Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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	)	WC Docket No. 07-135
Local Exchange Carriers	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

COMMENTS OF AT&T

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I. INTRODUCTION

Congress created the Federal Communications Commission in its Communications Act of 1934 for the purpose of making available to all people of the United States access to communication services with adequate facilities at reasonable charges.[1] In other words, the reason for the Commission's existence is to promote universal service. Since becoming Chairman last November, Chairman Wheeler has spoken on several occasions about the importance and the enduring values of the "Network Compact: universal service, public safety, competition and consumer protection."[2] Virtually all parties agree that these values should remain the focus of the Commission's universal service policies. But the ways in which the Commission can and should meet those objectives must evolve to reflect the dramatic changes in the marketplace since Congress opened all telecommunications markets to competition in the Telecommunications Act of 1996 (1996 Act).

Prior to 1996, the Network Compact reflected the view that there should be "One Policy, One System and Universal Service," with that "one system" being the Bell system.[3] In other words, the Network Compact was predicated on the assumption that telecommunications was a natural monopoly, and that policymakers could best promote social welfare and thus the public interest by granting the Bell System and independent telephone companies franchise monopolies. These monopolies guaranteed them a reasonable return on their investment in the Network in exchange for a commitment to offer affordable, basic voice telephone services (i.e., "Plain Old

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[1] 47 U.S.C. § 151.

[2] Statement of Chairman Thomas E. Wheeler, *Technology Transitions et al.*, GN 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, FCC 14-5 (2014).

[3] *See* Peter W. Huber, Michael K. Kellogg, & John Thorne, Federal Telecommunications Law 12 (2d. ed. 1999) (noting that this was AT&T's slogan beginning in 1908).

Telephone Service" or "POTS") to all Americans. The Network Compact thus established a quid pro quo that benefitted all concerned.

This regime was enormously successful in encouraging deployment of basic voice telephone services to the vast majority of Americans, including those living in remote and other high-cost areas. But, it did little to encourage innovation and investment in new technologies. And, as a consequence, basic voice services available toward the end of the 20th Century were little different from those offered at the beginning the century.

In the 1960s and '70s, the first cracks in the Network Compact edifice appeared as the Commission (in some cases, led by the courts) opened segments of the telecommunications markets to competition – first for CPE and then for interexchange services. By 1996, Congress, regulators and policy makers generally agreed that telecommunications no longer was a natural monopoly (if it ever was), and thus opening all communications markets to competition would better serve the American people by encouraging innovation and investment, while ensuring that consumers would continue to receive service at affordable rates. At the same time, Congress recognized that competition would eliminate the implicit subsidies (from urban to rural, business to residential, and long distance to local) on which incumbent telephone companies had relied to keep rates for basic local telephone services – particularly in rural and other high cost areas – affordable. Consequently, it directed the Commission and the states in the 1996 Act to adopt universal service policies and support mechanisms to replace such subsidies with explicit support to ensure that all Americans would benefit through access to advanced telecommunications and other services at affordable rates. But, while the Commission successfully opened all telecommunications markets to competition, it failed to adopt universal service support mechanisms to explicitly replace the implicit subsidies in urban, business and long distance rates (at least for price cap carriers), which predictably evaporated as consumers switched to lower priced services offered by competitive providers that were not required to (and thus did not) serve high-cost customers.

In the eighteen years since passage of the 1996 Act, the communications ecosystem has undergone a complete transformation from the POTS monopoly model. When President Clinton signed the 1996 Act into law, 94 percent of U.S. households subscribed to POTS provided by an incumbent local telephone company and the remaining 6 percent did without any phone service.[4] At the end of 2013, that number had decreased to 25 percent, with only 5 percent of U.S. households subscribing only to POTS.[5] The vast majority of Americans have switched to competitive alternatives, including wireless, cable-provided VoIP, and over-the-top VoIP services. In addition, the percentage of U.S. households that do not subscribe to any interconnected voice service is 2.5 percent.[6]

There is no question that today consumers have universal access to communications services (including broadband),[7] in most areas from multiple sources –both wireless and wireline. For the most part, these multiple, competitive sources have developed in response to market demand, not regulatory compulsion. Indeed, the most popular voice service among

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[4] Anna Maria Kovacs, *The New Network Compact: Consumers Are In Charge*, at 10, Internet Innovation Alliance (July 2014), *available at* http://internetinnovation.org/images/uploads/IIA_A_New_Network_Compact_071714_Report.pdf (Kovacs Study).

[5] *Id.* at 11.

[6] *Id.*

[7] *Id.* at 15 (citing a Pew Report showing that, as of 2013, 70 percent of adults had fixed broadband access from home, which increases to 80 percent when access via smartphone is included).

consumers – wireless – is also the least regulated, while the least popular service (and the one consumers are abandoning in droves) – POTS – is the most heavily regulated.[8]

Nonetheless, there remain corner cases: discrete geographic pockets of the United States where consumers have fewer competitive alternatives, and lack access to broadband altogether. It is in these areas where market forces alone are insufficient to incent private investment to provide consumers access to next generation services that the Commission's high-cost universal service programs should be focused. To its credit, the Commission recognized as much in its seminal 2011 *USF/ICC Transformation Order*.[9] The Commission created the Connect America Fund (CAF) in this 2011 order, the purpose of which was to target federal high-cost dollars to areas unserved by broadband service. AT&T had advocated for years for this reform and it supports the Commission's decision to repurpose its legacy high-cost mechanisms from supporting voice, which is ubiquitously available, to supporting broadband deployment in eligible, high-cost areas. As it is about to implement the centerpiece of its universal service reforms – CAF Phase II (CAF II), which will provide up to $1.8 billion/year in support to providers that will offer broadband service in Commission-identified eligible areas – the Commission must address a holdover of its prior high-cost regime, the eligible telecommunications carrier (ETC) rules. Under its prior rules, carriers were designated as ETCs on a study area-wide basis – regardless of whether they actually received any support for serving high-cost areas through the Commission's high-cost program. The rules thus imposed unfunded mandates on price cap carriers to continue offering service to all customer locations in such areas

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[8] *Id.* at 11-13. These data also show that providers of VoIP service, a service that also is regulated less than POTS, are increasing their market share year-over-year at the expense of POTS providers.

[9] *Connect America Fund et al.*, WC Docket No. 10-90 et al., 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*).

regardless whether subscribers at those locations actually purchased service from them. Those mandates have become increasingly untenable as consumers (even consumers in high-cost areas) switch from POTS to a variety of wireless and wireline alternatives. They also threaten to impede broadband deployment in those areas by forcing carriers to expend scarce capital on maintaining obsolete infrastructure to meet their service obligations rather than on broadband.

In its most recent CAF II-related Further Notice of Proposed Rulemaking (*FNPRM*), the Commission sought comment on several ETC issues, including whether ETCs should have high-cost obligations only in the geographic areas where they receive support.[10] AT&T[11] addresses those issues below but we also advocate for more significant ETC reform to ensure a successful and statutorily compliant CAF II.

The Commission's *FNPRM* mostly seeks comment on issues related to CAF II implementation. However, it does propose several significant rule changes that if adopted would affect its Mobility Fund Phase II (MFII) program and the frozen support that certain mobile wireless providers currently receive.[12] The proposed MFII rule revision, to exclude from MFII eligibility only those areas served by either AT&T's or Verizon's 4G LTE service, is discriminatory and should not be adopted absent the modifications we recommend, below.[13] The Commission's proposal to eliminate on a flash-cut basis certain mobile wireless carriers' support

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[10] *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 14-54, ¶¶ 179-85, 195-98 (rel. June 10, 2014). Elsewhere in these comments, we refer to the Report and Order as the *CAF II Report and Order*.

[11] AT&T Services, Inc. hereby submits these comments on behalf of its operating affiliates that are ETCs (collectively, AT&T).

[12] *FNPRM* at ¶¶ 235-53.

[13] *See infra* at Section III.A.

is similarly ill-advised and unlawful. AT&T suggests, below, changes to this proposal that would be necessary to make it consistent with the Commission's statutory requirements and are sound public policy should it decide to go forward.[14]

Finally, AT&T suggests several improvements to the Commission's proposed CAF II requirements. In addition to commenting on issues included in the *FNPRM* (e.g., increasing the CAF II downstream speed to 10 Mbps, modifying the definition of "unsubsidized competitor," sunsetting CAF II ETC designations at expiration of service term), AT&T recommends that the Commission clarify several fundamental CAF II issues that remain unclear before it offers any party CAF II support, including what precisely are a CAF II recipient's service area and service obligations.[15]

II. COMPREHENSIVE ETC REFORM MUST BE A PART OF CAF II

A. Summary

If the Commission were creating its high-cost universal service mechanisms from scratch, the design would be simple: The Commission would identify eligible, high-cost areas and calculate the amount of support it was willing to pay some provider to offer broadband service in those areas in accordance with specific service obligations; prospective service providers would compete for funds; the Commission would select one provider in a given geographic area; winning bidders would receive the agreed upon support and perform the required obligations for a defined period of time, after which their funding and their service obligations would terminate; and those service obligations would be relevant only to the service for which the provider

[14] *See infra* at Section III.B.

[15] *See infra* at Section IV.

received funding and apply only in the areas where the provider received funds. This design would be consistent with the Commission's CAF II mechanism except in one significant respect: unless the Commission reforms its ETC rules, a CAF II provider will be required to offer certain services that are unrelated to the service for which it receives funding (e.g., standalone voice) and one class of provider – price cap carriers – will have service obligations in areas where they do not and cannot receive CAF II support.

Because the Commission is not making its universal service reforms "on a blank slate, but rather against the backdrop of a decades-old regulatory system"[16] it needs to undo some of the decisions it and the states made more than a decade ago in order to reach its CAF II goals and comply with its statutory requirements. Most importantly, the Commission must sunset price cap carriers' ETC designations in areas where they cannot receive or choose not to receive any high-cost support, including CAF II support. And that action should occur either at the time the Commission offers price cap carriers the "state-level commitment"[17] or when an ETC declines its high-cost support, whichever occurs earlier. The Commission also should limit its CAF II service obligations to those that are specific to the service that CAF II-eligible areas lack – broadband – and not require recipients to offer voice on a standalone basis or to participate in the Lifeline program.

[16] *USF/ICC Transformation Order* at ¶ 165.

