IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	)))	No. 11-9900

MOTION TO HOLD IN ABEYANCE

The Federal Communications Commission ("FCC" or "Commission") respectfully moves the Court to hold this case in abeyance pending agency action on reconsideration. Because numerous reconsideration petitions currently pending before the FCC raise issues central to the claims petitioners intend to present to the Court in this case, holding this case in abeyance pending further administrative review is the appropriate course.

Statement of Liaison Counsels' Positions

On May 31, 2012, counsel for the FCC notified the Liaison Counsel for Petitioners that the Commission intended to file this motion.

The Liaison Counsel for Petitioners has indicated that most of the petitioners oppose this motion. Several parties have told him that they intend to file oppositions to this motion. The full statement of the position of the Liaison Counsel for Petitioners is set forth in an attachment to this brief.

The Liaison Counsel for Respondents is authorized to state that the United States, the FCC's co-respondent in this case, does not oppose the Commission's motion to hold the case in abeyance. A number of intervenors supporting respondents, including Verizon, Verizon Wireless, AT&T, the National Cable & Telecommunications Association, Comcast, Cox, Sprint, and Vonage, have informed the Liaison Counsel for Respondents that they support this motion.

<u>Background</u>

In the order on review in this case, the FCC undertook comprehensive reform of two major federal regulatory regimes: the universal service ("USF") program, which subsidizes the provision of telephone service in areas where the cost of providing service is high; and the intercarrier compensation ("ICC") system, which provides a framework for telephone companies to compensate each other for the cost of originating and terminating telecommunications traffic. *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*"). Within 30 days after the *Order* was published in the Federal Register, the Commission received more than 20 petitions for administrative reconsideration.

The Commission is now in the process of responding to the petitions for reconsideration. It has already issued three orders to address the issues raised by several of the reconsideration petitions.[1] At this point, however, many of the

[1] *See Connect America Fund*, Third Order on Reconsideration, FCC 12-52 (released May 14, 2012) ("*Third Reconsideration Order*"), *petition for review pending*, *Accipiter Commc'ns, Inc. v. FCC*, No. 12-1258 (D.C. Cir. filed June 13, 2012); *Connect America Fund*, Second Order on Reconsideration, FCC 12-47 (released April 25, 2012); *Connect America Fund*, Order on Reconsideration, 26 FCC Rcd 17663 (2011).

petitions for reconsideration of the *Order* are still pending before the FCC. As we explain below, a number of the pending petitions raise issues that are central to the claims that petitioners intend to present to this Court, and there is a substantial overlap between the issues raised in this litigation and those currently before the agency.

Although petitioners purport to raise "around 120 issues" in this case,[2] most of the briefs they propose to file present challenges to the FCC's new universal service program that coalesce around a single, overarching issue: whether the federal subsidy fund (the "Connect America Fund") established by the FCC's *Order* provides sufficient support to achieve the goal of universal service. Several of the pending petitions for FCC reconsideration concern the very same issue: the sufficiency of the Commission's new universal service funding regime. Indeed, a number of the specific issues presented by the reconsideration petitions substantially overlap with the matters identified by petitioners as issues that the Court will be called upon to address in this litigation. For example:

- In its petition for administrative reconsideration, the National Exchange Carrier Association ("NECA") has argued that the total amount of funds set aside for universal service is not "sufficient" to

[2] *See* Report of Liaison Counsel for Petitioners and Intervenors in Support of Petitioners, June 11, 2012, at 1. Petitioners' liaison counsel acknowledges that the petitioners' Appendix of Issues Raised contains "significant" or "very significant" "overlap" in places. Appendix of Issues Raised at 73, 76; *see also id.* at 36, 48, 52 (noting the presence of possible additional overlap).

satisfy the agency's statutory obligation to "preserve and advance universal service." NECA Petition at 6-8 (citing 47 U.S.C. § 254(b)(5).[3] Petitioners in this litigation have indicated that they likewise plan to raise the issue of the sufficiency of universal service funding in the first and second parts of their proposed First Main USF Brief.[4]

- NECA and the United States Telecom Association ("USTA") have asked the FCC to reconsider the requirement that universal service funding recipients offer broadband services that meet certain minimum performance standards. NECA Petition at 2-6; USTA Petition at 3-5, 9-11. Similarly, petitioners have indicated that they plan to challenge this broadband service requirement in Part I of their proposed Second Main USF Brief. *See* Scheduling Motion at 13 n.9.

- NECA seeks FCC reconsideration of the FCC's caps on recovery of capital and operating costs under the new universal service rules. NECA Petition at 9-13. Those same caps will be challenged in Parts II.D and II.G of the First Main USF Brief that petitioners propose to file. *See* Scheduling Motion at 13 n.9.

- NECA has asked the Commission to reconsider whether its standards for granting waivers of the universal service funding caps are too strict. NECA Petition at 19-22. Likewise, petitioners intend to challenge the reasonableness of the FCC's waiver procedures in Part II.E of their proposed First Main USF Brief. *See* Scheduling Motion at 13 n.9.

- The Blooston Rural Carriers have asked the Commission to reconsider its plan to use "reverse auctions" to distribute universal service funds for the expansion of wireless telecommunications service in rural areas. Blooston Rural Carriers Petition at 3-9. At the

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[3] Copies of the reconsideration petitions that are cited in this motion are attached.

[4] *See* Petitioners' Motion to Establish a Procedural Schedule ("Petitioners' Procedural Motion"), filed June 11, 2012, at 12-13 n.9. We cite petitioners' procedural motion solely to illustrate that petitioners plan to file briefs that address a number of the same issues raised by the pending reconsideration petitions. As we explain in our opposition to petitioners' procedural motion (filed herewith), we do not agree with various aspects of petitioners' briefing proposals.

> same time, in their proposed brief, wireless carrier petitioners plan to challenge the lawfulness of this "single winner auction scheme" to allocate universal service funding. *See* Scheduling Motion at 4 n.3.

Similarly, there is substantial overlap between the intercarrier compensation issues that petitioners plan to raise in this litigation and the issues currently before the FCC in the reconsideration petitions. For instance, NECA and USTA have asked the FCC to reconsider its new rules establishing a recovery mechanism to mitigate the effect of reduced intercarrier revenues. NECA Petition at 29-33; USTA Petition at 30-34. Various petitioners plan to challenge the same cost recovery mechanism in the proposed ICC "supplemental" brief. *See* Scheduling Motion at 8 (ICC Issues for Supplemental Briefs, Issues 1 and 2). In addition, Sprint Nextel, MetroPCS, and USTA have each asked the FCC to reconsider its rules addressing access stimulation or "traffic pumping" (*i.e.*, efforts by carriers to increase the ICC payments they receive by artificially inflating their call volumes). Sprint Nextel Petition at 7-11; MetroPCS Petition at 16-20; USTA Petition at 35-37. Access stimulation is another issue that petitioners plan to address in the proposed ICC "supplemental" brief. *See* Scheduling Motion at 9 (ICC Issues for Supplemental Briefs, Issue 5).

Argument

As shown above, many of the petitions for administrative reconsideration that are currently pending before the FCC concern the same core universal service issue raised by petitioners in this litigation: the sufficiency and scope of the agency's new universal service system. Similarly, other reconsideration petitions focus on the other principal issue raised by this litigation: the reasonableness of the Commission's plan to reform its intercarrier compensation system.

Because the reconsideration petitions currently pending before the FCC raise issues central to the case before this Court – and because the issues raised on reconsideration substantially overlap with those raised in this litigation – the Court should "hold the appeal in abeyance pending the Commission's further proceedings, keeping the record open for supplementation to reflect those proceedings." *Wrather-Alvarez Broad., Inc. v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957). This Court has taken that approach on a number of occasions in order to "prevent[ ] the wasteful consumption of judicial resources when a timely petition for reconsideration has been filed and further administrative action could render judicial review unnecessary." *Reppy v. Dep't of Interior*, 874 F.2d 728, 730 (10th Cir. 1989). *See, e.g., Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1247 (10th Cir. 1999); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 623 (10th Cir. 1983); *Koppel, Inc. v. United States*, 612 F.2d 1264, 1266 (10th Cir. 1979).

The Court should follow the same approach here. FCC action on reconsideration could substantially narrow the scope of the issues before the Court – or even render some issues moot. This should greatly assist the Court. Any FCC action on reconsideration that might reduce the lengthy litany of issues petitioners propose to present would help make this case more manageable and streamlined.

Even if none of petitioners' claims is rendered moot by FCC action on reconsideration, the Court will benefit from allowing the Commission to address the reconsideration petitions before briefing begins in this case. Once the agency has acted on reconsideration, the Court will be able to review the FCC's *Order* on the basis of a more complete record. Moreover, the Commission's further explanation of its reasoning on reconsideration could help facilitate the Court's review of the highly complex issues presented by this litigation.

Petitioners will not be prejudiced if the Court postpones review of this case while the Commission addresses the pending reconsideration petitions. Petitioners did not seek a stay of the challenged rules. Therefore, the rules are already in effect.[5] Moreover, petitioners themselves took nearly three months to respond to the Court's March 13, 2012 order requesting the submission of a list of issues in this case. Petitioners' delay in filing a list of issues with the Court belies any suggestion that there is an urgent need for judicial review of this case. In any event, if the Court grants this motion, it could direct the Commission to submit

[5] We understand that one of the petitioners plans to seek a stay of universal service rules that the Wireline Competition Bureau recently adopted in a separate order: *Connect America Fund*, DA 12-646 (Wireline Comp. Bur. released April 25, 2012) ("*Bureau Order*"). The *Bureau Order* is not before the Court in this case. It was issued after the order that petitioners challenge here, and was based on a different rulemaking record from the order on review.

periodic status reports on the reconsideration proceedings. Such reports would allow the Court to monitor the agency's progress and help ensure that this litigation will not be unduly delayed.

Conclusion

For all of the foregoing reasons, the Court should grant this motion and hold this case in abeyance until the FCC acts on pending petitions for reconsideration.

Respectfully submitted,

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June 25, 2012

11-9900

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161, Petitioners

v.

Federal Communications Commission
and United States of America, Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of the Order Governing Motion Practice dated March 13, 2012, I hereby certify that the accompanying Motion to Hold in Abeyance contains 1,834 words.

/s/ James M. Carr

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June 25, 2012

ATTACHMENTS

(1) Statement of Liaison Counsel for Petitioners
(2) NECA Petition for Reconsideration
(3) USTA Petition for Reconsideration
(4) Blooston Rural Carriers Petition for Reconsideration
(5) Sprint Nextel Petition for Reconsideration
(6) MetroPCS Petition for Reconsideration

LIAISON COUNSEL FOR PETITIONER COMMENTS[1]

Respondent FCC's James Carr notified me that the FCC planned to file a motion to hold the entire case in abeyance about a week before Petitioner Liaison Counsel filed the consensus motion for a comprehensive and expedited briefing schedule. The FCC did not share a copy of the motion with me, but did spend a few minutes on the phone orally describing the motion.

