Rural Associations reiterate that they have no conceptual objection to the Commission's proposed amendment of section 54.313(a)(12) to include a new annual certification that the pricing of at least one of an ETC's offered broadband service plans is no more than an applicable "two standard deviation" reasonable comparability rate benchmark set

by the Wireline Competition Bureau. However, they do have serious practical concerns that an accurate and equitable broadband rate ceiling cannot be calculated at this time, and that the evolving "two primary revenue streams" status of most RLECs will put them in a destructive revenue squeeze between the Commission's proposed rate ceiling and limitations in federal high-cost support.

B. Proposals to Modify Penalties for Late Filings Represent an Improvement Over the *Status Quo* But Remain Unnecessary, Inequitable and Unduly Harsh.

The Rural Associations agree that the proposed modified support reductions for failure to file the annual section 54.313 reporting information (FCC Form 481) by July 1 and for failure to file the annual section 54.314 certification for use of support by October 1, as well as the proposed new grace periods, are more reasonable than the current section 54.313(j) and section 54.314(d) provisions, but believe that even the modified penalties remain unnecessary, inequitable and unduly harsh.

For the sake of comparison and perspective, the following chart estimates the support reductions for four generic RLECs receiving differing amounts of high-cost support, if they miss the July 1 or October 1 deadlines by five (5) days or by forty-five (45) days:

Company	Monthly HCF Support	Quarterly HCF Support	Current Rule 5 days	Current Rule 45 days	Proposed Rule 5 days	Proposed Rule 45 days
A	$75,000	$225,000	$225,000	$225,000	$12,500	$112,500
B	$200,000	$600,000	$600,000	$600,000	$33,333	$300,000
C	$500,000	$1,500,000	$1,500,000	$1,500,000	$83,333	$750,000
D	$800,000	$2,400,000	$2,400,000	$2,400,000	$133,333	$1,200,000

The current rules, which took away an entire quarter's support for a delay of from one day to three months, were so harsh that they were waived in most instances.[160] The proposed rules are significantly less harsh from a comparative dollar standpoint, but will still penalize carriers tens or hundreds of thousands of dollars for what are, in virtually all instances, unintentional administrative or clerical errors or oversights. Moreover, the Commission has indicated its intention to eliminate or greatly reduce its prior practice of granting waivers for missed filing deadlines so that the proposed rules are likely to result in much greater actual support reductions for unfortunate carriers.

Neither the current nor the proposed sections 54.313(j) and 54.314(d) are necessary because the Commission has long had reasonable and appropriate rules and procedures in place to deal with missed filing deadlines. Specifically, section 1.80(b)(8) of the Commission's rules establishes a forfeiture guideline of three thousand dollars ($3,000) for "Failure to file required forms or information." This recommended forfeiture can be adjusted upward for: (1) egregious misconduct; (2) ability to pay and the establishment of a more effective disincentive for violations; (3) intentional violations; (4) substantial harm; (5) prior violations of Commission

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[160] *See, e.g., Petitions for Waiver of Universal Service High-Cost Filing Deadlines, Western New Mexico Telephone Company, Inc. et al.*, 25 FCC Rcd. 843 (2010) (USF deadlines waived for a variety of reasons, including delays in regular mail delivery); *Farmers Mutual Telephone Company*, 23 FCC Rcd. 6664 (2008) (annual section 54.314(d) state certification filing deadline waived to allow LSS recipient to receive support when confusion between it and the Idaho Public Utility Commission regarding new state ETC requirements resulted in a late-filed certification); *Alliance Communications Cooperative, Inc. and Hills Telephone Company, Inc.*, 20 FCC Rcd. 18250 (2005) (section 54.301(b) LSS deadline waived to accept projected LSS data submission filed four months late due to disruptions caused by corporate reorganization and employee reassignments); and *Smithville Telephone Company*, 19 FCC Rcd. 8891(2004) (section 54.301(b) LSS deadline waived to accept a projected LSS data submission filed four months late due to disruptions caused by the death of the carrier's president and the illness of its regulatory accountant).