[17] The state-level commitment is the term the Commission uses to describe its offer of CAF II support to price cap carriers in exchange for the carrier offering broadband service to all of the CAF II-eligible areas in its service territory within a state.

B. Background

In its 1996 Act, Congress established a new designation to enable carriers to obtain federal high-cost universal service support.[18] The purpose of this new designation – ETC – was to expand the types of carriers who could receive federal high-cost support and to make such support explicit. Prior to the 1996 Act, only one type of carrier received high-cost support from the Commission: ILECs. Consistent with the 1996 Act's pro-competitive goals, Congress created this new designation to enable non-ILECs to receive federal high-cost support. This was particularly true for so-called "non-rural" carrier service territories, where Congress *required* state commissions to permit competitive providers to obtain this designation.[19] Congress did not require participants in the Commission's other universal service programs to obtain this new designation in order to receive universal service funding. In fact, Congress explicitly exempted the Commission's Lifeline program from the new universal service rules and it permitted non-ETCs to participate in what became the Commission's E-rate and Rural Health Care programs.[20] As a consequence, the ETC designation is necessary only for providers that seek and obtain federal high-cost support.

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[18] 47 U.S.C. § 214(e).

[19] *See, e.g., id.* § 214(e)(2) (providing that state commissions "shall" permit competitors meeting the requirements of section 214(e)(1) to become ETCs in non-rural carrier service territories). For this purpose, all of AT&T's twenty-two price cap carrier affiliates are considered "non-rural."

[20] *See id.* §§ 254(j) ("Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission . . . ."); 254(h)(1) (stating that "telecommunications carriers" shall provide to rural health care providers and schools and libraries universal service supported-discounts upon a bona fide request for service). *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, ¶ 449 (1997) (*First Universal Service Order*) ("[W]e agree with the Joint Board in concluding that Congress intended that any telecommunications carrier, even one that does not qualify as an 'eligible telecommunications carrier,' should be eligible for support for services provided to schools and libraries.").

State commissions designated all of AT&T's price cap carrier affiliates as ETCs by early 1998 and, without exception, these designations mirrored these carriers' service territories. Prior to the Commission implementing the universal service provisions of the 1996 Act, all of these carriers had been receiving high-cost universal service support via implicit subsidies. These carriers continued to receive implicit and, in some cases, explicit support after the 1996 Act until the Commission implemented its high-cost model support mechanism in 2000, which was designed to provide explicit support to non-rural carriers and which replaced the Commission's prior high-cost regime for these carriers. At that point, only three out of AT&T's twenty-two price cap carrier affiliates were eligible for any high-cost model support and nineteen were not.[21]

That most of these affiliates were not eligible for this new support does not mean that these affiliates' service territories do not include rural and other high-cost areas. To the contrary, as AT&T previously has pointed out, AT&T serves far more high-cost customers than so-called rural carriers, but received little high-cost support to do so. Moreover, according to the Commission's CAF cost model, which identifies and calculates support amounts for high-cost areas, AT&T will be eligible to receive approximately $424 million in CAF II support each year for these nineteen affiliates to serve high-cost areas within their service territories.[22] The reason AT&T's price cap carrier affiliates did not receive high-cost model support under the

[21] Until the Commission "froze" this support in 2011, fifteen of AT&T's twenty-two price cap carrier affiliates received interstate access support (IAS) beginning in 2000. The purpose of IAS support was to "provide[] support to carriers serving lines in areas where they are unable to recover their permitted revenues from newly revised SLCs." *CALLS Order*, 15 FCC Rcd 12962, at ¶ 195 (2000). Thus, like other price cap carriers, these AT&T affiliates used their IAS to reduce the subscriber line charge (SLC) increases that would have otherwise occurred as part of the reforms in the *CALLS Order*. Moreover, these carriers applied this support across their entire customer base, not just to customers residing in high-cost areas.

[22] *See* Federal Communications Commission CAF II – CAM 4.1.1. – Report Version 7.0, April 2014, *available at* http://www.fcc.gov/wcb/CAM_4_1_1_Results_FINAL_042514.xlsx.

Commission's legacy high-cost support mechanism was because of the Commission's flawed decision to use statewide averaging, which perpetuated the implicit subsidies the universal service provisions of the 1996 Act were intended to eliminate and replace with explicit support. Carriers, including a legacy AT&T affiliate, repeatedly and successfully challenged the Commission's high-cost model support mechanism methodology, resulting in two remands from the Tenth Circuit Court of Appeals.[23] The court's and carriers' concerns with this mechanism had not been satisfactorily addressed when the Commission announced in its 2011 *USF/ICC Transformation Order* that it was scrapping altogether this mechanism.[24]

During the transition to a fully implemented CAF that will occur with CAF II, the Commission "froze" price cap carriers' legacy high-cost support – both high-cost model support and IAS – at 2011 levels and it required frozen support recipients to use increasingly larger amounts of this support to build and operate broadband-capable networks to offer the recipient's retail broadband service in areas that are substantially unserved by an unsubsidized competitor.[25] Seven of AT&T's twenty-two price cap carrier affiliates receive no frozen support. Again, this does not mean that these affiliates do not serve high-cost or even extremely high-cost areas; rather, these carriers receive no frozen support simply as a result of the Commission's decision to

[23] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2003) (*Qwest Corp.*); *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222 (10th Cir. 2005).

[24] *USF/ICC Transformation Order* at ¶ 128 & n.200 (explaining that it is "eliminat[ing] altogether the current [high-cost model support] and IAS mechanisms for price cap companies"). The Commission itself recognized the deficiencies with its non-rural carrier high-cost mechanism when it described the "rural-rural" divide, where "some parts of rural America are connected to state-of-the-art broadband, while other parts of rural America have no broadband access, because *the existing program fails to direct money to all parts of rural America where it is needed*." *Id.* at ¶ 7 (emphasis added).

[25] *See* 47 C.F.R. § 54.313(c).

use an outcome-driven formula to calculate price cap carrier high-cost support a decade and a half ago.

Even though 86 percent of AT&T's price cap carriers never received funding that was designed to enable them to provide service in high-cost areas (i.e., high-cost model support), these carriers nonetheless have ETC designations and service obligations that cover their entire service territories.[26] Such large ETC service areas are in contravention of congressional intent and Commission precedent. First, Congress plainly intended that the states issue ETC designations for non-rural carriers that are smaller than those carriers' study areas (i.e., the carriers' service territories within a state). Section 214(e)(5) states that an ETC's "'service area' means a geographic area established by a State commission . . . for the purpose of determining universal service obligations and support mechanisms."[27] This subsection of the statute establishes a presumption that a *rural* carrier's ETC service area is its study area yet Congress purposefully did not establish any such presumption for *non-rural* carriers.[28] Consistent with Congress's intent, the Commission in its *First Universal Service Order* urged the states to define small service areas when designating non-rural carriers as ETCs.[29] The Commission (and the Federal-State Joint Board before it) expressed concern that ETC service areas covering a large ILEC's study area could potentially violate section 254(f) of the Act by undermining the

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[26] And for the few affiliates that did receive this legacy support, their funding was targeted to specific wire centers even though these affiliates' ETC service areas also covered their entire footprint in the state.

[27] 47 U.S.C. § 214(e)(5).

[28] *Id.* ("In the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.").

[29] *First Universal Service Order* at ¶ 116.

Commission's efforts to preserve and advance universal service.[30] But many states ignored congressional intent and the Commission's and Joint Board's admonitions, and designated price cap carriers as ETCs throughout their entire study areas. As a result, these carriers had no business case to deploy broadband in high-cost areas (and struggled to maintain the network to provide traditional POTS services) as competition eliminated the implicit subsidies in these carriers' rates, with no replacement from federal and state universal service support mechanisms. Now, almost two decades later, the adverse effects of those state ETC designations are only getting worse for consumers residing in those areas.

Under section 214(e)(1) of the Act, ETCs are required to "offer the services that are supported by Federal universal service support mechanisms . . ." "throughout the service area for which the designation is received."[31] Although it had warned against overly broad ETC designations, the Commission nonetheless found that, under this provision, price cap carriers designated as ETCs for their entire service territories were subject to ETC service obligations throughout the area covered by that designation even though they may not actually receive *any* high-cost support from the Commission's legacy mechanisms because they nonetheless were "eligible" to receive support.[32] This interpretation imposed federal carrier of last resort-like obligations on price cap carriers, requiring them to provide voice service to uneconomic areas

[30] *Id.* at ¶¶ 184-85; *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶¶ 176-77 (1996). Section 254(f) of the Act provides in relevant part that a "State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. . . A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 47 C.F.R. § 254(f).

[31] 47 U.S.C. § 214(e)(1).

[32] *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carrier*, 23 FCC Rcd 8834, ¶ 29 (2008).

without any support designed to enable them to do so. The Commission was able to defend this prior interpretation because, under its old rules, price cap carrier ETCs were not categorically barred from receiving high-cost support and the Commission allowed multiple carriers to receive high-cost support for serving the same geographic area. The Commission changed the rules in its *USF/ICC Transformation Order*. And this fundamental change necessitates the ETC reforms we discuss below.

The Commission's prior interpretation of section 214(e)(1) has harmed consumers residing in high-cost areas served by price cap carriers by depriving them of the innovative communications services that have flourished in areas where costs are lower and business opportunities attracted competitors. Imposing ETC obligations on carriers that do not receive high-cost support creates an unfunded mandate that distorts the market and harms exactly the consumers that the Commission's high-cost universal service program is intended to benefit. Now that the Commission has transformed the USF program and created the CAF to target funding to specific areas of need and to a single carrier willing to take on the obligations, it must also "transform" its ETC rules to match the new vision. Failure to do so will hobble, and potentially doom, CAF II before it is even out of the gate.

What is the effect of an ETC designation with no high-cost support? As explained above, most of AT&T's price cap carrier affiliates have had unfunded ETC service obligations across vast expanses of their high-cost, rural areas for years. This has required these carriers to divert countless capital dollars to maintain increasingly antiquated facilities in order to continue to offer a service that consumers do not desire[33] instead of using their capital to expand broadband service to more consumers. The Commission's own statistics cited in its *USF/ICC*

[33] *See* Kovacs Study at 11 (stating that only 5 percent of households subscribe to POTS alone).