Specifically, the FCC indicated the agency will be claiming that outstanding petitions seeking reconsideration on seven issues (out of - it should be noted - 160 specifications of error/out of 120 discrete issues/subissues) justifies holding this case in abeyance.

While certainly not unexpected, the motion, at least as described, appears to present very little to justify holding the entire case in abeyance. Viewed most favorably, the motion, which I have not seen, might foreshadow FCC "ripeness" arguments on brief of unspecified merit, but not much else. A more pointed

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[1] IMPORTANT CAVEAT: Liaison Counsel for Petitioners circulated his draft comments to all parties (except the FCC and the United States) via the Liaison Counsel listserve prior to supplying it to the FCC. <u>However, shortly before I forwarded my comments to the FCC, I discovered that several counsel on the listserve DID NOT receive the notice</u>. Therefore, it is unclear how many parties actually saw my comments before I forwarded them to the FCC. I did receive comments or responses from four parties.

review will necessarily have to wait until the undersigned can examine the actual motion text.[2]

The minority of intervenors that ONLY filed in support of the FCC (and are not also petitioners or supporting petitioners) and AT&T (who has stated they will oppose all other petitioners' specifications of error) are the only parties to this proceeding likely to support this FCC motion. At least one party that intervened both supporting and opposing the FCC on some aspects of the order indicated they will take no position on the motion. Many others are likely to oppose delay. For the overwhelming majority of petitioners/intervenors in support of Petitioners, including NARUC, NASUCA, the other State petitioners/intervenors, as well as the National Exchange Carrier Association, the Blooston Rural Carriers, and other incumbent carriers, the opposition will be vigorously advanced and unequivocal - *unless of course, the FCC is willing to immediately stay ALL implementation of the*

[2] According to the FCC, those issues are [1] traffic pumping/access stimulation rules; [2] sufficiency of the budget for the universal service fund; [3] the required offering of broadband services; [4] caps the FCC has imposed on operating costs; [5] wavier process objections; [6] use of reverse auctions to designate Essential Telecommunication Carriers for certain areas; and [7] rules for recovering costs, i.e., the access recovery charge, based on requests for reconsideration filed by the National Exchange Carrier Association, at http://apps.fcc.gov/ecfs/document/view?id=7021752064, on issues 2, 3, 4, 5, & 7, United States Telecom Association, at http://apps.fcc.gov/ecsf/document/view?id= 7021752209, on issues 3 & 7, Blooston Rural Carriers, at http://apps.fcc.gov/ecfs/ document/view?id=7021752182, on issue 6, Sprint-Nextel, http://apps.fcc.gov/ecf s/document/view?id=7021752209, on issue 1, and Metro PSC, http://apps.fcc.gov /ecfs/document/view?id=7021752064, on issue 1.

order AND specify it will act on the listed outstanding petitions within a specific timeframe.[3]

Petitioners will present arguments demonstrating that expeditious resolution of this appeal is crucial suggesting, *inter alia*, that:

States are already making major and expensive changes to State programs as a result of the order on review's blatant usurpation of authority Congress specifically reserved to the States. At least two States are currently considering the need to create a State fund to assure local rates remain affordable in areas losing funding under the revised plan. Until specific provisions challenged in this order are either vacated or upheld, States (and carriers) will be necessarily operating in limbo – seeking State legislative fixes serially and adjusting continuously State regulations to try to match up to the radical restructuring and reallocation of authority and of resources presented by the FCC's order. As

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[3] Counsel for [1] Halo and Transcom, [2] CenturyLink, [3] C-Spire, [4] RICA, and [5] RBA sent e-mail specifying they will be filing to oppose this FCC motion. Russ Lukas, representing Petitioners ~~Cellular South~~ U.S. Cellular, Nex-Tech Wireless & Cellular Network Partnership, ~~ALP~~ DOCOMO Pacific, and PR Wireless, sent an e-mail that said: "Our wireless carriers clients intend to oppose the FCC's motion to hold the case in abeyance primarily on the grounds that the FCC was without jurisdiction to allow USF support to be used for broadband Internet access service and holding the case in abeyance will serve to prolong the FCC's misappropriation of universal service funds." Some counsel expressing unequivocal opposition noted that "In the unlikely event [the FCC] motion included an effective stay of the Order, we would reevaluate."

described, the FCC motion does not cite issues related to the key preemptive ruling in the order – its assumption of authority over intrastate access charges.

The issues actually raised present an interesting spectrum. For example, it is certainly interesting, but very much typical of the FCC to ask this Court to hold the case in abeyance based on the issue about the use of auctions and the fidelity of that process to the statutory text until most certainly AFTER the reverse auctions currently slated for third quarter 2012 are held (and if abeyance is granted for any time at all – most likely pushing any possible Court decision also PAST the second auction set for sometime in 2013).

However viewed, it is apparent that the issues raised are a very, very small subset of those raised by petitioners. Moreover, even on the reconsideration issues, this Court's resolution of several statutory authority issues raised in the original order is still justified. After all, by definition, any argument the FCC raises in the abeyance motion, *should* translate directly into a ripeness argument on the particular issue – arguments that, if the Court finds them persuasive, can defer action on that narrow issue <u>without delaying resolution of the others</u>. In short, the motion should not be granted. Alternatively, the Court could proceed with an expedited review of all other issues raised on appeal and simply hold review of a few of the discrete issues raised by the FCC in abeyance – subject to a 3 month deadline for FCC action. Imposing a deadline is appropriate given the FCC's not infrequent problems with addressing universal service related petitions for reconsideration in anything close to a timely manner. See, e.g., the July 11, 2001 FCC Notice[4] to many parties that filed petitions for reconsideration of a much smaller and less controversial FCC universal service order OVER THREE YEARS earlier in 1997, asking that:

> parties that filed petitions for reconsideration of the *Universal Service First Report and Order* in 1997 now file a supplemental notice indicating which of such issues they still wish to be reconsidered. In addition, parties may refresh the record with any new information or arguments they believe to be relevant to deciding such issues.
>
> Interestingly, in the same document, the FCC notes that:
>
> Since then, there has been substantial litigation concerning many of the rules adopted in the *Universal Service First Report and Order*. As a result, many of the issues raised in the petitions for reconsideration may no longer remain in dispute."

Indeed, in the undersigned experience, often in the USF context, waiting for the FCC to act is an exercise if not futility, of at least extreme patience.

Any further delay is enormously prejudicial to the petitioners.

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4 *Parties Asked To Refresh The Record Regarding Reconsideration Of Rules Adopted In The 1997 Universal Service First Report And Order*, FCC Notice DA No. 01-1647 in Docket No. 96-45 (rel. July 11, 2001), available online at: http://transition.fcc.gov/Daily_Releases/Daily_Digest/2001/dd010711.html.

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION AND CLARIFICATION

of the

NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES; and
WESTERN TELECOMMUNICATIONS ALLIANCE

December 29, 2011

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Summary

The Rural Associations listed above seek reconsideration and/or clarification of several aspects of the Commission's *Order* in the above-captioned proceeding.

RLECs are thoroughly committed to expanding broadband services to their customers. However, any *obligation* to provide such services should be established only after a broadband-oriented Connect American Fund (CAF) mechanism that provides sufficient and predictable support is adopted for these carriers. The Associations accordingly first request the Commission reconsider its decision to impose new, unfunded public interest obligations on rural rate-of-return regulated local exchange carriers (RLECs) until such time that a new, sufficient CAF mechanism is in place.

Second, the Associations seek reconsideration of the Commission's imposition of various new cost recovery caps and limitations on RLECs. In particular, the Commission should reconsider the sufficiency of its overall high-cost support budget for RLEC areas and allow for potential expansion of available funds to meet actual broadband needs. The Commission should also reconsider its premature decision to adopt regression-based caps on recovery of capital and operating expenses.

Several other aspects of the *Order*'s approach to cost recovery limitations should be reconsidered as well. Specifically, the Commission should reconsider its decision to set an end-user rate floor at the national average of such rates. By definition, an "average" rate cannot be considered an "artificially low" rate. The Commission should also reconsider several aspects of its decisions regarding phase-out or elimination of the safety net additive (SNA) support mechanism. Additionally, the Commission should reconsider its decision to impose a per-line cap on RLECs' overall legacy high-cost support, as this will not accomplish any significant

savings for the universal service fund (USF), yet will have devastating effects on a small number of RLECs and their customers.

Third, the Commission should abandon its unreasonably stringent approach to considering waivers of rules governing USF disbursements and additional funding for access replacement support. The waiver processes described in the *Order* will impose substantial burdens on small companies, and appear designed primarily to discourage companies from seeking relief. The Commission should instead continue to rely on the "good cause" standard specified in section 1.3 of its rules, and provide a concrete and realistic path to obtaining such waivers where needed to meet the objectives of universal service.

Fourth, the Commission should substantially revise the annual reporting requirements imposed on RLECs by the *Order*. The Commission should instead continue to rely primarily on existing monitoring mechanisms, including those established in cooperation with state commissions under section 254 of the Act. The Commission should also refrain from requiring RLECs to submit audit reports by April 1 of each year, as compliance with this rule may be nearly impossible for most small companies. The burdensome performance reports required under new section 54.313 should also be reconsidered, as regulatory requirements will require RLECs to divert precious resources from providing service to customers to filling out reports.

Fifth, the Commission should reconsider its approach to represcribing the interstate rate of return. The abbreviated notice-and-comment process adopted in the *Order* will not satisfy the hearing requirement of section 205(a) of the Act. The Commission instead needs to follow a two-step process, whereby it would first resolve the numerous flaws it has previously identified with traditional cost of capital analyses as applied to small, non-publicly traded RLECs. At that point, it would be possible for the Commission to conduct a fact-based paper hearing, including opportunities for parties to present direct cases and rebuttal testimony, that will conform to the hearing requirement of section 205(a), as well as the Administrative Procedure Act.

Finally, the Commission should reconsider several aspects of the intercarrier compensation (ICC) rules adopted in the *Order*. Most critically, the Commission must provide a reasonable opportunity for RLECs to recover interstate costs allocated by the Commission's own rules to switched access rate elements. Under the *Order*, these costs will be relegated to the regulatory and economic equivalent of a black hole. The Commission must resolve this problem either by reconsidering its decision to cap and then reduce carriers' eligible recovery amounts in a lockstep manner, or by permitting RLECs to establish a new rate element designed to recover allocated costs not otherwise recovered via end-user charges or ICC CAF support.