requirements; (6) substantial economic gain; and (7) repeated or continuous violations. It can also be adjusted downward for: (1) minor violations; (2) good faith or voluntary disclosures; (3) history of overall compliance; and (4) inability to pay. A potential $3,000 forfeiture (larger if an entity has a history of missed deadlines) is a more than sufficient additional incentive to make sure that all ETCs take the annual section 54.313 and 54.314 filing deadlines very seriously. Moreover, the section 1.80 procedures eliminate the need for the Wireline and Wireless Bureaus to process waiver requests, and instead assign late filing issues to the Enforcement Bureau for the issuance of Notices of Apparent Liability, the negotiation of any upward or downward adjustments, and the collection of the ultimate penalties.

It may initially seem dubious that a forfeiture of $3,000 or so would be just as effective a compliance incentive or deterrent against late filing as a support reduction of tens or hundreds of thousands of dollars. However, the critical fact is that no ETC has ever knowingly and/or intentionally missed a section 54.313, section 54.314, or any other universal service filing deadline. All ETCs have affirmatively requested universal service support, and are fully aware that they must supply information and certifications to the Commission and/or to USAC in order to calculate the amount of their support and to receive it in timely fashion. When deadlines have been missed in the past, the oversight was not only wholly inadvertent but also often remained undiscovered for weeks until someone at the ETC noticed that high-cost support payments had stopped coming or had been reduced significantly, and inquired why. Put simply, there is really no effective way to deter an accidental mental lapse or missed communication, and the amount of a threatened penalty is generally of little or no significance.

Contrary to the Commission's apparent assumption, high-cost support recipients like RLECs that depend upon such support for substantial portions of their revenues do in fact have

policies and procedures in place to ensure compliance with Commission reporting requirements. RLECs have developed and implemented numerous procedures, checks and safeguards to try to ensure that universal service filings are completed in timely fashion and delivered to the Commission, USAC and other required recipients by the applicable deadline. Among other things, carriers have learned to establish calendar and tickler systems containing multiple deadline reminders, to give two or more employees responsibility for ensuring timely completion and submission of universal service filings, not to use regular U.S. mail for filings subject to deadlines, and to confirm proper and timely delivery of emails and of commercial delivery service packages. However, just like the military commands that become well prepared to fight the previous war but not the next one, these carrier procedures do a great job of preventing known prior mistakes but unfortunately cannot always anticipate the ingenuity of human beings in finding new and original ways to make a mess of things. Regrettably, there is no amount of forfeiture or support reduction, and no company policy or procedure, that can deter or protect against inadvertent mistakes, missed communications and oversights that occur when normal business or daily routines are disrupted, or normally reliable employees are distracted, by a variety of unusual or unforeseen circumstances.

In addition, it is not clear who the proposed support reductions are intended to punish, or how they accomplish that goal. For example, ever since the 2000 *Alenco*[161] decision, the Commission and the courts have emphasized the critical importance of universal service programs in providing funding and service for customers. If that is the case, what sense does it make to deprive the customers in a particular study area of tens or hundreds of thousands of dollars of universal service support because an employee or agent of their telecommunications

[161] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608 (5th Cir. 2000).

carrier inadvertently missed a Commission filing deadline? Likewise, if a state commission or state commission employee misses the October 1 deadline for section 54.314 certifications, why should all of the customers residing in supported study areas within the state (and their telecommunications carriers) suffer the loss of any universal service support for a delay wholly outside their control?

Virtually all missed universal service deadlines entail administrative or clerical errors or omissions that can be readily corrected without harm to any interested party, including the Commission and USAC. For example, the potential disruptions to Commission and USAC operations of a missed July 1 deadline are mitigated significantly by the fact that the following two weeks include the Independence Day holiday and are a popular early summer vacation period when the short-staffed Commission and USAC processing offices are not likely to begin reviewing and processing many of the submitted reports anyway. Likewise, whereas the October 1 certifications are important to satisfy the statutory requirement of section 254(e) of the Act, they do not specifically affect the calculation by the Commission or USAC of the amount of any ETC's actual dollar support.