Transformation Order bear this out: Over 80 percent of the locations unserved by broadband in 2011 were in price cap carrier areas.[34] Thus, not only has the Commission's prior decision to impose unfunded ETC mandates on price cap carriers adversely affected consumers residing in these unfunded areas, by forcing price cap carriers to divert private capital from broadband deployments, it also has imposed costs on all consumers in the U.S. through an increased burden on the high-cost fund.

As previously interpreted by the Commission, the unfunded ETC obligations include, among other things, a requirement to offer voice service – i.e., the "supported service" – throughout the carrier's extensive ETC service area, and if the carrier receives any amount of high-cost support, no matter how small, it also must offer voice on a standalone basis throughout that area without regard to whether consumers desire such an offering.[35] Notwithstanding the fact that many price cap carriers, including most of AT&T's price cap carrier affiliates, did not receive *any* support that was designed to enable them to provide service in rural, high-cost areas,[36] these carriers nonetheless have been required to maintain (and, indeed, extend in some cases) facilities to provide voice service in areas where it is uneconomic to do so, including areas where other providers were already offering voice service. Such areas include locations where a developer or a building owner granted exclusive marketing rights and/or the exclusive right to sell video and Internet services to another provider. Other unfunded ETC service obligations

[34] *See USF/ICC Transformation Order* at ¶ 127.

[35] *See id.* at ¶ 80.

[36] The Commission cannot say that its legacy IAS mechanism was designed to enable providers to offer voice service in high-cost areas. IAS recipients used this support to reduce SLCs for all customers, without regard to whether those customers resided in Chicago, Illinois, which, according to 2012 Census Bureau data, has a population of 2.73 million, or Union Hill, Illinois, which has a population of 59.

include having to comply with state ETC requirements[37] and participate in the Lifeline program.[38]

Failing to reform ETC designations and obligations as part of CAF II thwarts the Commission's broadband objectives at the expense of consumers because price cap carriers will continue to be required to expend resources to maintain rapidly obsolescing facilities and services, which everyone agrees are better spent on broadband deployment. Price cap carriers will continue to be saddled with legacy service obligations, imposing costs and placing these carriers at a competitive disadvantage. Additionally, as we discuss below, perpetuating legacy ETC designations and obligations once the Commission implements CAF II can no longer be sustained legally because, at that point, price cap carriers that do not receive CAF II support in a particular geographic area are no longer "eligible" for high-cost support.[39]

[37] A number of AT&T's price cap carrier affiliates have to comply with state-specific ETC obligations even though they do not receive any high-cost support. For example, several states require ETCs to file outage reports and maintain and/or file maps showing locations of outside plant. In addition, some states require ETCs to file tariffs, maintain battery backup power that will last for a specified period of time or advertise services in a particular manner and with a particular frequency. Congress and the Commission assumed that a state would establish its own high-cost support fund to preserve and advance universal service within the state, particularly if the state adopts additional requirements. *See* 47 C.F.R. § 254(f). However, Congress's and the Commission's expectation that states would have their own robust high-cost funds did not materialize, at least not with respect to price cap carriers. It has been AT&T's experience that few states provide funding to price cap carriers and those that had "sufficient" funds after enactment of the 1996 Act scaled those funds back dramatically in the past decade. Today, AT&T's price cap carrier affiliates receive state high-cost support in only three states.

[38] *See* Section II.E., *infra*, recommending that the Commission make Lifeline participation voluntary.

[39] We discuss, *infra*, the Commission's proposal for transitioning frozen support to CAF II support at Section II.D.

C. The FCC Should Limit A Carrier's ETC Designation And Service Area To Its Funded Areas And Should Sunset Price Cap Carriers' Legacy ETC Designations And Obligations In Areas Where They Do Not Receive Support.

The Commission's reform of its legacy ETC regime has not kept pace with the sweeping reforms contained in its 2011 *USF/ICC Transformation Order*. In that order, the Commission determined that the most appropriate use of high-cost funds is to support the deployment of broadband in eligible areas of the country that would otherwise not have access to this essential service. To implement this fundamental change in policy in a fiscally responsible manner, the Commission announced that it would apply key limits to CAF II. Specifically, it would make CAF II funding available only in geographically granular areas that it identified through a forward-looking economic cost model; it would award CAF II support to just one provider in a particular area; after an interim period, it would award CAF II funding only through a competitive process; and it would provide a carrier with CAF II support only for a defined period of time.[40] However, the Commission did not, at that time, reform ETC designations and the designation process to conform to these changes. As a consequence, the legacy ETC designations that state commissions awarded price cap carriers fifteen years ago, which were based on a fundamentally different universal service model, continued to apply. And while the Commission since has taken several incremental, and welcome, steps toward modernizing its outdated ETC regime, more needs to be done to ensure that CAF II is implemented in a manner consistent with the Commission's statutory requirements.

In its 2014 *CAF II Report and Order*, the Commission determined that an entity is permitted to seek a CAF II ETC designation *after* the Commission selects it as a winning bidder

[40] *See, e.g., USF/ICC Transformation Order* at ¶¶ 23-25.

in the CAF II competitive bidding process.[41] AT&T commends the Commission for this decision, which appropriately recognizes that potential bidders would be discouraged from participating in the competitive bidding process if, by doing so, they risk being subjected to ETC obligations in "areas for which they are not ultimately awarded support."[42] As a result of this decision, a successful CAF II competitive bidder may tailor its ETC designated service area to correspond precisely with the geographic areas where it will receive CAF II support. Thus, in fulfillment of Congress's intent in section 214(e)(1), these carriers will be able to offer throughout their designated ETC service areas the services that are truly "supported" by the Commission's CAF II support mechanism.

This most recent ETC reform decision builds on the Commission's prior decision to permit prospective Mobility Fund Phase I (MFI) participants to file ETC applications conditioned on actually receiving MFI support.[43] In that 2012 order, the Commission forbore from the requirement in section 214(e)(5) that the service area of an ETC should conform to the service area of any rural carrier serving the same area. Without such action, the Commission was concerned that "parties seeking support may be required to take on *unsupported ETC obligations* in portions of rural carriers' study areas – areas that may not be eligible for support or for which they may not win support. . . ."[44] The Commission correctly concluded that requiring "Mobility Fund Phase I support recipients to serve a wider area runs counter to the

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[41] *CAF II Report and Order* at ¶ 43.

[42] *Id.*

[43] *Connect America Fund et al.*, WC Docket 10-90 et al., Second Report and Order, 27 FCC Rcd 7856 (2012) (*Mobility Fund Phase I ETC Forbearance Order*).

[44] *Id.* at ¶ 15 (emphasis added).

Commission's recent and ongoing efforts to serve the public interest by focusing USF resources on defined areas of need."[45]

AT&T urges the Commission to take the next logical ETC reform steps and to do so in its order finalizing the CAF II rules. First, the Commission should clarify that, if a price cap carrier elects the state-level commitment, its ETC designation, service area, and associated CAF II service obligations are limited to the locations where the Commission announced it will provide CAF II funding to that carrier. Through its decisions in the two orders described above, the Commission already has implemented this reform for competitive bidders that win CAF II support and MFI recipients. It should do the same for price cap carriers that elect the state-level commitment. Just as the Commission found that prospective CAF II competitive bidders may be discouraged from participating if doing so could result in them having unfunded ETC obligations so, too, should the Commission recognize that price cap carriers may decline the state-level commitment if accepting such funding means they will continue to have legacy ETC designations and obligations in their non-CAF II-funded areas.

It is unlikely that most, if any, of the winning CAF II competitive bidders will already be ETCs in all of the areas where the Commission will award them CAF II funding. This means these competitive providers will have to file ETC applications. Filing ETC applications with perfect knowledge about the locations where they will receive support enables these providers to identify precisely which geographic areas are covered by their applications and eliminates the possibility that competitive providers will have ETC obligations in "areas for which they are not ultimately awarded support."[46] By contrast, every price cap carrier already is an ETC throughout

[45] *Id.* at ¶ 16.

[46] *CAF II Report and Order* at ¶ 43.

its entire service territory and, thus, for these carriers further ETC applications are unnecessary in order to obtain CAF II funding. But, as explained above, their existing ETC designations include areas where they cannot receive CAF II support so a change is needed in order to avoid perpetuating unfunded legacy ETC obligations across significant stretches of their service territories.

Consistent with the Commission's objective "to serve the public interest by focusing USF resources on defined areas of need,"[47] and the statutory requirements of sections 214(e) and 254 of the Act, the Commission should declare all existing ETC designations in price cap carriers' service territories to be null and void when the Commission implements CAF II by making the offer of a state-level commitment to price cap carriers or a carrier declines to receive frozen support. More specifically, the Commission should find that price cap carriers' existing ETC designations were tied to the legacy high-cost support mechanisms and declare that those designations sunset by operation of law when and where a carrier either declines to or can no longer receive support under those mechanisms. To the extent the Commission offers explicit high-cost support (either frozen or CAF II support) to a price cap carrier, that carrier could elect to retain its ETC designation in those areas where it has agreed to receive support. For price cap carriers that elect the state-level commitment, this means they would retain their ETC designation only in CAF II-funded locations.[48]

AT&T is asking the Commission to reinterpret section 214(e)(1)(A) of the Act knowing that the Tenth Circuit recently upheld the Commission's prior interpretation of this section of the

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[47] *Mobility Fund Phase I ETC Forbearance Order* at ¶ 16.

[48] As an alternative and at the price cap carrier's choosing, the Commission could sunset a price cap carrier's designation completely and permit the price cap carrier to seek a CAF II ETC designation from the relevant state commission (or the Commission), just as a winning CAF II competitive bidder will do.

statute. Several months ago, the Tenth Circuit found that "[h]ad Congress intended designated ETCs to automatically receive USF funds, it could and should have omitted the phrase 'be eligible to' from the language of § 214(e)(1)"[49] and "[n]othing in the language of § 214(e) entitles an ETC to USF funding."[50] The court was responding to petitioners' assertion that the Commission's failure to relieve ETCs of their service obligations as it eliminated their support was arbitrary and capricious.[51] The court responded that the petitioners "make no attempt to explain precisely how it was arbitrary or capricious" and, in any event, the Commission permits "any carrier negatively affected by the universal service reforms . . . to file a petition for waiver that clearly demonstrates that good cause exists for exempting the carrier from some or all of those reforms, and that waiver is necessary and in the public interest to ensure that consumers in the area continue to receive voice service."[52]

AT&T respectfully suggests that the Tenth Circuit's analysis misses the mark. Under its current interpretation, the Commission has allowed state commissions to incorrectly implement section 214(e)(1) as if the ETC designation was a federal version of carrier of last resort, an outdated state policy mechanism that required one carrier to stand ready to serve all consumers throughout its service territory in exchange for its monopoly franchise and implicit subsidies.