The Commission should also reconsider several other aspects of its ICC rules, including methods used to calculate ICC CAF support. Specifically, the Commission should revise its rules so that baseline interstate revenue requirements are based on actual cost studies rather than tariff forecasts, clarify methods for estimating minutes of use (MOU), and change the proposed base period Fiscal Year to July 1 – June 30 rather than ending it on September 1. The Commission should also revise or clarify rules governing calculation of net reciprocal compensation revenues to include transit costs, clarify the distinction between "local" and "toll" Voice Over Internet Protocol (VoIP) traffic in light of today's telecommunications marketplace, clarify that access charges may be applied to intraMTA traffic routed via interexchange carriers (IXCs), and further strengthen its call signaling rules, as the limited requirements imposed by the *Order* will not be sufficient to address previously-identified problems.

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

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
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Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION AND CLARIFICATION
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES; and
WESTERN TELECOMMUNICATIONS ALLIANCE

Pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the rural telephone associations listed above hereby seek reconsideration and/or clarification of certain aspects of the Commission's November 18, 2011 *Order*[1] in the above-captioned proceeding.

[1] *Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers,*

I. THE COMMISSION SHOULD ADOPT A SUFFICIENT AND PREDICTABLE CONNECT AMERICA FUND MECHANISM *BEFORE* IMPOSING BROADBAND-RELATED PUBLIC INTEREST OBLIGATIONS ON RATE-OF-RETURN CARRIERS.

As carriers based in and committed to serving their communities, rural rate-of-return regulated local exchange carriers (RLECs) are committed to universal broadband service. Although they have obtained impressive broadband build-outs in reliance on existing high-cost support mechanisms, expansion of such services will require additional, predictable support.

The *Order* imposes a number of new broadband-related public interest obligations on eligible telecommunications carriers (ETCs), including RLECs, in connection with receipt of legacy high-cost universal service fund (USF) and/or Connect America Fund (CAF) support, including the requirement that offer broadband service that meets certain minimum performance requirements exceeding what RLECs typically offer today.[2] The Commission further expects that such services will be provided at rates that are "reasonably comparable" to offerings of comparable broadband services in urban areas. The Commission also imposed a series of reporting requirements on USF/CAF recipients with respect to the provision of both voice *and* broadband services to consumers.[3]

WC Docket No. 07-135, *High-Cost Universal Service Support,* WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (*Order* or *FNPRM*).

[2] *Id.* ¶ 206. As of July 2010, approximately 70 percent of RLEC service areas did not have access to the 4/1 Mbps broadband service required under the Order. *E.g.,* Comments of OPASTCO, NECA, NTCA, and WTA, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337 (filed July 12, 2010) at 7. The performance level and extent of RLECs' current broadband service deployments has generally been hampered by high "last mile" facility costs, and the fact that existing support mechanisms do not include support for critical "middle mile" connections to the Internet backbone. *Id.* at 58.

[3] *See* 47 C.F.R. § 54.313(a)(11).

These obligations conflict, however, with many operative provisions of the *Order*. Most glaringly, there is as yet no CAF for RLECs to permit achievement of these objectives. Instead, USF changes applicable to RLECs consist entirely of cuts to existing support mechanisms and additional limits on cost recovery, which together will undermine the ability of RLECs to deploy new broadband services, maintain existing broadband services, and otherwise satisfy the new broadband public interest obligations identified in the *Order*.[4]

If current levels of support have not enabled widespread availability of broadband service meeting the *Order*'s performance metrics, then *cutting that support* will certainly not enable carriers to extend or upgrade service upon "reasonable request" or otherwise. Moreover, even if a carrier receives CAF support as part of ICC reform, that support – which represents an explicitly declining revenue stream to replace lost ICC revenues – cannot reasonably be expected to enable the delivery of standalone broadband services in high-cost areas where it is not available today.

While the Commission repeatedly asserts that its USF and ICC reforms will provide carriers with greater certainty and predictability, *e.g.*, *Order* at ¶¶ 125, 221, 286, 291, the opposite is true: in addition to uncertainty regarding the adequacy of funding under the yet-to-be-determined CAF mechanism for RLECs, along with the unknown impacts of new regression-based limitations on reimbursable capital and operating costs, RLECs are now threatened with greater challenges through the *FNPRM.* These include, but are not limited to: the potential reduction in the authorized rate-of-return; loss of support based on instances of competitive overlap; and, despite Commission assurances to the contrary, potential increases in problems

[4] *E.g.*, *Order* ¶ 45.

with phantom traffic and access avoidance behaviors during a transition to a mandatory zero rate for all switched services (except transit).

The Commission suggests that "waivers" might somehow allow carriers to obtain support to meet broadband public interest obligations and achieve statutory universal service objectives, but that supposed route is obstructed by both the plain language and clear tone of the *Order*. As an initial matter, and as described below, the process for obtaining a waiver is quite onerous.[5] Moreover, the Commission has warned explicitly that waivers will be difficult to come by.[6] Given prior history, small companies facing the need for emergent relief are unlikely to have any confidence that waivers can be obtained before irreparable harms occur.[7]

It is also unclear how a provider could obtain a waiver for failure to meet the Commission's *broadband*-oriented objectives and related public interest obligations when the waiver process requires a showing "that the reduction in high-cost support would put consumers at risk of losing *voice* services . . . ."[8] An RLEC might be quite capable of providing voice service throughout a massive study area, but face extreme difficulty in delivering *any* level of higher-cost broadband (never mind 4/1 Mbps speeds) to wide portions of that study area at anything approaching an affordable or reasonably comparable rate.

More astounding is the construct that would condition USF support to meet *mandatory* performance obligations upon a *discretionary* waiver; that sequence simply fails to meet any

[5] *Id.* ¶¶ 542-544; *see also* section III, *infra*.

[6] *Id*. ¶ 540.

[7] *See* Letter from Hon. Greg Walden, Chair, Subcommittee on Communications and Technology, and Hon. Cliff Stearns, Chair, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, to Chairman Julius Genachowski (dated Dec. 21, 2011) (noting that, as of July 2011, 5,328 petitions, more than a million consumer complaints, and 4,185 license applications that had been sitting for more than two years).

[8] *Id*. ¶ 540 (emphasis added).

notion of sufficiency or predictability required by section 254 of the Act.[9] As an accounting matter the amount of support available under the rules should "tick and tie" to the obligations imposed, rather than leaving carriers to hope that they can "back into" compliance with specific obligations based upon the slim likelihood of obtaining a waiver for additional support. Accordingly, the purported availability of waivers will do little, if anything, to blunt the serious impacts of the caps and cuts that merit reconsideration for the reasons described below.

In the face of cuts to existing high-cost support in the *Order*, with no specific or predictable broadband-focused mechanism in place, and with the threat of more cuts in the *FNPRM*, the Commission should not compel RLECs as a class of carriers to adhere to broadband-focused obligations as a matter of law. It should instead revisit these issues at such time as a new CAF mechanism can be shown to provide sufficient and predictable support that enables them to satisfy such obligations. Specifically, the Commission should refrain from requiring RLECs: (i) to provide broadband service "upon reasonable request" or otherwise; (ii) to provide broadband at rates that are reasonably comparable to those charged in urban areas; or (iii) to provide standalone broadband throughout an entire study area if it is offered in any portion thereof.[10] The Commission should also refrain from requiring RLECs to submit reports of broadband network performance tests, as specified in new section 54.313(a)(11), unless and

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[9] 47 U.S.C. § 254(b)(5).

[10] Among the many items that must be addressed prior to imposition of new service extension requirements is the nature of the "broadband" service RLECs will be expected to provide. That is, while the *Order* defines certain technical characteristics of "broadband service", it does not address whether RLECs can satisfy these requirements by continuing to offer the common carrier *broadband transmission services* they currently provide to their ISP customers, or whether they must now begin offering *broadband Internet access services* directly to consumers in order to continue qualifying for high-cost USF support. *See generally* Comments of NECA, NTCA, OPASTCO, WTA, and ERTA, GN Docket No. 10-127 (filed July 15, 2010). Clarification of this issue is needed before RLECs will even begin to be in a position to comply with the speed, latency, capacity and price reporting requirements imposed by the *Order*.

until such time specific, sufficient and predictable funding is provided for the underlying broadband services. Finally, the Commission should clarify that RLECs will not be required to satisfy any specific performance criteria with respect to broadband services unless and until sufficient funding is available, including the availability of funding explicitly intended to support robust "middle mile" transport.

II. THE SUPPORT CUTS AND COST RECOVERY LIMITATIONS IN THE ORDER MUST BE RECONSIDERED OR CLARIFIED SO AS TO AVOID CONFLICTS WITH THE PUBLIC INTEREST OBLIGATIONS IMPOSED BY THE ORDER, THE GOALS OF THE REFORMS, AND THE NEW UNIVERSAL SERVICE PRINCIPLE ADOPTED BY THE COMMISSION.

A. The Commission Should Reconsider the Sufficiency of its Budget for High-Cost Universal Service.

The *Order*, for the first time, establishes a defined budget for the high-cost component of the USF, set at the estimate for the size of the high-cost program for FY 2011 ($4.5 billion).[11] The Commission asserts that setting the budget at this level will "minimize disruption and provide the greatest certainty and predictability to all stakeholders."[12] Even if true, however, the Commission's budget-setting exercise fails to incorporate an explicit and detailed determination of how this budget (and its particular piece-parts) would be *sufficient*. Once the Commission defines the network facilities and services supported by federal universal service mechanisms, sections 254(b) and (e) of the Act require it to *preserve and advance* universal service via "specific, predictable, and sufficient" support mechanisms.[13]

The *Order* fails to provide any explanation as to how maintaining funding at current levels – or reducing support to entire subsets of carriers of last resort (COLRs) within that budget

[11] *Order* ¶ 125.

[12] *Id*.

[13] 47 U.S.C. § 254(b)(5).

– is consistent with its statutory mandate of sufficiency.[14] The Commission itself has acknowledged that the higher-capacity broadband networks of tomorrow cannot be built with today's funding levels.[15] As discussed above, the budgeted amount for RLEC areas in particular is inadequate when compared to the new public interest obligations imposed by the *Order* and requirements to ensure that services will remain "reasonably comparable" in scope and price going forward. Under the reforms in the *Order* along with those threatened in the FNPRM, few, if any, RLECs will be in position to *advance* broadband, and some may not even be able to sustain the DSL-speed broadband they have deployed today.

The Commission should accordingly adopt a more practical approach to "budgeting" that balances the need for fiscal responsibility with continued deployment and operation of broadband-capable networks in rural areas. The RLEC Plan's "budget target" for rate-of-return service areas of $2 billion to start, growing to $2.3 billion over six years, was aimed to "edge out" broadband to the unserved, while also making sure that consumers in RLEC areas would not be left behind or "leapfrogged" as broadband service capabilities evolve.[16] It provided "headroom" for important mobility objectives and increased deployment in areas served by price cap carriers while accommodating ICC reforms and adequate restructuring. In fixing support for consumers in RLEC areas at $2 billion – *including* ICC restructuring – the Commission's budget will only ensure an ever-widening digital divide to the particular disadvantage of customers in

[14] *Order* ¶ 2.