Finally, it is well established that penalties and forfeitures are not favored by the law, and should be enforced only when they are within both the spirit and letter of the law.[162] In determining whether penalties and fines are excessive, courts have examined whether they are "so disproportionate to the offense as to shock public sentiment" or "contrary to the judgment of reasonable people concerning what is proper under the circumstances."[163] The Rural Associations submit that the proposed modified support reductions constitute penalties of tens or

[162] *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939).

[163] *Hindt v. State*, 421 A.2d 1325, 1333 (Del. 1980).

hundreds of thousands of dollars that are wholly unreasonable and excessive for the administrative or clerical errors in question.

Therefore, the Rural Associations urge the Commission to delete sections 54.313(j) and 54.314(d) rather than modifying them, and clarify that the Enforcement Bureau will handle future late filings of section 54.313 reports and section 54.314 certifications pursuant to section 1.80 and other applicable procedures.[164]

C. Rules Governing Support Reductions for Non-Compliance with Service Obligations Must Recognize Specific Circumstances Faced by RLECs in Providing Service in High-Cost Areas.

The Commission should establish a separate set of reasonably attainable performance compliance standards and procedures for RLECs. First, unlike the Phase II CAF recipients of model-based support for statewide commitments and the Phase II CAF winners of competitive bidding processes, RoR carriers are not receiving high-cost support in exchange for specific contract-like commitments to provide specific levels of service to specific areas or locations. Second, RLECs do not have to provide particular minimum levels of broadband service throughout their study areas, but rather need to satisfy only "reasonable requests" for broadband service at this time. Third, many RLECs must depend upon middle mile facilities provided by unrelated third parties, and cannot control the speeds, latency and other characteristics of their broadband services when signal quality, congestion and other problems originate in whole or part in those middle mile facilities.

If and when reasonable performance standards are developed and implemented for RLECs, they should be given a reasonable period to come into compliance with such standards

[164] 47 C.F.R. § 1.80.

before any support is reduced for non-compliance. Given that the RLEC industry as a whole is being asked to deploy broadband with the same amount of federal high-cost support it received in 2011 and that most RoR carriers rely upon high-cost support for major portions of their revenue streams, precipitous reductions of such support for actual or alleged performance shortcomings will only ensure that the desired performance standards will not be met within the foreseeable future. Particularly because RLECs have networks in place and have long been the only entities exhibiting a sustained commitment to serve many high-cost areas, working with them to achieve desired and reasonable performance standards, rather than reducing their high-cost support, is the most effective and efficient way to provide the residents of their service areas with the desired broadband services. Finally, in defining a "reasonable period" for RoR carriers to come into compliance with certain performance standards, the Commission needs to consider that some improvements will require substantial infrastructure construction and Rural Utilities Service (or other) financing, and that such projects may take several years from the initial planning and loan application to completion.

With respect to the Commission's questions regarding the consequences for failing to meet its reasonable comparability benchmarks for rates, the Rural Associations note that they cannot print money or run long-term budget deficits. Rather, they must pay their bills and recover their voice and broadband service costs from their customer rates and from the high-cost support they receive. If the Commission (and, in some cases, the state) provides sufficient high-cost support, RLECs can maintain lower customer rates that should comply with the Commission's benchmarks. If the Commission does not provide sufficient high-cost support and/or reduces such support for various reasons, the only other place RLECs can get the money they need to remain in business is from their customers. RLECs have worked very hard for years

to keep their customer voice and broadband rates reasonable and affordable. However, if and when they have no choice but to increase these rates above the Commission's reasonably comparable benchmarks, it makes no sense for the Commission to reduce their high-cost support and force them to increase their customer rates even further in order to survive.

IX. CONCLUSION

The Rural Associations strongly support efforts to reform existing universal service mechanisms in ways that will improve the availability and quality of broadband services provided to consumers and businesses located in areas served by RLECs. Accordingly, the Commission should act promptly to establish a support mechanism for data-only broadband (DOBB) services provided by RLECs. As shown above, the Rural Associations' proposed DOBB support mechanism not only satisfies the principles established by the Commission in the *Further Notice*, but presents the simplest and most straightforward way on the record for the Commission to achieve its goals in this proceeding.