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[49] *Direct Communications Cedar Valley v. FCC*, 753 F.3d 1015, 1067 (10th Cir. 2014). Section 214(e)(1) provides, "A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall *be eligible to* receive universal service support in accordance with section 254 . . . ." (Emphasis added).

[50] *Id.*, 753 F.3d at 1088.

[51] *Id.*

[52] *Id.*, 753 F.3d at 1088-89 (quoting *USF/ICC Transformation Order* at ¶ 539). While the court notes that the Commission's review of such petitions will be "rigorous," the court does not to mention that a condition precedent for relief is that there is no other terrestrial-based voice service alternative. *See USF/ICC Transformation Order* at ¶ 539 ("a carrier seeking such waiver must demonstrate that it needs additional support in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative.").

Section 214(e)(1) simply defines the service obligations a provider must perform in an ETC service area where it receives federal high-cost support. AT&T is not advocating for additional high-cost support to provide a service – POTS – that consumers do not desire and in areas where there are numerous other voice providers. Instead, AT&T agrees with the Commission that high-cost dollars should be focused on ensuring broadband availability in high-cost areas. However, to implement that vision fully, AT&T believes that the Commission should reinterpret section 214(e)(1) so that ETCs are actually able to offer "services *that are supported by Federal universal service support mechanisms*" "throughout the service area for which the designation is received."[53] The Commission is of course able to depart from its precedent as long as it offers a reasoned basis for doing so.[54]

AT&T and others have explained the policy rationale for why it is essential to relieve price cap carriers of their ETC designations and obligations in areas where they do not receive high-cost support. In addition, USTelecom filed an ETC modernization white paper with the Commission several months ago.[55] In it, USTelecom detailed the Commission's legal authority to reinterpret section 214(e) and sunset price cap carriers' legacy ETC designations that state commissions issued about fifteen years ago.[56] AT&T agrees with USTelecom's analysis and urges the Commission to implement ETC reform as described therein.

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[53] 47 U.S.C. § 214(e)(1) (emphasis added).

[54] *See, e.g., Williams Gas Processing – Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006).

[55] *See* Letter from Jonathan Banks, USTelecom, WC Docket Nos. 10-90, 05-337 (filed March 14, 2014) (attaching a white paper titled, Modernizing the Eligible Telecommunications Carrier Designation) (USTelecom White Paper).

[56] *Id.* at 11-17.

Briefly, the Commission could issue a declaratory ruling or adopt rules pursuant to section 201(b) that ties ETC designations to support such that the designation expires when the support sunsets. As interpreted in *Iowa Utilities Board*, section 201(b) authorizes the Commission to adopt rules guiding the states' exercise of the duties allocated to them elsewhere in Title II.[57] Just as the Commission may adopt rules that limit the states' prerogative and determine what costs may and may not be included to "establish . . . rates" for unbundled network elements,[58] so too can it adopt rules that interpret and implement section 214(e)(1) by limiting ETC designations in areas served by price cap carriers only to those areas in which an ETC receives high-cost support. Thus, while section 214 assigns the states a significant role in the ETC designation process, the Commission plainly has authority to interpret the text of section 214, and the states are bound by its interpretation of the areas within a price cap carrier's service territory where a provider may be designated as an "ETC." And to the extent that the statutory language is ambiguous, the courts likewise must defer to the Commission's interpretation of section 214.[59] As USTelecom explains, that deference should be especially strong here, because section 254 grants the Commission broad authority to implement the entire federal universal service program, of which ETC designations form only a small part.[60] Moreover, the declaratory ruling sought by USTelecom is consistent with Commission ETC precedent going back to 2000. In its *Western Wireless Order*, the Commission concluded state

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

[58] 47 U.S.C. § 252(c)(2); *Iowa Utilities Board*, 525 U.S. at 384-85.

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

[60] USTelecom White Paper at 13-14.

commissions may not adopt policies or eligibility criteria pursuant to section 214(e)(2) that thwart federal universal service goals because doing so would "effectively undermine[] congressional intent in adopting the universal service provisions of section 254."[61]

Another statutory basis for a declaratory ruling is the universal service statute itself. Once the Commission implements the CAF II limits described above (e.g., Commission identifies targeted, granular areas for support, one recipient per area), the excessively large price cap carrier ETC designations are even more plainly in contravention of section 254(f). Unless the Commission sunsets these designations, these carriers – and these carriers alone – will have unfunded ETC obligations because of the states' ill-advised decision to award study area-wide ETC designations to price cap carriers about fifteen years ago. USTelecom is correct that unfunded ETC service obligations impede the Commission's broadband goals by forcing price cap carriers to expend private capital to maintain facilities and services that consumers do not want (i.e., standalone wireline voice service) to meet unnecessary regulatory requirements instead of spending those limited resources to deploy broadband service, which is the service that consumers desire and policymakers want to be as ever-present in the near term as voice service is today.[62] Imposing unfunded ETC service obligations on price cap carriers also violates the Commission's competitive neutrality universal service principle, Congress's requirement that the

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

[62] USTelecom White Paper at 15.

Commission's universal service support mechanisms provide sufficient support,[63] and Congress's requirement in section 706 of the 1996 Act that the Commission remove barriers to broadband infrastructure investment.[64]

As an alternative to a declaratory ruling, the Commission could forbear from applying section 214(e) to price cap carriers in any geographic area where the carrier does not elect to receive universal service support.[65] Section 10 prohibits states from "continu[ing] to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."[66] USTelecom discusses how Commission forbearance from section 214(e) in these circumstances satisfies the forbearance criteria.[67] We do not repeat that analysis here but we agree with USTelecom and urge the Commission to forbear from section 214(e) to the extent necessary to relieve price cap carriers of their legacy ETC designations in geographic areas where they do not receive high-cost support.

D. It Is Unnecessary For The Commission To Support Voice Service In Areas That Are Already Served By Another Voice Provider.

The Commission proposes to eliminate its current requirement that price cap carriers use all of their frozen support in 2015, and thereafter, to build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by unsubsidized competitors. Instead, the Commission seeks comment on whether it should continue providing some amount of frozen support on an interim basis to price cap

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[63] *Id.*

[64] Section 706 of the 1996 Act is codified as 47 U.S.C. § 1302.

[65] USTelecom White Paper at 15.

[66] 47 U.S.C. § 160(e).

[67] USTelecom White Paper at 15-17.

carriers that are ETCs to provide voice service in areas where "no other providers wish to serve."[68] By that, it appears that the Commission is referring to the high-cost and extremely high-cost areas where no other <u>ETC</u> is providing voice telephony service.[69] If that assumption is correct, then there are no such areas in AT&T's price cap carrier affiliates' service areas as there are at least 3 ETCs, including Lifeline-only ETCs, providing service in all of these affiliates' wire centers. If the Commission means areas where there is no other provider of voice telephony service (i.e., ETC and non-ETC alike), AT&T's price cap carrier affiliates obviously have no such areas.[70]

Rather than focusing on whether some other <u>ETC</u> provides voice service in a particular area to determine if continued funding is warranted, AT&T respectfully suggests that the Commission instead consider whether a particular high-cost area is unserved by *any* provider of voice telephony service, including satellite providers.[71] AT&T believes that it is only in such areas where the Commission should consider providing high-cost support for voice service.[72]

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[68] *FNPRM* at ¶ 192.

[69] *Id.* at ¶ 191 & n.379 ("Such interim support would not be necessary if and when other providers are designated ETCs to such areas.").

[70] For example, in just two representative states where AT&T's price cap carrier affiliates operate there are approximately 132 entities certificated by the Illinois Commerce Commission to provide telecommunications "throughout the state" and 118 entities similarly certificated in Louisiana to provide statewide service.

[71] *See Connect America Fund et al.,* WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 14-98, ¶ 29 (rel. July 14, 2014) (*Rural Broadband Experiments Order*) (explaining that winning satellite providers may satisfy the Commission's requirements for quality of voice service by demonstrating that they can provide voice service that meets a Mean Opinion Score of four or greater).

[72] This limitation gives effect to the Commission's new "Support for Advanced Services" universal service principle, which provides that "[u]niversal service support should be directed where possible to networks that provide advanced services, as well as voice service." *USF/ICC Transformation Order* at ¶ 45.

Such a decision is consistent with Commission precedent. When the Commission overhauled its high-cost support mechanisms and established the CAF, it correctly concluded that "providers that offer service without subsidy [should] no longer face competitors whose service in the same area is subsidized by federal universal service funding."[73] There is no reason why that principle should apply only if the service at issue is broadband, not voice.

As AT&T understands it, the Commission is proposing that price cap carriers spend any remaining frozen support in 2015 on providing voice service in cost model-identified, high-cost and extremely high-cost areas within their ETC service areas where there is no CAF II recipient. According to the Commission's cost model, such areas lack broadband service by an unsubsidized provider and are high-cost to serve. While these areas also may be (or even likely are) high-cost for voice service providers, it simply does not follow that there is a dearth of voice providers in CAF II-eligible areas and thus funding voice service is necessary to ensure that consumers do not lose access to this service post-CAF II implementation. The voice marketplace has been radically transformed over the last decade, as illustrated by various studies. For example, according to USTelecom, price cap carriers continue to provide circuit-switched voice service to a mere 26 percent of households in their service areas.[74] And another study finds that only 5 percent of U.S. households rely solely on POTS as their voice offering, whereas almost 90 percent subscribe to wireless service and the percentage of households that do not subscribe to any interconnected voice service is just 2.5 percent.[75] This means that an

[73] *Id.* at ¶ 177 (explaining that this decision is consistent with the Commission's competitive neutrality universal service principle).

[74] *See Growing Voice Competition Spotlights Urgency of IP Transition*, Patrick Brogan, USTelecom Research Brief (Nov. 22, 2013).

[75] Kovacs Study at 11.

overwhelming majority of households, including those in high-cost and extremely high-cost areas, have cut the POTS cord and have elected to obtain voice telephony service through some other means.