[15] *See Connecting America: The National Broadband Plan*, FCC (rel. Mar. 16, 2010) at 136-138, 143-148. *See also Omnibus Broadband Initiative,* The Broadband Availability Gap: OBI Technical Paper No. 1 (April 2010).

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

RLEC service areas.[17] The Commission should reconsider its budgeting approach and adopt the RLEC Plan budget as proposed.

At a bare minimum, if the Commission does not adopt the RLEC Plan budget structure it should incorporate an inflation adjustment within the budget set forth in the *Order*. The Commission has recognized the value of inflation adjustments in other contexts. By way of example, in measuring contribution burdens on consumers and businesses, the Commission explains that it will divide total inflation-adjusted expenditures of the existing high-cost program and CAF (including the Mobility Fund) each year by the number of American households and express the measure as a monthly dollar figure.[18] Similarly, section 54.507(a)(1) of the Commission's rules adjusts the E-rate program's annual cap based on the gross domestic product chain-type price index (GDP-CPI) as a measure of inflation.[19] Allowing adjustments to a "target" funding level consistent with the GDP-CPI measure of inflation will at least maintain the target's value and achieve consistency across programs.

[17] The RLEC Plan's proposed budget, as captured in a joint letter signed by and filed with several larger carriers, included a provision pursuant to which AT&T and Verizon would forgo certain funding, if needed, to enable growth in RLEC USF/CAF support from $2 billion to $2.3 billion over several years. *See* Letter from Walter B. McCormick, Jr., United States Telecom Association, *et al.*, to Chairman Genachowski, FCC, WC Docket No. 10-90 (filed July 29, 2011). In other words, as part of the consensus framework, the two largest carriers in the industry *affirmatively and expressly agreed* to enable reasonable growth in RLEC funding over six years through their own initiative. Yet the Commission inexplicably declined to adopt the written offer made by the two largest carriers in the industry to forgo a portion of their own support for the good of rural customers served by the smallest carriers.

[18] *Order* ¶ 58.

[19] 47 C.F.R § 54.507(a)(1).

B. The Commission Should Reconsider Several Aspects of its Caps on Capital and Operating Expenses

The Commission's proposal to apply "regression analysis" caps on recovery of capital expenditures (CapEx) and operating expenses (OpEx) is unlawful and not rational in a number of respects. In particular, the Commission's decision to apply the caps retroactively to investments made prior to the effective date of the Commission's implementing rules is so fundamentally at odds with the Act and basic principles of administrative law that certain parties have sought review of the Commission's *Order* before the appellate courts, in lieu of seeking reconsideration.[20] Other aspects of the Commission's regression analyses approach remain to be determined in the *FNPRM* phase of this proceeding. The Associations expect to file comments on these issues in January 2012.

In this Petition, the Associations ask the Commission to reconsider specific determinations with regard to regression-based caps that appear to pre-judge the operation of the caps prior to allowing interested parties the opportunity to comment on specific methods to be utilized and to analyze the impacts of such decisions. These issues are described below.

<u>*Premature Adoption of Regression Analysis-Based Constraints.*</u> The Commission's determination to use regression analyses to develop the new caps is premature and improper given that the methodology for doing so is subject to further examination pursuant to the *FNPRM* and Appendix H of the *Order*. Although the Associations understand the Commission may alter this methodology based upon comments, its firm conclusion to utilize regression analyses in the first instance leaves no room to argue that other approaches might be used in

[20] *See, e.g., National Telecommunications Cooperative Association v. Federal Communications Commission* (4th Cir., filed Dec. 8, 2011).

whole or in part as a substitute to achieve the kinds of constraints sought by the Commission.[21] By firmly adopting the use of a regression analysis before giving parties the ability to consider whether this approach truly works or whether other constraints might yield better results, the Commission has ventured down a path that could limit cost recovery in unworkable or unlawful ways. The Commission should accordingly reconsider its conclusion to utilize a regression analysis to develop the new caps, and should state instead that it will *examine* a regression analysis approach such as that in Appendix H, subject to adequate notice and comment, *before* it adopts and implements a particular form of investment or operating expense constraint.[22]

Unlawful Adoption of "Dynamic" Caps. The Commission should reconsider its decision to change the caps each year based upon a refreshed "run" of the regression analyses. This approach creates a "race to the bottom," in which carriers will be encouraged to invest less in plant and spend less on operations – even if the "job to be done" (such as delivering 4/1 Mbps speed broadband) in a given area requires such expenditures – simply to avoid being affected by the caps. Moreover, this dynamic capping does nothing to restore predictability to the high-cost program but instead only exacerbates uncertainty. Under these caps, it appears that a carrier could actually reduce or maintain existing investment and expense levels during a given year but still suffer unexpected reductions in its HCLS (and/or ICLS) if its "peer group" has changed or if its existing peers have reduced their costs faster.

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[21] The Associations suggested a reasonable constraint on investment as part of the RLEC Plan. *See Rural Associations April 18 Comments*, Appendix A.

[22] The Commission's decision to delegate to the Wireline Competition Bureau the authority to establish regression-based constraints raises serious legal concerns as well. *E.g.*, Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Oct. 21, 2011) at 2.

The Commission dismissed these concerns in the *Order* by noting that the current HCLS mechanism is unpredictable.[23] This is hardly reassuring. The Commission should *fix* uncertainty within the HCLS mechanism rather than exacerbate it by introducing more unpredictability. To remedy this shortcoming, the Commission should find that any caps based upon regression analyses will, once developed, remain in place for at least seven years before being "refreshed." This would give carriers a more reasonable time horizon against which to plan investments and adjust operations than a cap that dynamically and unpredictably changes each year.

Premature Application of Caps to ICLS. Application of new caps on cost recovery through ICLS is hasty and injudicious. Even as it adopts this requirement, the *Order* acknowledges that neither the Commission nor any party has any sense yet of how to implement this or the effects of it.[24] The Associations understand the Commission's desire to *examine* this issue, and welcome participation in a thorough debate about *whether* such a measure should be adopted. But to adopt this approach first and then try to figure out later if and how it can work – without any discussion or consideration of the impacts of doing so – is highly questionable as a matter of reasoned rulemaking. The Commission should reconsider this decision and state instead that it will *examine* the potential application of the new caps to ICLS, subject to adequate notice and comment.[25]

[23] *Order* ¶ 220.

[24] *Id*. ¶ 225.

[25] At a minimum, the Commission should reconsider the timing for extension of the corporate operations expense cap to the ICLS mechanism, and the effective date of all other operating expense caps to be developed through the regression analyses. Under the *Order*, the corporate operations expense cap will immediately extend to ICLS well before any mechanisms that might permit additional opportunities for interstate cost recovery through high-cost USF (such as proposed in the RLEC Plan) are adopted. The expense caps to be developed through the regression analyses would apparently take effect immediately upon adoption as of July 1, 2012,

"Double Capping" of HCLS. The Commission should reconsider its decision to siphon support away from the HCLS mechanism based upon application of the new caps.[26] The HCLS mechanism is already subject to an overall cap that results in many carriers receiving less support than they would by straightforward operation of the rules.[27] For this reason, in the context of the current corporate operations expense cap, any support reductions that occur as a result of the application of that current cap are redistributed to other HCLS recipients – these carriers are simply receiving support they would have received but for the overall cap on the mechanism.

This diversion of HCLS means that some carriers who are already suffering from a shortfall in cost recovery due to the overall cap will see no relief. The Associations understand that the Commission's intent is to preclude the "recycling" of savings from the new caps to those RLECs who are affected in some way by those caps.[28] But this policy is punitive in that it effectuates a "double cap" – the overall cap on HCLS and then the new caps – on RLECs who need such support in the first instance precisely because they serve high-cost areas.

Indeed, this policy runs the risk of penalizing RLECs who are highly "efficient" in nearly every way that the Commission might measure. For example, a carrier may exceed the benchmark in a single cost category or two by a minimal amount, say $1,000, but otherwise be hundreds of thousands of dollars below the benchmarks in all other cost categories subject to the

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even though no carrier will have seen those caps prior to that time. To ensure that carriers have adequate opportunity to adjust their operations for compliance with these new caps, the Associations suggest the Commission at a minimum delay implementation of *any* new operating expense caps, including extension of the corporate operations expense cap to ICLS, until no sooner than January 1, 2013.

[26] *Id.* ¶ 220.

[27] *See* 47 C.F.R. § 36.601(c).

[28] *See Order* ¶ 220. (support will only be redistributed to those carriers "whose unseparated loop cost is not limited by operation of the benchmark methodology").

regression analysis. Yet the Commission's policy would deny that RLEC the benefit of any "redistributed" HCLS. This is plainly irrational and contrary to the intent of the law.

The Commission's decision seems to overlook the undisputable fact that these are small companies who serve as COLRs in high-cost areas in which no other entity would serve. Denying these carriers the chance to recover more *but still not all* of the high loop costs associated with serving these large, sparsely populated areas is patently inconsistent with the *Order*'s stated objectives for universal broadband service availability.[29] The Commission should reconsider its decision with respect to the handling of HCLS reductions resulting from application of the new caps, and find instead that the entirety of those reductions will be redistributed to other RLECs – including those impacted by new caps -- within the overall capped HCLS mechanism.

C. The Commission Should Reconsider Or Modify Several Of The Other Capping Mechanisms Adopted In The Order.

1. The Commission Should Determine Reasonably Comparable Rates on the Basis of Standard Deviations, Rather than Arithmetic Average.

The *Order* limits high-cost support where end-user rates do not meet an urban rate floor based on the national average of the local rate plus state-regulated fees.[30] The Commission's intent is to reduce support for "artificially low" end-user rates.[31] The Associations submit that

[29] *E.g.*, *id.* ¶¶ 17, 22, 28, 48, 87.

[30] *Id.* ¶ 238.

[31] *Id.* ¶ 234.

the use of a statistical measure such as the standard deviation would identify more accurately those carriers whose rates are so-called "artificially low" or beyond reasonable comparability.[32]

There is nothing "artificially low" about an end-user rate that is a penny or even a dollar below the national average. Moreover, the Commission has previously relied upon standard deviations to establish reasonable comparability for USF purposes.[33] The plain language of the statute contemplates variances of the type accommodated by standard deviations as it instructs the Commission to ensure "reasonable comparability."[34] For these reasons, the Commission should reconsider the rule and replace the arithmetic average with a statistical measure to determine instances where end user rates are considered "artificially" low.

2. The Commission Should Reconsider Several Aspects of its Decision with Respect to the Elimination of Safety Net Additive Support.