Additionally, as discussed herein, the Rural Associations believe proposals to reduce or eliminate support in rural areas served by unsubsidized or "qualifying" competitors using alternative technologies raise substantial public interest questions and should be approached with great caution. Finally, the Rural Associations support the Commission's efforts to assure accountability in the use of federal high-cost funding, but suggest the Commission apply caution

in adopting new certification requirements, and should consider eliminating rules that impose draconian penalties on RLECs (and their customers) for failure to comply with complicated administrative rules.

Respectfully submitted,

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APPENDIX A

EFFECT ON RURAL CONSUMERS OF PROVIDING OR NOT PROVIDING STANDALONE BROADBAND SUPPORT

Benchmark Component	Benchmark/Retail Rate/Other Amount Needed for Cost Recovery From Individual Consumer		Relevant Costs Covered
	Provide Support Per Group Proposal	Not Providing Support	
Broadband SLC	$26.00	NA	Regulated Local Loop Costs (developed on Title II basis pursuant to Parts 32, 36, 64, and 69)
Wholesale Transmission Tariff Rate	$18.64[1]		Regulated Costs of Non-Loop Transmission Facilities and Equipment to Enable Broadband Internet Access (developed on Title II basis pursuant to Parts 32, 36, 64, and 69)
Wholesale Transmission Tariff Rate		$103.58[2]	Regulated Facilities-Based Network Costs of Loop and Transmission to Enable Broadband Internet Access (developed on Title II basis pursuant to Parts 32, 36, 64, and 69)
Total Benchmark for Supported/Regulated Network Elements	$44.64[3]	NA	Regulated Facilities-Based Network Costs of Loop and Transmission to Enable Broadband Internet Access
Middle Mile and Access Service Connection Point Costs[4]	$6.75	$6.75	Unsupported regulated and unregulated network costs for transmission through the Broadband Access Service Connection Point and connections to Internet backbone
Other ISP Costs	**$X**[5]	**$X**[5]	Unsupported unregulated non-network costs associated with provision of Broadband Internet Access to consumers (e.g., marketing, help desk)
Total Approximate Consumer Rate for Finished Broadband Internet Access	$51.39 **PLUS** (banded)	$110.33 **PLUS** (banded)	Finished Broadband Internet Access Service

[1] 2014 Annual Filing – DSL Voice-Data 1/6 Mbps, Rate band 9, Opt B, 3 Year – Rates for rate bands 1-16 range from $9.27 to $22.42.

[2] 2014 Annual Filing – DSL Data-Only 1/6 Mbps, Rate band 8, Opt B, 3 Year – Rates for rate bands 1-16 range from $50.54 to $122.31.

[3] Note this is a rate banded total, and that the total benchmark would actually range from $35.27 to $48.42 depending on the rate band (*i.e.*, the relative distance and density of the market).

[4] The middle mile cost of $6.00 per broadband line is calculated using actual middle mile costs (from NECA's 2014 Company Services Questionnaire), divided by actual broadband lines. Add to this $0.75 per line for the Broadband Access Service Connection Point. Based on 2014 Annual Filing, and using an Ethernet Basic Port and Channel Termination with representative capacity, the Rate band 11 connection point rate was divided by the average number of broadband lines per company. Although support should be provided for such costs and apparently is included to some degree in the price cap model, such costs are currently unsupported for RLECs.

[5] "X" represents the additional unsupported, unregulated non-network costs that the typical ISP would incur to deliver a finished Broadband Internet Access Product to a consumer. Such costs may include sales and marketing functions, help desk operations, etc. While such costs may vary widely based upon company size, size of addressable customer market, and other factors, a typical business' sales and marketing budgets, for example, will each often equal approximately 7% to 8% of revenue.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Rural Associations' Comments was served this 8th day of August, 2014 by electronic filing and e-mail to the persons listed below.

By: /s/ Elizabeth R. Newson
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