In the event that the sole provider of voice service in a high-cost or extremely high-cost area where there is no CAF II recipient is the price cap carrier, then the Commission could offer that carrier some amount of support in exchange for it continuing to provide voice service in that discrete area as an ETC. Again, AT&T's price cap carrier affiliates have no such areas. However, it is conceivable that other price cap carriers may now offer voice services in areas that are not served by any competing provider of wireline or wireless voice services. The Commission's offer of support in this narrow circumstance must be voluntary, which is consistent with the Commission's statement in the *Seventh Order on Reconsideration* that if a frozen support recipient did not want to comply with the Commission's broadband obligations, the provider could simply decline that frozen support.[76]

If the price cap carrier declines the Commission's offer of support to provide voice service, its legacy ETC designation would sunset in that area just as it would in non-CAF II-eligible areas and in areas where some other provider is receiving CAF II support. However, as the Commission itself acknowledges, simply because the Commission sunsets an ETC designation does not mean that the affected provider would cease providing service in that area because "carriers may not discontinue voice service without receiving authorization pursuant to section 214. . . ."[77] To the extent a price cap carrier accepts continued frozen high-cost support after CAF II implementation, then the price cap carrier would elect to maintain its legacy ETC

[76] *Seventh Order on Reconsideration* at ¶ 120.

[77] *FNPRM* at ¶ 184.

designation only in those areas funded by frozen support until either it declines further frozen funding or the Commission eliminates this interim support. At that time, this last remaining part of the price cap carrier's legacy ETC designation would sunset by operation of law.

The Commission sought comment on the methodology it should use to calculate the amount of frozen support it may offer price cap carriers in exchange for providing voice service in high-cost and extremely high-cost areas where no party has been selected as a CAF II recipient.[78] While such funding will not be necessary except in the limited circumstances described above, if the Commission adopts its proposal, then AT&T recommends that the Commission devise some methodology to calculate offered support amounts other than the one it proposed in the *FNPRM*. There, the Commission suggests applying a certain formula to derive a percentage of a price cap carrier's existing frozen support that it may continue to receive post-CAF II implementation.

First, AT&T does not believe the Commission could apportion some amount of frozen support for this purpose because of the simple fact that not all price cap carriers receive frozen support. Almost one-third of AT&T's price cap carrier affiliates do not receive any frozen support. For these affiliates and similarly situated unaffiliated price cap carriers, there is no legacy high-cost support to continue providing in exchange for the carrier agreeing to remain an ETC in specific geographic areas. Second, even if a price cap carrier currently receives some frozen support, the Commission should assume that the amount of support is insufficient[79] for the purpose of enabling that ETC to extend facilities to provide voice service to new customers or to maintain existing service in these high-cost and extremely high-cost areas. The legacy IAS

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[78] *See id.* at ¶ 191 & n.378.

[79] *See* 47 U.S.C. § 254(b)(5) (requiring the Commission to adopt universal service mechanisms that are "sufficient").

that many price cap carriers now receive as "frozen support" was never designed or calculated for this purpose and too few carriers ever received legacy high-cost model support. As the Commission itself acknowledged about its now-legacy non-rural carrier high-cost support mechanism, "the existing program fails to direct money to all parts of rural America where it is needed."[80] The only way to address this sufficiency concern is to ensure that the offer of interim support to provide voice service in these areas is purely voluntary. In the event that a carrier declines this funding, the Commission should sunset its legacy ETC designation in that area. If the Commission declines to make this support voluntary, then it will have to establish a different methodology that accurately reflects the costs of providing voice service in these areas.[81] Otherwise, it will be back again at the Tenth Circuit defending the sufficiency of this support.

E. CAF II Service Obligations Should Not Include A Requirement To Offer Voice On A Standalone Basis Or Lifeline; Participation In The Lifeline Program Should Be Voluntary For All Providers.

As a mere aside, the Commission in its *USF/ICC Transformation Order* stated that "[a]s a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area."[82] The Commission offers no reasoned basis

[80] *USF/ICC Transformation Order* at ¶ 7.

[81] AT&T has analyzed the cost to provide standalone voice service in high-cost areas served by price cap carriers using the CostQuest Broadband Access Tool (CQBAT). Using the model, AT&T estimated that the cost to provide standalone voice in CAF II-eligible areas would be $3.5 billion/year. The cost to provide standalone voice in Remote Areas Fund-eligible areas would be an additional $2.5 billion/year. Additionally, the cost to provide standalone voice service to high-cost areas that are already served by competitors (i.e., non-CAF II-eligible areas that are nonetheless high-cost) would be an extra $2.7 billion/year. Moreover, the cost to provide standalone voice in extremely high-cost areas that are already served by competitors (i.e., that are not Remote Areas Fund-eligible) would be an additional $300 million/year. We note that AT&T's model runs using CQBAT are CQBAT Licensed Materials and the Property of CostQuest Associates, Inc. These materials are intended for use only in conjunction with the analysis of the Federal USF System and its reform. Any other use without permission is strictly prohibited.

[82] *USF/ICC Transformation Order* at ¶80.

for this requirement nor does it attempt to explain why standalone voice is a necessary service for a CAF II recipient to provide. After all, the Commission's CAF cost model has determined which census blocks are high-cost based on certain assumptions about what services households in these areas will purchase. The cost model assumes that consumers will purchase both voice *and* broadband service, which the Commission also assumed when it established its high-cost benchmark. This 2011 Commission decision to require standalone voice, which was clearly an afterthought, is not only inconsistent with its cost model-based decisions, it imposes higher, unfunded costs on CAF II recipients that are price cap carriers.

These increased costs are entirely unnecessary as industrywide data demonstrate that the vast majority of consumers do not desire or purchase standalone voice even when it is available. Only 5 percent of U.S. households subscribe to POTS alone and this figure is decreasing with each passing year.[83] Based on the data, the Commission can no longer reasonably argue that standalone voice is a service to which a substantial majority of residential customers subscribe, and thus meets the universal service definition in section 254.[84] Clearly, it is the quite the opposite. This is an instance of the Commission overregulating to deal with the rare exception, not the rule. AT&T urges the Commission to reconsider its 2011 standalone voice decision and to permit CAF II recipients to offer voice service only as a bundled offering (e.g., voice and broadband).

AT&T, USTelecom, and others have repeatedly urged the Commission to separate Lifeline participation from the ETC designation. As we explained in the Background Section of these comments, Congress expressly exempted the Commission's Lifeline program from the

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[83] Kovacs Study at 11.

[84] 47 U.S.C. § 254(c)(1)(B).

requirements contained in the 1996 Act's new universal service statute, section 254.[85] This congressional carve-out includes the requirement in section 254(e) that carriers must be ETCs designated under section 214(e) in order to obtain federal universal service support.[86] The Commission tied the ETC designation to Lifeline participation through its rules.[87] It could just as easily break that link by amending its rules to permit, not require, high-cost ETCs to participate in the Lifeline program. By using the authority that Congress gave it in section 254(j) to allow non-ETCs to participate in Lifeline, the Commission could encourage an even greater variety of service providers to participate in this program. Moreover, expanding the program to permit non-ETCs to participate is essential if the Commission desires to make available Lifeline discounts for broadband service.[88]

Included among the principles on which Congress required the Commission to base its universal service policies is the principle that low-income consumers should have access to telecommunications and information services.[89] The Commission may be concerned that if it sunsets a price cap carrier's ETC designation in an area where it receives no high-cost support, Lifeline-eligible consumers would have no ability to obtain Lifeline-discounted service.

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[85] *See id.* § 254(j).

[86] *See id*. § 254(e).

[87] *See* 47 C.F.R. § 54.405.

[88] This is true because the Commission will not provide CAF II support in areas where an "unsubsidized competitor" is providing broadband service at a certain speed. *See, e.g., USF/ICC Transformation Order* at ¶ 170. Of course, most unsubsidized competitors are cable operators who are unlikely to be ETCs. Under the Commission's current rules, which require Lifeline providers to be ETCs, a Lifeline-eligible person residing in an area served by a non-ETC cable operator could never obtain discounted Lifeline broadband service from that cable provider, even if no other entity is providing broadband service in that geographic area. If the Commission adopts AT&T's Lifeline Provider proposal, however, that eligible consumer could obtain Lifeline-discounted broadband service from the non-ETC cable company if it elects to participate.

[89] 47 U.S.C. § 254(b)(3).

However, based on AT&T's data, that scenario is almost nonexistent. First, in every single AT&T price cap carrier wire center, there are at least 3 Lifeline providers and the average number of Lifeline providers across all AT&T wire centers is over 12. AT&T selected two representative price cap carrier affiliates, Illinois Bell Telephone Company (d/b/a AT&T Illinois) and BellSouth Telecommunications, LLC (d/b/a AT&T Louisiana), to collect and analyze detailed subscriber and competitive data. Among other things, the data show that most Lifeline customers choose to obtain their Lifeline benefit from a wireless provider. In Illinois, 95.6 percent of the Universal Service Administrative Company's (USAC's) 2013 disbursements to Lifeline providers were to wireless carriers. In Louisiana, that figure is 95.9 percent.

When the Commission asserts that price cap carriers "recover the costs associated with many of those [non-high-cost-funded ETC] obligations from other sources" it cites its Lifeline program as the prime example.[90] The Commission fails to acknowledge the significant administrative costs associated with Lifeline participation. By the Commission's own estimate, participating in its Lifeline program costs providers approximately $600 million a year, or about 37 percent of the $1.64 billion/year program.[91] Additionally, Lifeline is a pass-through program, which means that carriers are reimbursed $9.25/month per customer for each $9.25 discount they

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[90] *See Seventh Order on Reconsideration* at ¶ 122 & n.268 ("For example, the Commission reimburses incumbent LECs for their provision of Lifeline service . . . that is distinct from the high-cost universal service program. . . .").

[91] FCC Supporting Statement, 3060-0819 (Sept. 2012), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201207-3060-011. The $600 million figure does not include costs that are not borne by all ETCs (e.g., the estimated $20 million/year that prepaid wireless Lifeline providers incur to comply with the Commission's non-usage rule). *See also* Universal Service Administrative Company, Federal Universal Service Support Mechanism Fund Size Projections for Fourth Quarter 2014, at 19 (August 1, 2014) *available at* http://www.usac.org/about/tools/fcc/filings/2014/Q4/USAC%204Q2014%20Federal%20Universal%20Service%20Mechanism%20Quarterly%20Demand%20Filing%20-%20Final.pdf (estimating the total annual 2014 Lifeline support to be $1.64 billion).

provide to their Lifeline customers. The Commission should not compel providers to incur such substantial non-reimbursable costs by requiring them to participate in the Lifeline program. This is particularly true given that Lifeline consumers do not desire price cap carrier-provided Lifeline benefits. Compelling a certain class of carrier to offer a service that is costly to provide and that consumers do not want is the wrong policy.