In considering changes to the safety net additive (SNA) support mechanism, the Commission declined to adopt the Associations' suggestion that SNA qualification be based on total year-over-year changes in total telecommunications plant in service (TPIS), rather than on *per-line* changes in TPIS. It concluded instead that beneficiaries whose TPIS increased by more than 14 percent over the prior year at the time of their initial qualification should continue to

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[32] Arithmetic averages are influenced unduly by the presence of outliers, both above and below the mean. Therefore, even where the predominant number of rates is clustered closely to each other, the inclusion of a substantially higher or lower figure can produce an average that deviates from the cluster. In contrast, the standard deviation accommodates favorably a distribution of data across a range.

[33] *E.g.*, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Joint Petition of the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate for Supplemental Federal Universal Service Funds for Customers of Wyoming's Non-Rural Incumbent Local Exchange Carrier*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd. 4072 (2010) ¶ 43, n. 144; *see also Order* ¶ 592.

[34] *See, e.g.*, 47 U.S.C. § 254(b)(3). It is hard as a matter of logic to see how a single end-user rate could be considered both "artificially low" and yet "reasonably comparable" at the same time. Yet a benchmark floor based upon the national average would enable just such a result.

receive SNA support for the remainder of their eligibility period. For remaining beneficiaries, SNA support will be phased down in 2012.[35] No new SNA support for costs incurred after 2009 will be provided.[36]

In reaching these determinations, the Commission reasoned that even if SNA support is based on total (rather than per-line) TPIS, it would not ensure proper targeting or efficiency in investing.[37] The Commission's analysis failed to consider, however, that other provisions of the *Order* designed to limit recovery of CapEx and OpEx amounts via other high-cost mechanisms would also ensure that investment eligible for SNA support under the total TPIS test would be similarly confined, thereby restoring SNA to its original purpose. The Associations therefore request that the Commission reconsider its decision to eliminate SNA altogether, and instead adopt new qualifications for SNA support based upon total year-over-year changes in TPIS, as previously recommended.

At a minimum, the Commission should reconsider its conclusion that no SNA will be available for costs incurred between 2009 and the effective date of the *Order*. The Commission reasons that carriers are not "entitle[d]" to such support, and that "since early 2010, the Commission has given carriers ample notice that we intended to undertake comprehensive universal service reform in the near term."[38] This purported justification assumes the industry should have expected the Commission to engage in retroactive rulemaking. Parties aware of impending rule changes might reasonably be expected to reconsider *future* investment plans, but it is irrational to suppose carriers would refrain from making investments that qualify under

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[35] *Order* ¶ 249. For this group, SNA support will be reduced 50 percent in 2012, and eliminated in 2013.

[36] *Id.*

[37] *Id.* ¶ 251.

[38] *Id.* note 409.

current rules simply because future rules *might* change in some unforeseeable manner.[39] This outcome is patently inconsistent with "familiar considerations of fair notice, reasonable reliance, [and] settled expectations" embodied in the general prohibition against retroactive rules.[40]

Finally, the Associations request that the Commission reconsider the pace of its phase-down of support for those who are receiving SNA as a result of line loss. These recipients are often companies struggling to adjust to market developments, and the precipitous loss of SNA – coupled with many of the other significant reforms contained in the *Order* – could place some of these companies in significant peril. At a minimum, the Commission should therefore extend the phase-down of SNA support where attributable to line loss from two to four years, so that SNA support would be eliminated at the end of 2015 rather than 2013.

3. The Order's Adoption of a Per-Line Cap on High-Cost Support Imposes Substantial Damage on Small Companies with Little Aggregate Public Interest Benefit.

The Commission should reconsider its imposition of a $250 monthly per-line high-cost cap.[41] First, the *Order* provides no explanation whatsoever as to the basis for choosing $250 per month as a limit on per-line support. What is known, however, is that the rule as adopted will have limited benefit but devastating impacts on affected small companies. While the Commission has acknowledged an opportunity for waiver, the anticipated administrative and

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[39] Strict application of this logic would lead to the conclusion that no one should invest in broadband-capable network deployment in 2012 in reliance upon high-cost USF support because their support might change as a result of the pending *FNPRM*.

[40] *See, Marie v. Securities and Exchange Commission*, 374 F.3d 1196, 1207 (D.C. Cir. 2004) *(Marie v. SEC)* (SEC disciplinary action against auditors for 1994 actions invalidated because standard imposed was not effective during period of auditors' actions), *quoting Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The fact that USF processes in some cases incorporate delays between expenditures and recovery does not mitigate the general principle that the *impact* of regulations should be prospective-only.

[41] *Order* ¶ 274.

financial burdens of executing those waivers as discussed below argue for reconsideration of the rule.[42]

The Commission's imposition of a per-line cap on individual carrier high-cost support is intended, ostensibly, to be "consistent with fiscally responsible universal service reform."[43] This rule does not achieve that objective. By the Commission's own measure, the cap would only affect a few high-cost RLECs.[44] Savings from this measure would amount to less than three-quarters of one percent the total high-cost support received by RLECs. For affected end-users, however, the impacts would be disastrous – carriers would need to raise monthly rates anywhere from about nine dollars to $1,200 in order to recover resulting revenue shortfalls.[45]

The Associations do not dispute the need to ensure fiscal responsibility. But the per-line cap does not achieve that goal. There has been no finding that carriers requiring high per-line support amounts are, by definition, "irresponsible" or that their costs above $250 per line per month were not used, useful, or lawful; in fact, the FCC has recognized that the cost of providing terrestrial phone service in some rural areas is significant.[46] Nor are these carriers (or any other

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[42] *Infra*, section III.

[43] *Order* ¶ 273.

[44] *Id.* ¶ 277. ("We emphasize that virtually all (99 percent) of incumbent LEC study areas currently receiving support are under the $250 per-line monthly limit. Only eighteen incumbent carriers and one competitive ETC today receive support in excess of $250 per-line monthly, and as a result of the other reforms described above, we estimate that only twelve will continue to receive support in excess of $250 per-line monthly.")

[45] *Id.* at 46.

[46] *Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, *High-Cost Universal Service Support,* WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up,* WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 (2011) ¶ 210.

RLECs) placing significant strains on the high-cost USF program such that these draconian measures are warranted – as noted several times before in this record, RLECs' total high-cost USF support increased by only 3 percent on average between 2006 and 2010.[47]

The Commission should accordingly set aside monthly per-line caps and not consider similar measures until the impacts of other constraints the Commission has adopted are evaluated. Alternatively, the per-line cap should be applied on a prospective basis only, after costs of current investment have been recovered. Finally, if the Commission declines to reconsider the cap in the short-term, it should provide for an expedited waiver process, avoid applying the per-line cap while a waiver request is pending, and also lift the cap when other caps are imposed, since those constraints should have a broader impact on the Commission's objective to meet high-cost funding budgets.

4. The Commission Should Not Begin Phasing Out Support in Areas with Competitive Overlap Without Addressing Ongoing RLEC Obligations as COLRs and ILECs.

The *Order* states that the Commission has adopted a rule phasing out all high-cost support in study areas where an unsubsidized competitor, or combination of unsubsidized competitors, offers voice and broadband service for 100 percent of residential and business locations in an incumbent's study area.[48] Methods to identify overlaps and how to adjust support where overlaps are less than 100 percent will be considered in the FNPRM. [49]

Neither the *Order* nor the *FNPRM* address, however, the continued application of COLR obligations to RLECs facing elimination or reductions in support as a result of competitive overlap, or even whether such companies will continue to be treated as "incumbent" LECs under

[47] *Id.* at 59, Figure 7. *See also Rural Associations April 18 Comments* at 56, note 116.

[48] *Order* ¶ 283.

[49] *Id.* ¶¶ 1061-78.

the Act. These issues are critical and must be addressed prior to implementation of any such rule. The Associations accordingly request the Commission reconsider the Order insofar as it would require any phase-out of support in RLEC areas with 100 percent overlap, at least until such time that questions related to RLECs' ongoing obligations as COLRs and ILECs are resolved.

III. THE ORDER ESTABLISHES UNREASONABLY STRINGENT STANDARDS FOR OBTAINING WAIVERS OF THE SUPPORT REDUCTION RULES AND FOR REQUESTING ADDITIONAL CAF ICC SUPPORT.

Both the high-cost support waiver petition process established in section VII.G of the *Order* (“USF waiver petition process”) and the additional access replacement support request process established in section XIII.G thereof (“ICC additional support request process”) impose unreasonable burdens on RLECs and other small businesses, and should be reconsidered.

The Commission’s general rule governing waiver requests permits the filing of relatively brief, straightforward and inexpensive petitions for waiver.[50] Existing procedures also permit the Commission to exercise broad discretion to waive a rule where particular facts make strict compliance inconsistent with the public interest, and to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[51]

In stark contrast, the new high-cost USF waiver petition process requires submission of extraordinarily detailed information that will be difficult, if not impossible, for small companies

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[50] *See, e.g., Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Cedar-Wapsie Communications, Inc. Petition for Waiver of Section 54.904(d) Filing Deadline For Submission of Annual Interstate Common Line Support Certification, DialToneServices, L.P. Petition for Waiver of Section 54.307(c) of the Commission’s Rules*, *et al.*, Order, 26 FCC Rcd. 11069 (2011).

[51] *Id.* ¶ 10, citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

affected by funding cuts to assemble and submit.[52] ICC additional support requests also require RLECs to perform burdensome and outdated separations studies.[53] The type of RLEC most likely to consider filing a USF waiver petition and/or an ICC additional support request is one for whom loss of substantial USF and/or ICC revenues will threaten its very ability to survive. Cuts in support resulting from the changes announced in the *Order* will likely impose significant hardship on many small companies, and may require them to reduce service and eliminate jobs that are important to maintaining service, as well as the economic health of their local communities. And, yet, the Commission would have these companies divert resources to prepare and prosecute elaborate and extensive waiver petitions, while at the same time imposing new limits on recovery of such expenses from support mechanisms.

The *Order* fails to assess the impacts of these burdens on small companies.[54] Nor does the Commission consider whether any reasonable alternatives might be employed to avoid such burdens. Rather, by making it painfully apparent that such waiver requests will be subjected to a

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[52] USF waiver petitions under the *Order* will require, at a minimum, submission of (1) extensive and expensive geographic and demographic information; (2) information regarding the existence or lack of alternative voice providers, and whether any such alternative providers offer broadband; (3) Part 32 and Part 36 accounting information regarding unused and/or spare equipment; (4) detailed breakdowns of corporate operations expenses; (5) descriptions of all end-user rate plans; (6) lists of all non-voice services provided over supported plant; (7) descriptions of all cost allocation procedures; (8) audited (if available) or unaudited financial statements for the most recent three fiscal years (including costs and revenues of unregulated operations); (9) information regarding outstanding loans (including loan terms and recent restructuring discussions); and (10) information regarding the specific facilities that will be taken out of service if the waiver is not granted. *Order* ¶¶ 542-543.