III. THE COMMISSION'S MOBILE WIRELESS PROPOSALS ARE ARBITRARY AND OTHERWISE UNLAWFUL.

The Commission seeks comment on two key mobile wireless proposals. First, the Commission proposes to exclude from the areas eligible for Mobility Fund Phase II (MFII) support only those areas covered by 4G LTE provided by either AT&T or Verizon, rather than any area covered by 4G LTE services offered by any mobile wireless provider. Second, the Commission proposes to accelerate the phase-out of wireless frozen support for those providers whose frozen high-cost receipts are one percent or less of their wireless revenues. Both proposals are substantially flawed and require significant revisions before the Commission could adopt them.

A. The Commission Should Target Mobility Fund Phase II Support To Areas That Lack 4G LTE Offered By *Any* Mobile Wireless Provider.

AT&T supports the Commission's proposal to target MFII support to those areas currently unserved by 4G LTE.[92] We agree with the Commission that its universal service programs, including MFII, should "preserv[e] and extend[] service in those areas that will not be served by the market without governmental support."[93] However, the Commission offers no

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[92] *FNPRM* at ¶¶ 239-41.

[93] *Id.* at ¶ 239.

explanation for why it is proposing to ignore that sensible and principled limitation when it identifies areas eligible for MFII support. Specifically, the Commission proposes to exclude from MFII eligibility only those areas that have 4G LTE provided by *AT&T or Verizon*. Inexplicably, areas that have 4G LTE provided by Sprint, T-Mobile or any other mobile wireless provider *would* be eligible for MFII support. In other words, it appears the Commission is essentially proposing to provide MFII funding to Sprint, T-Mobile and any other mobile wireless carrier that is already providing 4G LTE service in a particular area as long as that carrier is not called "AT&T" or "Verizon." Under this construct, mobile wireless carriers not named "AT&T" or "Verizon" may be able to receive MFII funding for doing nothing more than they do today, which is provide 4G LTE service.

Not only is this proposal discriminatory, in contravention of the Commission's competitive neutrality principle, it also is arbitrary and capricious, and wasteful. Instead of awarding universal service funding to providers that are already offering 4G LTE service, the Commission should exclude from MFII eligibility *any* area covered by 4G LTE, regardless of the identity of the service provider. This modification to the Commission's proposal would more effectively implement the Commission's "commitment" "to target the Mobility Fund Phase II funding in a way that preserves mobile service where it only exists today due to support from the universal service fund and to extend service to areas unserved by 4G LTE."[94] For the former (the corner cases where an area is receiving 4G LTE service by only one provider and that sole carrier receives federal high-cost support to provide mobile wireless service in that discrete area), the Commission could permit that provider to demonstrate through a waiver petition that

[94] *FNPRM* at ¶ 240.

continued funding is necessary in order for it to maintain 4G LTE service in that area.[95] If the Commission grants the waiver petition, then the Commission could deem that area eligible for the MFII competitive bidding process.

B. The Commission's Proposal To Eliminate Mobile Wireless Frozen Support On A Flash-Cut Basis For Recipients That Receive Little Funding Compared To Their Revenues Is Arbitrary And Capricious, And Unprincipled.

The Commission proposes an accelerated phase-down in legacy high-cost support for certain wireless providers using a misguided and arbitrary standard. As proposed, if a mobile wireless provider's frozen support receipts are "one percent or less of its wireless revenues," then the Commission proposes eliminating that carrier's support with a flash cut by the end of 2014 or on the effective date of the rule, whichever is later.[96] This proposal would undo the careful balance that the Commission struck in its *USF/ICC Transformation Order*.

In that order, the Commission decided to terminate its so-called "identical support" rule, through which the Commission awarded high-cost support to mobile wireless carriers (called, competitive ETCs or CETCs) based on the per-line support amount that the Commission provided to the underlying ILEC in that area. This rule undoubtedly spurred mobile wireless deployment in rural, high-cost areas but it did so in an inefficient manner as it allowed multiple CETCs to receive support for providing service in the same area, even when that area may have been served by mobile wireless providers that did not receive support. AT&T advocated that the Commission phase out legacy high-cost support (including CETC support) over a five-year period (reducing CETC support in 20 percent/year increments) and transition that support to an

[95] *See id.* at n.467 (citing *USF/ICC Transformation Order* at ¶ 542 and finding that a "mobile provider should include in its waiver petition 'evidence demonstrating that it is the only provider of mobile service in a significant portion of any study area for which it seeks a waiver.'").

[96] *FNPRM* at ¶ 253.

Advanced Mobility Fund.[97] The Commission agreed and adopted a five-year phase-down in CETC support, finding that this "transition is desirable in order to avoid shocks to service providers that may result in service disruptions for consumers" and a five-year phase-out allows CETCs "to adjust and make necessary operational changes to ensure that service is maintained during the transition."[98]

Ignoring these prior findings about the importance of avoiding flash cuts in support, which it repeats several times in its 2014 *CAF II Report and Order*[99] (to which the *FNPRM* is appended), the Commission proposes to do just that for certain mobile wireless providers. Eliminating wireless frozen support on a flash-cut basis by the end of 2014 or on the effective date of the rule (whichever is later) is inappropriate for any provider, regardless of how much or how little frozen support it receives.

Given that the comment cycle for this *FNPRM* will not close until September, it is unlikely that the Commission will release an order and final rules addressing this and other issues until some time in the fourth quarter – at the earliest. Thus, by the time any such rule becomes effective, affected carriers only may have a week or two before their support is eliminated on a flash-cut basis. It is true that the courts have given the Commission deference when it has balanced the various principles in section 254(b).[100] That balancing act, however,

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[97] AT&T Comments at 90, 109-110, WC Docket No. 10-90 (filed April 18, 2011).

[98] *USF/ICC Transformation Order* at ¶ 513.

[99] *See CAF II Report and Order* at ¶ 50 ("the Commission generally prefers to avoid flash cuts in support . . ."), ¶ 51 ("The Commission's desire to avoid flash cuts has led it to adopt transitions of varying lengths for various reforms adopted in the *USF/ICC Transformation Order*. . . ."), & n.90 (citing the *USF/ICC Transformation Order* at ¶¶ 242, 802, which discusses "the Commission's desire to avoid flash-cuts").

[100] *See, e.g.*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) ("The Commission enjoys broad discretion when conducting exactly this type of balancing.").

cannot exclude altogether a particular statutory principle.[101] Under section 254(b)(5), the Commission's universal service support mechanisms must be "predictable." To give any meaning that that statutory requirement, the Commission cannot adopt a rule that eliminates on a flash-cut basis a carrier's high-cost support on the same day or within a week or so that the rule becomes effective.[102]

In addition, eliminating affected carriers' support with a flash cut will leave these carriers with unfunded ETC service obligations, which is precisely what the Commission sought to avoid when it issued its *Mobility Fund Phase I ETC Forbearance Order*. As we discussed above, that decision enabled parties to avoid "tak[ing] on *unsupported ETC obligations* in portions of rural carriers' study areas – areas that may not be eligible for support or for which they may not win support."[103] To prevent that result here, AT&T believes its mobile wireless ETC affiliates would require approximately six months' notice in order to relinquish their ETC designations. Of course, this assumes prompt state commission (and Commission) consideration of these affiliates' ETC relinquishment notifications, which is a factor outside the control of any ETC.

The Commission's proposed one percent threshold is the textbook definition of arbitrary and capricious. The Commission asserts that carriers affected by its proposal are not relying on

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[101] *See, e.g.*, *Qwest Corp.*, 258 F.3d at 1200 ("the FCC may exercise its discretion to balance the principles against one another when they conflict, *but [it] may not depart from them altogether to achieve some goal*") (emphasis added).

[102] In some cases, carriers like AT&T Mobility make business decisions premised on the availability of high-cost support consistent with the Commission's rules (i.e., a predictable, five-year phase-down in support). Moreover, many of AT&T Mobility's ETC affiliates file progress reports with their state commissions and the Commission. These reports describe and depict how these affiliates spent their prior year's high-cost support to improve coverage and capacity and how they plan to spend the upcoming year's support to increase coverage and capacity in their ETC areas. Depending on permitting and construction status, the abrupt elimination of a carrier's support could result in stranded investment or require re-planning in ETC areas.

[103] *Mobility Fund Phase I ETC Forbearance Order* at ¶ 15 (emphasis added).

this support to maintain existing service[104] yet it makes no effort to explain why one percent, as opposed to five percent, or some other percentage is reasonable or anything other than arbitrary, which it plainly is. Nor does the Commission attempt to justify its suggestion to include *all revenues* for purposes of calculating the one percent (i.e., wireless and non-wireless revenues, telecommunications and information service revenues alike) and to perform this total revenue review at a holding company level.[105] It is not even clear that the Commission has tested its proposed metric to determine which companies will be captured by this arbitrary threshold and whether its assumption that these carriers are "not relying on such support" has any basis in fact. Companies of vastly different sizes and investment profiles could be caught in this net with totally unpredictable results for each one of them.

While AT&T does not believe the Commission could or should salvage this misguided proposal, we note that it would be far more appropriate to consider the wireless voice revenues of an ETC (and that ETC alone) in order to evaluate whether the amount of frozen wireless support the ETC receives is "a tiny fraction of its revenues."[106] These modifications would be an improvement but even with these changes, AT&T and, perhaps, others would oppose any Commission effort to implement this flawed and unlawful proposal.

The Commission's justification for maintaining wireless frozen funding for other carriers unaffected by this one percent cut-off is its "concern[] that some areas of the country may lose service if competitive ETC funding is further phased down before the rules for Mobility Fund

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[104] *FNPRM* at ¶ 253.

[105] *Id*.

[106] *Id*.