[53] *Id.* ¶ 932

[54] The final Regulatory Flexibility Analysis (RFA) in Appendix O is deficient in that it does not address the cost and burden of the USF waiver petition process or the ICC additional support request process upon RLECs and other small businesses. Although the Commission recognizes that RLECs are non-dominant small businesses for RFA purposes, it does not consider or adopt any procedures that would make either process less burdensome and less expensive for RLECs and other small businesses. *Id.*, Appendix O ¶ 45.

rigorous review "comparable to a total company earnings review" and that they will not be granted except in extreme circumstances,[55] the Commission's "waiver" process appears to be nothing more than a fig leaf, designed to make small companies jump through administrative hoops in futile attempts to pursue relief.[56]

On reconsideration, the Commission should revise both the USF waiver petition process and the ICC additional support request process to make them much less burdensome and more equitable and attainable for RLECs and other small companies.[57] Specifically, the Commission should discard the various hurdles specified in the *Order* and instead simply apply the "good cause" standard applicable to waiver requests generally under section 1.3 of the rules.

If the Commission retains its stringent and inequitable waiver processes, it should afford RLECs the option to sub-divide their study areas and terminate service to portions thereof if their petitions for additional USF and/or ICC support are denied. Whereas this is a "solution" that RLECs do not desire, there is concern that instances may arise where the Commission's

[55] *See, e.g., Order* ¶ 540.

[56] Companies are also likely to be discouraged from filing such waiver requests by the prospect of lengthy delays in receiving responses. Relatively simple waivers of high cost support filing deadlines typically take about five months for processing, but many petitions languish for years. *See, e.g., Allo Communications Petition for Waiver of Section 54.307(c) of the FCC's Rules et al.*, CC Docket No. 96-45 and WC Docket No. 08-71, *et al*., Order, 26 FCC Rcd. 6178 (2011) (waiver petitions filed from 11.5 months to 5.2 years earlier); *Iowa Telecom Petition for Interim Waiver of the Commission's Universal Service High-Cost Loop Support Mechanism*, WC Docket No. 05-337, Order, 25 FCC Rcd. 5573 (2010) (waiver petition filed over four years earlier).

[57] The Commission's selective approach to imposing support cuts and reductions on RLECs, while proactively discouraging small companies from seeking relief, is patently unfair in comparison to its treatment of larger carriers like Verizon and AT&T. Based on a review of Verizon and AT&T's 2010 Annual Reports, for example, each of these companies had average annual net income during the 2001-2010 period in the range of $9.0 billion. That is, they each could fund the entire proposed $4.5 billion annual high-cost budget about twice. Yet, the *Order* will potentially provide these carriers with substantial new CAF and Mobility Fund support (as well as major access and reciprocal compensation savings) without any reference whatsoever to whether such funding is actually needed in light of their "total company earnings."

broadband service requirements are so burdensome, and where support is so limited, that RLECs may have no choice but to stop serving the more expensive portions of their study areas to prevent their entire company from spiraling into bankruptcy, leaving customers in those areas without service. This result would be in direct conflict with the universal service goals of the Act.

Finally, given the serious potential consequences of support reductions to end users, and the history of substantial delay in processing waiver petitions, the Commission should suspend implementation of any support reductions pending release of a final order on submitted waiver petitions regardless of what standard is applied in considering such waivers.

IV. NEW RULES IMPOSING ANNUAL REPORTING REQUIREMENTS ON RLECs ARE UNDULY BURDENSOME AND SHOULD BE SUBSTANTIALLY REVISED.

The new annual federal reporting requirements in section 54.313 of the Commission's rules should be reconsidered, and limited in both scope and content. They not only override established and effective state commission reporting and monitoring processes without any showing they are defective, but also impose expensive, unduly burdensome, and in some cases impossible information requirements and deadlines upon RLECs and other small companies.

Virtually all RLECs were designated as ETCs by their state commissions during the initial implementation of the Telecommunications Act of 1996 and have been subject to state commission ETC monitoring and reporting requirements since that time. Unless their state commission independently implemented some or all of the reporting requirements that the

Commission adopted in 2005 for FCC-designated ETCs,[58] these RLECs have not heretofore been subject to federal ETC monitoring and reporting requirements.[59]

The Commission should accordingly reconsider and reduce the scope of section 54.313 to encompass annual filing requirements solely for ETCs designated by the Commission pursuant to section 214(e)(6) of the Act. Whereas the Commission can always recommend or suggest reporting requirements to the states, it should continue to respect the rights and discretion of state commissions to maintain reporting requirements and monitoring procedures for state-designated ETCs that are congruent with the particular needs, resources and circumstances of each state.

Moreover, imposing the new federal reporting requirements on small RLECs will inflict substantial additional regulatory burdens and filing expenses on these entities.[60] For example, it will be very difficult, if not impossible for most privately-held RLECs to comply with section 54.313(f)(2)'s mandate for the filing of a complete, audited annual financial report (including non-regulated revenue) by April 1 of each year.[61] Obtaining outside auditing services during the January 1 to April 1 period is particularly problematic because accounting firms are overwhelmed with year-end financial reports and audits for publicly traded companies as well as

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[58] 47 C.F.R. § 54.209(a).

[59] The Commission has repeatedly recognized that the USF and ICC are "hybrid state-federal programs" and that the states need to remain "key partners" as these programs evolve (*Order* ¶ 15). The *Order* provides no evidence of inadequate, negligent or otherwise unsatisfactory monitoring of state-designated ETCs by state commissions during the more than 14 years that they have been responsible for that task. In fact, the Commission has retained its procedures and requirements for the annual October 1 state commission certifications pursuant to section 54.314.

[60] Again, the Commission's RFA in Appendix O fails to address the major new burdens and costs that new section 54.313's requirements will place on RLECs and other small businesses.

[61] Rural Utilities Service (RUS) procedures require RLECs and other borrowers to submit audited financial reports to RUS by April 30 of each year, but RUS routinely grants formal and informal extensions of this filing date, and does not impose self-effectuating penalties or funding reductions like those included by the Commission in section 54.313(j) for late filings.

corporate and individual tax returns.[62] A significant number of RLECs also participate in wireless partnerships and other joint ventures, often with larger carriers over whom they have no control or influence. Such RLECs often do not receive their year-end financial statements and/or K-1 partnership tax forms until March or months later, and therefore cannot prepare their consolidated financial statements for review by external auditors in time to meet an April 1 deadline. This requirement will also be particularly onerous for companies that have not been required by regulators, investors or lenders to conduct financial audits during recent years, and who therefore do not have recently-audited financial statements on which to base reports.

The self-effectuating penalties of section 54.313(j) will greatly exacerbate the difficulties and severity of the April 1 deadline. RLECs who through no fault of their own are unable to meet the current April 1 filing deadline stand to lose approximately 25 percent of the already reduced annual USF and ICC support that they urgently need to sustain their existing operations (and will lose another 25 percent if they cannot meet the secondary July 1 date). Section 54.313(j) is also far more onerous than similar prior rules that applied to individual high-cost support mechanisms because it reduces an ETC's entire USF and CAF support.

As noted above, the annual network performance tests required by section 54.313(a)(11) of the Commission's rules constitute another burdensome and expensive undertaking for RLECs, particularly inasmuch as the reforms adopted in the *Order* fail to provide support for the services these tests are intended to analyze. However, even if these services were being supported, conducting network performance tests in the large and sparsely populated farming, ranching, mountain, forest, desert and tundra areas served by many RLECs will require hundreds of man-

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[62] *See* Letter from David M. Marlett, Marlett and Associates, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Dec. 27, 2011).

hours, as well as the diversion of vehicles and monitoring equipment that would be better used for providing quality service to rural consumers and businesses.[63]

It would be far more reasonable for the Commission to reduce such regulatory burdens and encourage small carriers to expend their decreasing revenues upon facilities, maintenance and service to customers. The Commission should accordingly limit the scope of its reporting requirements to FCC-designated ETCs and reduce the significant economic burdens placed upon RLECs and other small entities by (1) revising the filing deadline for RLEC annual reporting from April 1 to September 1; (2) establishing a simplified waiver process that will allow RLECs to avoid the harsh consequences of section 54.313(j) if they cannot meet the filing deadline for reasons beyond their control or other good cause; and (3) establishing simplified and less expensive network performance testing and reporting requirements for RLECs and other small entities.

Finally, the Commission should treat any reports submitted by carriers pursuant to section 54.313 as confidential and proprietary, and exempt from disclosure under the Freedom of Information Act. At a minimum, the Commission should make clear carriers submitting such reports may obtain confidential treatment pursuant to standard protective orders.[64]

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[63] As also noted above, *see supra* note 10, it is not at all clear how RLECs providing only broadband transmission services can be expected to comply with the end-to-end broadband service reporting requirements specified in section 54.313 in any event.

[64] *E.g.*, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *et al.*, Protective Order, 25 FCC Rcd. 13160 (2010); Supplemental Protective Order, 26 FCC Rcd. 12795 (2011).

V. THE COMMISSION MUST ESTABLISH CLEAR RULES GOVERNING THE RATE OF RETURN REPRESCRIPTION PROCESS BEFORE INITIATING A REPRESCRIPTION HEARING.

The informal notice-and-comment procedures the Commission intends to follow to represcribe the authorized interstate rate of return are insufficient to meet the hearing requirement of section 205(a) and relevant provisions of the Administrative Procedure Act (APA) and must accordingly be reconsidered.

The Associations have no objection to the Commission's decision to waive portions of the Part 65 rules that have clearly become obsolete (*e.g.*, rules requiring service of paper copies, page limits, etc.). Nor do the Associations expect the Commission to return to the "trial-type" procedures previously used to prescribe the rate of return. The Commission must, however, follow a two-step process whereby it first addresses identified flaws in current substantive rules governing rate-of-return represcriptions. At that point it may conduct a hearing based on such rules, using procedures that are sufficiently rigorous for the adjudicative, adversarial fact-finding process required under section 205(a) of the Act and the APA.

A. The FCC Must First Adopt New Substantive Rules Governing the Represcription Process Before It Takes Evidence to Determine a Reasonable Rate-of-Return.

More than 20 years ago, the Commission concluded its Part 65 rules were deeply flawed and, as such, could not be used, without revision, for a rate of return prescription.[65] Among other things, the FCC admitted its methodology for determining "comparable firms" was deficient.[66] It further stated that it did not know how to account properly for the fact that many

[65] *Represcribing the Authorized Rate-of-Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd. 7507 (1990).

[66] *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers;* and *Represcribing the Authorized Rate of*

RLECs are locally owned and not publicly traded.[67] The Commission, however, never adopted revised regulations addressing these and other flaws.