Phase II are adopted."[107] If this truly is the Commission's concern, then the logical and more effective way to address it is to determine whether there is at least one other unsubsidized facilities-based provider offering mobile wireless service in the same geographic area as a wireless frozen support recipient. If there is, then by the Commission's own measure, the sole justification for continued legacy wireless support does not exist in that area. Thus, if the Commission is determined to accelerate the phase down in CETC support, AT&T recommends the following framework: In the event that there is only one provider offering mobile wireless service in a particular area and that provider receives frozen high-cost support, the Commission should apply its existing rules (i.e., suspend the phase down until it implements MFII and then resume the phase down as scheduled).[108] For those areas where there is at least one facilities-based unsubsidized provider offering mobile wireless service in the same geographic area as a wireless frozen recipient, the Commission could reinstate the phase-down in support for that carrier (i.e., not wait to implement MFII before resuming the 20 percent/year phase down).

AT&T proposes a reasonable, principled, and statutorily compliant basis for the Commission to accelerate the phase out of frozen support in areas where an unsubsidized provider is offering mobile wireless service. Additionally, AT&T's proposal is consistent with the Commission's rules identifying CAF II-eligible areas, as well as its MFII proposal (albeit with the modifications AT&T proposes above). Finally, as we recommended above for price cap carrier ETC designations, AT&T urges the Commission to sunset mobile wireless carriers' ETC designations at the time it eliminates their support, unless the carrier notifies it otherwise. Not

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[107] *Id.* at ¶ 252.

[108] 47 C.F.R. § 54.307(e)(5).

only is this proposal the right policy, it is the most efficient means to address what otherwise would likely be a flood of relinquishment petitions.

IV. SEVERAL PROPOSED CAF II REQUIREMENTS WARRANT FURTHER MODIFICATION.

A. The Commission Should Clarify Several Fundamental Issues That Remain Unclear Prior To Offering The State-Level Commitment.

The Commission proposes several service obligations that, if adopted, would apply to some or all CAF II recipients. Before we discuss these Commission proposals, we recommend that the Commission clarify or confirm several other obligations or presumed obligations before the Commission implements CAF II. Prospective CAF II recipients need a full understanding of the requirements associated with accepting funding before they can determine whether the support will, as intended, improve the business case for deploying broadband to the identified high-cost areas. Every obligation must be clearly defined so that all parties – regulators, recipients, and USAC auditors – have a common understanding of how deployment goals are to be met and compliance will be confirmed. The stakes are high for everyone involved, and particularly for consumers in rural areas who lack broadband today.

First, the Commission should confirm that the ETC service area for any CAF II recipient should correspond to the set of high-cost locations for which that entity will receive funding. Second, all CAF II recipients should be subject to the same service obligations[109] and those obligations must be known to prospective CAF II participants before either they are offered support (price cap carriers via the state-level commitment) or they bid for support (competitive bidding participants). The Commission should not adopt CAF II service obligations that evolve

[109] AT&T thus agrees with the Commission's proposal to require all CAF II recipients to adhere to the same usage and latency standards. *FNPRM* at ¶ 149.

during the service term but that remain undefined at the time of providers elect to participate.[110] For example, if the Commission desires to increase the downstream speed of CAF II-supported broadband service during the CAF II service term, all prospective providers must know what that increase will be and when it will go into effect before they must decide whether to participate in CAF II.[111] It is for this reason that AT&T suggests the Commission revisit its determination that, for price cap carriers that accept the state-level commitment, the usage allowance could change over the service term to some as-yet undefined amount.[112] This decision runs counter to the Commission's conclusion that "[t]o plan a network, recipients of support need to know ahead of time what will be expected of them."[113] Instead, the Commission should establish what that minimum usage allowance will be during the entire CAF II service term in its final CAF II rules.

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[110] This is equally true of state requirements. Since this is federal support for broadband, an interstate information service, it is AT&T's view that the states lack the authority to establish requirements on this funding and the Commission should prohibit states from imposing CAF II obligations on CAF II recipients. Moreover, to the extent that any state-specific CAF II obligation imposes a cost on a CAF II recipient and the state fails to provide funding to offset in full that cost, the state regulation is burdening the federal mechanism and should be preempted under section 254(f) as being inconsistent with the Commission's support mechanism. If the Commission is unwilling to preempt states from imposing conditions on this federal support, at a minimum, it should require states to inform prospective CAF II participants what those state-specific requirements are before these providers have to decide whether to accept funding (state-level commitment) or participate in the CAF II competitive bidding process. Once a provider accepts CAF II support, the Commission should prohibit states from imposing any new obligation on CAF II recipients.

[111] *See, e.g.*, *FNPRM* at ¶ 157 (providing an example of a change during the service term that would be known to prospective CAF II participants in advance of the state-level commitment election or the competitive bidding process). As we discuss below, changing the speed of the required service from 4 Mbps downstream to 10 Mbps downstream, as an example, has significant consequences in terms of how CAF II providers must design and construct their networks. The Commission should expect that increasing the downstream speed further will have similar consequences. It is therefore essential for prospective CAF II recipients to be able to calculate the costs they might incur to comply with service obligations that change during the service term in order to decide whether they should participate.

[112] *See Connect America Fund*, WC Docket No. 10-90, 28 FCC Rcd 15060, ¶ 18 (WCB 2013) (*CAF II Service Obligations Order*). AT&T also recommends that the Commission reconsider its decision to reserve the right to adjust the CAF II latency standard based on the work of the Internet Engineering Task Force. *Id.* at n.57.

[113] *FNPRM* at ¶ 157.

If the Commission believes that its 100 GB minimum usage allowance may need to increase during the CAF II service term, it should adopt a rule that increases the usage allowance to a defined amount at a defined year (e.g., year 5 of an 8-year term or year 7 of a 10-year term). While such a decision may render ineligible some providers or technologies at the outset, it is better for these providers to know about any service obligation change now then halfway through the service term. If the Commission is reluctant to eliminate certain types of providers based on a future requirement, then it should simply adhere to the 100 GB minimum usage allowance and have the confidence that if the market demands much higher allowances, service providers will respond and increase their allowances whether they are required to do so.

Similarly, prospective CAF II recipients must know prior to accepting funding what the Commission and USAC will require of them to demonstrate that they meet the CAF II service requirements. In other words, in the event of a USAC audit, the Commission's rules should explain in advance of its offer of the state-level commitment how a CAF II recipient would need to demonstrate that it satisfies all of the CAF II service obligations.

Finally, the Commission requests comment on "issues related to [its annual reporting and certification procedures] that are applicable to all Connect America Fund recipients that are required to offer broadband service as a condition of receiving high-cost support."[114] The Commission seeks comment on several specific items, including its proposed broadband reasonable comparability certification. In its *CAF II Service Obligations Order*, the Wireline Competition Bureau (Bureau) concluded that a price cap carrier could demonstrate its compliance with the broadband reasonable comparability requirement by certifying that it offers fixed services meeting the Commission's broadband requirements for the same or lower prices in

[114] *Id.* at ¶ 310.

rural areas as urban areas.[115] And, for this purpose, the price cap carrier need not offer a particular rate nationwide; the Bureau found that it is sufficient for the carrier to offer the same rate in an urban area in the state where it accepts CAF II funding.[116] The Commission proposes to codify this common sense presumption in a rule of general applicability.[117] We agree but we recommend the following edits to the Commission's proposed rule:

§ 54.313(a): Any recipient of high-cost support shall provide

(12) a letter certifying that the pricing of the company's broadband services is not more than the applicable benchmark as specified in a public notice issued by the Wireline Competition Bureau, or is no more than the non-promotional prices **that the company** charge**s**~~d~~ for comparable **broadband** ~~fixed wireline~~ services in urban areas **within the state**.

AT&T recommends that the Commission replace "fixed wireline" with "broadband" in recognition that CAF II providers may not be fixed wireline broadband providers. Similarly, the Commission should amend its proposed rule in section 54.309 to incorporate the reasonably comparability presumption described above.

B. The Commission Could Adopt Its Proposal To Require All CAF II Recipients To Offer Broadband At A Speed of 10 Mbps Downstream If The Commission Makes Other, Related Changes.

The Commission's proposal to require all CAF II recipients to offer broadband service at a downstream speed of 10 Mbps[118] might be reasonable as long as the Commission gives CAF II recipients the flexibility to provide this service to fewer than 100 percent of the eligible locations

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[115] *CAF II Service Obligations Order* at ¶ 8.

[116] *Id.*

[117] *FNPRM* at ¶ 313.

[118] *See id.* at ¶ 140.

in their funded areas and the Commission gives these recipients the opportunity to obtain support for an additional three years.

While AT&T believes that it would be able to offer broadband service at 10 Mbps down/1 Mbps upstream to most CAF II-eligible locations with CAF II funding using technology that either is available today or will be available within the next several years, there may be pockets of CAF II-eligible locations where providing broadband at a downstream speed of 10 Mbps may not be economically viable, even with CAF II support. For this reason, it is essential that the Commission pair any decision to increase the downstream speed to 10 Mbps from the current 4 Mbps with giving CAF II recipients the flexibility to provide service to some percentage that is less than 100 percent of the CAF II eligible locations in its CAF II ETC service area. Additionally, the technologies and network design needed to deliver 10 Mbps downstream/1 Mbps upstream are substantially different from those that would have enabled the prior 4 Mbps downstream/1 Mbps upstream standard. Meeting a 10 Mbps downstream requirement is therefore likely to cause price cap carriers to redesign their networks in a significant way, which not only adds to these carriers' costs, it also adds time. AT&T also does not believe it could meet the current CAF II state-level commitment build-out milestones[119] if it has to offer broadband service at 10 Mbps downstream/1 Mbps upstream. For that reason, the Commission should give price cap carriers the opportunity to obtain an additional three years of support and time to complete the CAF II build-out.

Elsewhere in the *FNPRM*, the Commission requests comment on whether it should permit all CAF II recipients to provide service to 95 percent, not 100 percent, of the funded

[119] *See* 47 C.F.R. § 54.313(e).

locations, with the provider's CAF Phase II funding adjusted, accordingly.[120] AT&T supports this proposal and recommends that the Commission lower the minimum to 90 percent. Just as the Commission correctly recognized that the "actual cost for a provider to serve census blocks that are above the extremely high-cost threshold may, in fact, be less than is predicted by the cost model,"[121] so, too, is it likely that there are pockets within eligible census blocks where a provider's actual cost to serve is higher, perhaps significantly so, than predicted by the cost model. If a provider has the flexibility to deploy service to something less than 100 percent of the eligible locations in a state, it will be able to manage its costs more effectively, thereby enhancing the prospects that it would be willing to seek CAF II support. Requiring that service be offered to something less than 100 percent of the funded locations is consistent with the Commission's decision in MFI to require recipients to provide service to "at least 75 percent of the road miles" where they receive support.[122] In that context, the Commission also indicated that if the MFI recipient's coverage is less than 100 percent, "the recipient will receive support only for those road miles actually covered."[123] Allowing similar flexibility in CAF II acknowledges the reality of network deployment where the on-the-ground situation can be considerably different than imagined during the planning stages.