The Commission apparently expects these issues will be worked out via the FNPRM. Given the significance of the support that flows from these rules to RLEC stability and service delivery, the Commission cannot conduct a fair, fact-based hearing based on either the old, flawed rules or revised rules that have not yet been adopted. A rate of return prescription based on a record compiled in this manner is effectively "rate-making on the fly," and will almost certainly be overturned by a court as arbitrary and capricious, particularly insofar as the Commission has not explained any reason why its earlier findings regarding flaws in traditional methods used to estimate the cost of capital for RLECs are no longer a concern. Methodology questions raised in the FNPRM must be resolved, and new "rules of the road" announced, before the Commission can legitimately conduct a represcription hearing under section 205(a).

B. The Abbreviated Informal Notice and Comment Procedures Described in the FNPRM Will Not Satisfy Section 205(a)'s "Hearing" Requirement.

A section 205(a) hearing need not be a trial-type proceeding – "paper hearing"

Return for Interstate Services of Local Exchange Carriers, Order, 5 FCC Rcd. 197 (1989) ¶ 47. The FCC must evaluate earnings of "comparable firms" and ensure firms selected for evaluation have similar risks to the RLECs. *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695 (D.C. Cir. 2007).

[67] *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, Notice of Proposed Rulemaking, 7 FCC Rcd. 5023 (1992) ¶ 6. Other Part 65 concerns were raised by the FCC in an even earlier notice of proposed rulemaking. *Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers,* Notice of Proposed Rulemaking, 2 FCC Rcd. 6491 (1987). The problems identified included: 1) groupings of carriers in light of regulatory and market changes; 2) possible prescription of a return on equity only; 3) use of Capital Asset Pricing Model (CAPM); and 4) use of accounting data to segregate overall company risk by jurisdiction or line of business.

procedures may be used instead.[68] But contrary to claims, the abbreviated notice and comment procedures the Commission intends to follow in this proceeding will not satisfy section 205(a)'s hearing requirement.[69] This is because rate of return represcription proceedings are "adversarial in nature and depend upon a thorough fact-based inquiry that develops a great amount of probative evidence."[70]

The Commission cannot avoid these requirements simply by "waiving" its Part 65 rules governing represcriptions.[71] No explanation is given as to why the Commission's prior statements regarding the need for adjudicative fact-finding – which underlie the Part 65 rules – are no longer operative.[72]

Key to the ability to participate fully in a rate-of-return prescription hearing is access to two basic tools: (1) disclosure of the information and assumptions underlying the factual submissions of any parties seeking lower rates of return; and (2) the ability to probe others'

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[68] *Order* ¶¶ 641-642. *Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers*, Report and Order, 59 Rad. Reg. 2d (P&F) 651 (1985); *Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes*, Report and Order, 10 FCC Rcd. 6788 (1995) ¶¶ 51-57 (*Rate of Return Streamlined Rules R&O*).

[69] *Id.* ¶ 51. Instances where the Commission has used "pure" notice and comment procedures to prescribe rates and tariff regulations have typically involved policy matters requiring determination of legislative facts as opposed to adjudicative facts. For example, the Commission used informal notice and comment procedures to prescribe tariff regulations that permitted the resale of interstate private lines (*AT&T v. FCC*, 572 F.2d 17 (2nd Cir. 1978)) and the establishment of ceilings for subscriber line charges (SLC) (*Access Charge Reform*, CC Docket No. 96-262, First Report & Order, 12 FCC Rcd. 15982 (1997) ¶¶ 75-87, *aff'd Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998)).

[70] *Rate of Return Streamlined Rules R&O* ¶ 51.

[71] *Order* ¶ 642.

[72] Informal notice and comment procedures are particularly inappropriate where, as here, commenters are also expected to address a multitude of complex USF and ICC reform issues in addition to presenting the equivalent of a direct case on RLEC cost of capital, all within a very short time frame.

submissions for weaknesses and errors. Existing Part 65 rules address both.[73]

The Commission should accordingly reconsider its decision to conduct an abbreviated all-in-one represcription proceeding utilizing inadequate notice and comment procedures. It should instead first determine what methods will be used to represcribe the authorized rate of return for RLECs, and it must then conduct an adjudicative hearing sufficient to meet section 205(a)'s requirements. At a minimum, the Commission should clarify procedures governing presentation of data and discovery.[74] The Commission should also reinstate the 60-60-21-day time frames for adversarial filings set forth in section 65.103 of its rules. This is critical for RLECs with limited resources to develop the data needed to prepare direct cases, to obtain the services of qualified experts to analyze this data, and to respond fully to adversarial filings.

VI. RECONSIDERATION AND/OR CLARIFICATION IS REQUIRED REGARDING THE APPLICATION OF NEW INTERCARRIER COMPENSATION RULES ADOPTED IN THE ORDER.

A. The Commission Must Provide a Reasonable Opportunity for Rate-of-Return Carriers to Recover Interstate Costs Allocated to Switched Access Rate Elements.

Under current Commission Part 36, 64 and 69 cost allocation rules, RLECs are required to allocate costs between the interstate and intrastate jurisdictions and assign portions of those costs to specific access rate elements for recovery from a combination of charges assessed upon end users and interexchange carriers, along with high-cost universal service support mechanisms. The *Order*, however, caps and then reduces charges that may be assessed upon other carriers for

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[73] Section 65.105, for example, combines mandatory disclosure and limited discovery. Of note, while the *Order* waives Part 65 rules governing service of process and related matters, this provision is not explicitly addressed. *Order* ¶¶ 643-645. It thus remains unclear whether these procedures will be available to parties in the proceeding.

[74] *Id.*

switched termination and permits RLECs to recover only a portion of the resulting shortfall from a new end-user charge (the Access Recovery Charge (ARC)) and a new interstate recovery mechanism (CAF ICC Support), which is scheduled to be reduced at a rate of five percent per year.[75] Since existing cost allocation rules remain in effect, however, RLECs are mathematically required to allocate expenses and investments to the equivalent of a regulatory black hole, with no opportunity whatsoever for recovery.

The Commission seeks to justify this result by asserting that rate-of-return carriers are now "off of rate-of-return based recovery specifically for interstate switched access revenues."[76] But in simply declaring that RLECs no longer recover switched access costs via rate-of-return regulation, the Commission failed to address the numerous objections raised in comments to this result.[77] If the Commission's intent was to implement some form of incentive regulation system for RLECs' switched access services, it failed to provide any basis for why earlier concerns, in particular issues surrounding the need to develop appropriate and fair productivity factors for RLECs, suddenly no longer apply.[78]

To resolve these concerns the Commission must provide a reasonable method for RLECs to recover costs allocated to switched access elements under current rules. This may be accomplished either by (a) reconsidering the decision to cap and then reduce annually carriers'

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[75] *Id.* ¶¶ 850-853.

[76] *Id.* ¶ 900.

[77] Comments of NECA, NTCA, OPASTCO, WTA, and the Rural Alliance, WC Docket No. 10-90, *et al.* (filed July 12, 2010) at 45-62 (*Rural Associations July 12 Comments)*.

[78] *Id.* The Commission's analysis of *average* reductions in switched access revenue requirements among RLECs, *Order* ¶¶ 885-887, does not provide an adequate foundation for assuming that *individual* RLECs will achieve such productivity gains. To the contrary, there is and will continue to be tremendous variance among RLEC revenue requirement trends, which in turn will cause some to experience significant shortfalls as their eligible recovery amount declines year after year.

eligible recovery amounts, or (b) permitting RLECs to establish a new rate element applicable to interexchange carriers (which may be flat-rated) designed to recover costs assigned to existing switched rate elements in excess of those recovered via ARCs and CAF ICC Support. Otherwise, put quite simply, neither switched access costs nor the "additional costs" of transport and termination will be recoverable.

B. Mechanics of CAF ICC Support Calculations.

For rate-of-return carriers, the *Order* specifies that the "Rate-of-Return Eligible Recovery" will be calculated from a carrier's "Rate of Return Baseline" less its "ICC recovery opportunity" for that year. The *Order* indicates that the starting point for calculating the Rate-of Return Baseline will be a rate-of-return carrier's 2011 interstate switched access revenue requirement, plus its FY2011 intrastate switched access revenues for rates capped or reduced by the *Order*, plus its FY2011 net reciprocal compensation revenues.[79] Several aspects of this calculation require reconsideration and/or clarification.

1. Rate-of-Return Baseline Interstate Revenue Requirements Should Be Based on Actual Cost Studies Rather than Tariff Forecasts.

The rules governing calculation of the Rate-of-Return Baseline generally specify that rate-of-return carriers must use projected interstate switched access revenue requirements associated with their most recent tariff filing.[80] For purposes of calculating CAF ICC Support at the individual study area level, however, the Commission should rely on each study area's actual 2011 interstate revenue requirements rather than tariff projections.

The rule requiring carriers to use tariff forecasts to determine Baseline amounts comes as a surprise. The Commission did not propose this approach in any of the notices leading up to the

[79] *Order* ¶ 892.

[80] 47 C.F.R. § 51.917(b).

Order, and carriers certainly could not have reasonably anticipated such short-term forecasts would form the basis for CAF ICC Support payments. For NECA tariff participants, use of forecasts is especially problematic. While NECA's overall tariff forecasts are reasonably accurate, there are great variations at the study area level.[81] Indeed, some companies do not prepare individual forecasts at all, and instead rely on NECA to develop them. Actual revenue requirements will, in contrast, be far more accurate and fair in establishing individual company interstate Baseline amounts.[82]

As this Rate-of-Return Baseline revenue requirement will be used for years to come to calculate individual study area CAF ICC Support amounts, the Associations request that the Commission reconsider use of tariff forecasts to establish Rate-of-Return interstate Baseline amounts for individual study areas and permit carriers to base such amounts on 2011 actual interstate revenue requirements.

The Commission should also reconsider its decision to define Fiscal Year 2011 as the period October 1, 2010 through September 30, 2011, for purposes of calculating rate-of-return carriers' base period revenues and demand.[83] To assure that base period data are fully and fairly representative of prior-year operations and provide a greater degree of certainty and closure to all

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[81] Based on an analysis of differences between forecasted and actual revenue requirement data for 2010, tremendous differences exist in the extremes, with some study areas seeing increases up to 120 percent from their forecast and some with decreases as low as 98 percent. In the 2010 data, there were 356 study areas that experienced increases and 320 study areas that experienced decreases, with an average increase of 8 percent and an average decrease of 6 percent.

[82] The Associations have previously explained the degree to which actual cost studies are subject to review and verification by independent auditors, NECA review procedures, state regulators and other entities. *E.g.*, *Rural Associations April 18 Comments* at 29, note 62; *Rural Associations July 12 Comments* at 62. Concerns that cost studies might be manipulated in some way are thus without foundation.

[83] 47 C.F.R. § 51.903(e).

parties, the Commission should consider instead establishing the period July 1, 2010 through June 30, 2011 as the Fiscal Year under section 51.903 of the rules.