If the Commission permits CAF II recipients to provide service to less than 100 percent of the eligible locations, which it should, the Commission asks whether it should require a CAF

[120] *FNPRM* at ¶ 165.

[121] *Id.* at ¶ 31.

[122] *USF/ICC Transformation Order* at ¶ 365. *See also id.* at ¶ 366 (noting that commenters explained that, due to the "high expense of providing last mile coverage in difficult circumstances, requiring 100 percent coverage may dissuade parties from seeking support and expanding coverage").

[123] *Id.* at ¶ 367.

II recipient to specify the percentage of locations to which it will provide broadband service at the time the Commission first authorizes its funding or whether the recipient should be permitted to adjust that number during its CAF II service term.[124] AT&T recommends that the Commission require the CAF II recipient to specify upfront what percentage it will build to and the Commission should fund it on that basis (rather than assuming that the recipient will build to 100 percent of the locations and paying the CAF II recipient 100 percent of the funding). This approach ensures that funds are not sidelined by committing them to a provider that is unlikely to use them. Instead, the up-to-10 percent that a CAF II recipient opts to forgo could be put to better use by another provider to provide service in additional unserved areas.

The Commission also requests comment on the methodology it should use in the event a CAF II recipient opts to provide broadband service to less than 100 percent of the eligible locations. The Commission proposes two methodologies: "modelled-support method" and "direct-proportion method."[125] AT&T recommends that the Commission use the direct-proportion method for all CAF II recipients, which means that for every one percent of locations a recipient does not serve, its support would decrease by one percent. This methodology is the only one that could be implemented at the time of CAF II acceptance. The modelled-support method could not be implemented at the time of acceptance because CAF II recipients simply will not be able to identify which locations will fall into the up-to-10 percent category until well into the network build process. Moreover, the modelled-support methodology seems as though it will be difficult (if not impossible) for USAC to administer.

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[124] *FNPRM* at ¶ 165.

[125] *Id.* at ¶ 166 & n.350.

If a carrier provides service to something less than what it committed (e.g., 92 percent instead of the promised 95 percent), USAC should recover support using the direct proportional methodology, which would be tied to the number of locations to which the recipient failed to provide broadband by the end of the service term. USAC's recovery should go back to the carrier's first CAF II payment. In the event the carrier deploys broadband service to a larger number of locations than what it initially committed (e.g., it initially commits to 92 percent but ends up providing broadband to 97 percent of the locations), the Commission could either true up the carrier's support at the end of the service term (by giving it more support, as it will do with the MFI recipients)[126] or take no further action. AT&T's view is that additional funding is unnecessary in this circumstance as the CAF II recipient plainly did not require extra support to complete those additional builds.

If the CAF II recipient's final build is less than 90 percent of the eligible locations, which is the minimum AT&T recommends the Commission establish, the Commission could consider the recipient to be in default of its performance obligations and it could assess a penalty of, perhaps, 5 percent of the total amount awarded, in addition to the recovery we discuss above (e.g., provider initially commits to 92 percent but ultimately builds to 82 percent of the locations). AT&T opposes the Commission recovering *all* of the support that the CAF II recipient received or imposing a penalty in excess of 5 percent of the recipient's total funding if it fails to satisfy all of its performance obligations. Doing so is unnecessarily punitive and fails to account for the fact that the CAF II recipient may have experienced delays outside of its control (e.g., permitting delays, delays caused by labor or materials shortages). AT&T and other prospective CAF II participants would be unlikely to participate at all in CAF II if they could

[126] *USF/ICC Transformation Order* at ¶ 367.

lose all of their support in the event they failed to meet a particular performance standard even though they were in substantial compliance with all of other performance obligations. The purpose of CAF II is to offer broadband to Commission-identified eligible areas, not to penalize recipients that are making good faith efforts to meet the requirements. For that reason, it is essential that the Commission consider the goals of the program and the reality of major network construction projects when it determines the consequences to a CAF II recipient if the provider misses a performance requirement. And, of course, the Commission should communicate those consequences clearly before it offers CAF II funding to any provider.

C. The Commission Should Modify Its Definition Of "Unsubsidized Competitor" To Account For Any Service Provider That Satisfies The CAF II Service Obligations Regardless Of Technology.

The Commission proposes to exclude from the offer of model-based CAF II support any census block that is served by a facilities-based terrestrial competitor offering fixed residential voice and broadband services that meets the Commission's service requirements.[127] AT&T recommends that the Commission modify its proposed requirement to exclude any census block that is served by a facilities-based provider offering residential voice and broadband services that meet the Commission's CAF II service requirements, finding that funding overbuilders is a wasteful use of the Commission's tight CAF II budget.[128] Thus, it should decline to discriminate against providers using a particular technology (e.g., mobile wireless or satellite providers) by treating these areas as CAF II-eligible as long as these alternative technology providers offer voice and broadband services that satisfy the CAF II requirements. Similarly, the Commission

[127] *FNPRM* at ¶ 174.

[128] *Id.* at ¶ 175 (expressing skepticism that funding overbuilders is an efficient use of CAF II dollars).

should of course exclude such areas (including areas served by price cap carriers that meet the CAF II requirements) from the CAF II competitive bidding process.[129]

D. The Commission Should Adopt Its Proposal To Sunset CAF II ETC Designations Upon Expiration Of The Service Term And The Commission Should Adopt Its CAF II ETC-Related Designations Deadlines.

As is evident from the discussion above in Section II, AT&T supports the Commission's proposal to sunset an ETC designation tied to CAF II participation after the funding term has expired and the CAF II recipient has fulfilled its build-out and service obligations.[130] Our prior discussion also should make clear how unnecessary it is, as the Commission suggests, to convert automatically a CAF II ETC designation to Lifeline-only ETC designations at the conclusion of the CAF II ETC's service term. The data are quite clear that there most certainly are other providers offering Lifeline benefits in such areas. This does not preclude a former CAF II ETC from voluntarily electing to continue operating as a Lifeline-only ETC. Rather, it is AT&T's belief that, in virtually all cases, such an automatic conversion is unnecessary to ensure that eligible low-income consumers continue to have access to Lifeline-discounted service and the Commission should assume that retaining a Lifeline-only ETC designation is both unnecessary and not desired by the former CAF II ETC. What happens to their ETC designations at the close of their service term is another ground rule that all prospective CAF II participants must

[129] *Id*. The Commission seeks comment on whether it should exclude served areas only if the current provider certifies that it is willing and able to continue providing broadband for a specified period of time, such as five years. *Id.* at ¶ 177. Such a certification may have a superficial appeal but AT&T does not recommend that the Commission adopt this requirement because these provider certifications could never be enforced in the event the provider discontinues service in a particular area before the end of that five-year term.

[130] *Id.* at ¶ 184.

understand before they are asked to participate (either via the state-level commitment or through the competitive bidding process).

Finally, AT&T supports the Commission's proposal to adopt deadlines for when a winning bidder must file its CAF II ETC application and when a state commission must act (or not) on such an ETC application.[131] If a state commission considers a CAF II ETC application, AT&T also recommends that the Commission either prohibit states from imposing state-specific obligations on CAF II ETCs or require states to inform CAF II ETC applicants in writing what those state-specific ETC requirements are before it acts on the CAF II ETC application. In the event that a state seeks to apply its own obligations on CAF II participants, the Commission should permit these participants to default without any penalty.

E. The Commission Should Exclude Areas Covered By Rural Broadband Experiment Proposals From CAF II Eligibility Only When The Commission Awards Funding To Those Applicants.

The Commission requests comment on whether it should remove from CAF II eligibility areas covered by formal proposals for Rural Broadband Experiment funding.[132] The clear and obvious answer is no. Based on the 1,000+ expressions of interest, requesting over $11 billion in funding,[133] the Commission will have more formal requests for funding than it has funding but many of those requests, like the expressions of interest, could be far from satisfying even the most basic requirements for support. If the Commission removes from a price cap carrier's state-

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[131] *Id.* at ¶¶ 181 (proposing that winning bidders submit a CAF II ETC application within 30 days of the public notice announcing that it is the winning bidder) & 182 (proposing a rebuttable presumption that the state commission lacks jurisdiction if it fails to open a proceeding on the CAF II ETC application within 60 days or if it fails to decide a CAF II ETC application within 90 days).

[132] *Id.* at ¶¶ 220-23.

[133] *Rural Broadband Experiments Order* at ¶ 5.

level commitment areas covered by formal proposals, it is sure to remove areas that will not receive Rural Broadband Experiment support. Another concern that the Commission identifies, which AT&T shares, is that such a proposal could incent would-be competitive bidders to file formal proposals that are less than sincere in order to remove census blocks that are desirable to the competitor from the state-level commitment. This action would make those census blocks unavailable during the state-level commitment but available for CAF II funding through the competitive bidding process. Also, other entities may file proposals simply to keep a CAF II-funded competitor out of their areas even though they do not intend to participate in the competitive bidding process.

The Commission should endeavor to award Rural Broadband Experiment funding before it offers price cap carriers the state-level commitment. Those areas covered by winning Rural Broadband Experiment bids should be removed from CAF II eligibility altogether (i.e., from the state-level commitment as well as the competitive bidding process if the price cap carrier declines the offer).[134] If the Commission is unable to issue Rural Broadband Experiment awards prior to the state-level commitment election or the competitive bidding process, then the Commission should decline to fund Rural Broadband Experiment proposals that are in census blocks covered by either a price cap carrier's state-level commitment or a winning CAF II competitive bid. No matter how the timing works out, the CAF II program should be given the priority in funding decisions because it is not an "experiment" but the Commission's statutorily required high-cost program.

[134] *Id.* at ¶ 18 (concluding that it will remove census blocks covered by winning Rural Broadband Experiment bids from CAF II eligibility).

V. CONCLUSION

AT&T respectfully requests that the Commission take action in accordance with the recommendations outlined above to ensure that its implementation of the Connect America Phase II high-cost program is consistent with its statutory requirements.

Respectfully Submitted,

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