2. Inclusion of Tandem/Transit Costs in Reciprocal Compensation Calculations.

Section 51.701(a) specifies the term "reciprocal compensation" includes charges for both transport and termination of non-access telecommunications traffic. Section 51.701(c) defines transport as "the transmission *and any necessary tandem switching* of Non-Access Telecommunications Traffic subject to section 251(b)(5) . . . ." Section 51.709 establishes the rate structure for transport and termination for non-access reciprocal compensation, but specifies that the rate for transmission facilities dedicated non-access traffic "shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send non-access traffic that will terminate on the providing carrier's network."[84]

To resolve this apparent inconsistency, the Associations request revision of these rules or clarification that the reference to the definition of transmission facilities in section 51.709(b) includes costs of any necessary tandem switched transport in the calculation of reciprocal compensation for purposes of computing CAF ICC Support.[85]

C. Identification of "Toll" VoIP Traffic.

The *Order* specifies that the default compensation rate for "toll" traffic exchanged between providers of Voice over Internet Protocol services and the public switched telephone

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[84] 47 C.F.R. § 51.709(b)

[85] Proposed ICC rules submitted by the Associations prior to adoption of the *Order* defined net reciprocal compensation revenues as "the net difference between reciprocal compensation amounts received by the carrier from other carriers or service providers (including payments for transit service) and amounts paid by the carrier to other carriers or service providers (including payments for transit service) pursuant to agreements established under Part 51 of this Chapter." Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 Attach. at 24 (filed Oct. 17, 2011).

network (VoIP-PSTN traffic) will be a carrier's interstate access rate, while applicable reciprocal compensation rates apply to other VoIP-PSTN traffic.[86] Local exchange carriers (LECs) are permitted to tariff default charges for toll VoIP-PSTN traffic in relevant federal and state tariffs in the absence of an agreement for different intercarrier compensation.[87]

Clarification is required regarding the distinction between "local" and "toll" VoIP. The Act defines toll calls as those "for which there is made a separate charge not included in contracts with subscribers for exchange service."[88] It is not clear how this definition applies in the context of VoIP or other "all distance" calling plans that do not include a separate charge for toll service. Consistent with current practice for traditional calling services, the Associations request clarification that state defined local calling areas, in combination with originating and terminating telephone numbers, will be used to determine whether particular VoIP calls should be considered local or toll.

The Associations further request clarification as to whether originating interstate access rates must be applied to intrastate "toll" calls originating on the PSTN and terminating to a VoIP customer. Inasmuch as originating carriers have no way of knowing whether particular numbers are associated with VoIP lines on the distant terminating end, it does not appear possible to apply a differential rate to such calls. To the extent the *Order* can be read to require originating carriers to bill such calls at interstate access rates, notwithstanding that signaling data indicates

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[86] *Order* ¶ 944.

[87] *Id.*

[88] 47 U.S.C.§ 153(55).

such calls are intrastate toll, the Associations request the Commission reconsider this requirement and confirm that normal billing rules apply.[89]

D. Call Signaling Rules for VoIP Traffic.

The *Order* extends the Commission's call signaling rules to interconnected VoIP service providers, requiring them to transmit the telephone number of the calling party for all traffic they originate that is destined for the PSTN.[90] Intermediate providers in a call path must pass, unaltered, signaling information they receive indicating the telephone number, or billing number if different, of the calling party.[91]

ICC obligations under the *Order*, however, apply to all VoIP-PSTN traffic, which is defined as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format" and includes voice traffic from interconnected VoIP service providers as well as providers of one-way VoIP service that allow end users to place calls to, or receive calls from the PSTN, but not both. The Commission recognized that the scope of the ICC obligations for VoIP providers adopted in the *Orde*r is broader than the definition of interconnected VoIP to which the call signaling obligations will apply.[92] The *FNPRM* now seeks comment (yet again) on the need for signaling rules for one-way VoIP service providers.

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[89] The Commission did not explicitly address compensation obligations for VoIP traffic exchanged prior to the *Order*'s effective date. *See Order* ¶ 945. To resolve numerous pending disputes, the Commission should reconsider this "hands off" approach and confirm that VoIP traffic exchanged prior to the *Order*'s effective date is and has always been subject to the same ICC obligations as any other switched voice traffic. *See e.g.,* Comments of NECA, NTCA, OPASTCO, WTA, ERTA, the Rural Alliance, and the Rural Broadband Alliance, WC Docket No. 10-90, *et al.* (filed Apr. 1, 2011) at 4-7.

[90] *Order* ¶ 717.

[91] *Id.* ¶ 719.

[92] *Id.* ¶ 1400.

Pending the outcome of the *FNPRM*, the Associations seek clarification and/or reconsideration that: (a) all kinds of VoIP services (not just interconnected) are subject to the call signaling rules; and (b) the rules apply to all traffic terminating to the PSTN, regardless of technology platform (e.g., softswitches). Otherwise, originating carriers can enter into arrangements with least-cost routers that employ a VoIP platform to "launder" traffic and thereby have all call signaling information stripped or altered from the call in question without consequence. This would clearly undermine, if not invalidate, the Commission's efforts to resolve phantom traffic concerns and do nothing after all to close long-standing loopholes that have led to arbitrage.

E. Application of Access Charges to IntraMTA Traffic Delivered by IXCs.

Under the Commission's "intraMTA rule" all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area of the LEC.[93] The *Order* notes that there have been questions as to whether application of the intraMTA rule is feasible or applicable when CMRS calls are routed through an IXC, but asserts that many ILECs apply reciprocal compensation rates to intraMTA CMRS traffic without regard

[93] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (1996) ¶ 1036 (*Local Competition First Report and Order*); 47 C.F.R. § 51.701(b)(2). The definition of an MTA can be found in section 24.202(a) of the Commission's rules. 47 C.F.R. § 24.202(a).

to IXC routing.[94] The Commission accordingly declined to clarify that the intraMTA rules do not necessarily apply to such traffic.[95]

This result will create significant billing and call flow concerns. When a terminating RLEC receives intraMTA traffic routed through an IXC, there is no realistic way for the carrier to determine whether such calls are in fact CMRS-originated or whether they are inter- or intra-MTA. In addition, it should be recognized that the CMRS provider has made an affirmative decision to route calls through an IXC rather than seeking a local interconnection agreement with the LEC. Therefore the Commission should reconsider its denial of this request and clarify that such traffic is subject to access charges notwithstanding potential qualification for reciprocal compensation rates under the intraMTA rule.[96]

F. Phantom Traffic Issues.

In addressing "phantom traffic" problems, the Commission amended its call signaling rules to require all carriers and providers of interconnected VoIP service to include the calling party's telephone number in all call signaling, and required intermediate carriers to pass this signaling information, unaltered, to the next provider in a call path. However, it declined to

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[94] *Order* note 2132.

[95] The Commission relied on findings in the *Local Competition First Report and Order* to the effect that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. *Id.*, citing *Local Competition First Report and Order* ¶ 1044.

[96] Concerns also arise in connection with LEC-to-CMRS calls that terminate to numbers rated outside of the RLEC's landline local calling area. As previously explained to the Commission, RLEC switches need to be upgraded and programmed to perform several dips on each and every outbound long distance call from a landline telephone customer to determine if the call is destined for a CMRS customer and if so, if this customer is located inside the same MTA. In instances where CMRS carriers operating in the same MTA have not chosen to establish direct or indirect connections with the RLEC, such calls must often be routed through IXCs as well. *E.g.*, Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (filed Dec. 9, 2011) at 2. These issues may require substantial study by industry technical groups before workable solutions can be put in place.

require transmission of carrier identification information (CIC and/or OCN codes) in signaling data.[97] The Commission also denied requests from parties to clarify that, absent mutual agreement on factors or the provision of information that can be used to determine with reasonable accuracy the actual origination point of a call, terminating carriers may use as a default the originating and terminating telephone numbers associated with a call to determine jurisdiction for billing purposes.[98] The Commission noted in this regard that its proposed rules were not intended to affect existing agreements between service providers regarding how to jurisdictionalize traffic in the event that traditional call identifying parameters are missing.[99]

In fact, standard industry practice relies on the "telephone numbers rule" to determine the jurisdiction of calls for billing purposes.[100] The Associations accordingly request the Commission reconsider its decision and clarify that absent mutual agreement on factors or the provision of information that can be used to determine with reasonable accuracy the actual origination point of a call, terminating carriers may use as a default the originating and terminating telephone numbers associated with a call to determine jurisdiction for billing purposes.

The Associations also request reconsideration of the Commission's decision not to impose financial responsibility for traffic delivered without adequate billing information on the last carrier in the call stream sending such traffic.[101] In declining this suggestion, the Commission found that imposing upstream liability or financial responsibility on carriers

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[97] *Order* ¶ 727.

[98] *Id.* note 1212.

[99] *Id.*

[100] Even where percent interstate usage factors (PIUs) are used, carriers must still rely on calling and called telephone numbers when conducting audits of PIUs submitted by sending carriers.

[101] *Order* ¶¶ 731-732

threatens to unfairly burden tandem transit and other intermediate providers with investigative obligations. Instead, the Commission placed the responsibility and liability with the party that failed to provide the necessary information, or that stripped the call-identifying information from the traffic before handing it off.

It will be difficult, however, for terminating carriers to identify "the party that failed to provide the necessary information" because, as noted above, the Commission declined to require transmission of adequate carrier identification information in signaling data. On the other hand, upstream carriers accepting such traffic are fully aware of the identity of the financially-responsible carrier or provider. Under the Associations' proposal, the terminating carrier would be allowed to charge its highest effective rate to the service provider delivering the phantom traffic to it, when the call detail information is insufficient to bill for such calls. In turn, an intermediate provider would be able to charge that rate to the service provider that preceded it in the call path, until ultimately the carrier that improperly labeled the traffic would be required to pay for its own traffic. Apart from assuring the correct entity is actually required to pay for the services it receives, this approach will significantly reduce upward pressure on the CAF ICC Support mechanism associated with non-payments.

The Associations accordingly request that the Commission either require passage of all CIC, OCN, and other carrier identifying information necessary to establish with certainty the financially responsible party for a call, or allow terminating carriers to bill the carrier or provider sending the calls to them at their highest effective rate when those calls fail to carry sufficient call signaling information to allow for proper billing.

VII. CONCLUSION

For the reasons specified above the Associations seek reconsideration and/or clarification of the Commission's *Order* in the above-captioned proceeding.

Respectfully submitted,

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December 29, 2011

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION OF
THE UNITED STATES TELECOM ASSOCIATION

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December 29, 2011

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Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE UNITED STATES TELECOM ASSOCIATION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.429 of the Commission's rules,[1] the United States Telecom Association ("USTelecom") respectfully petitions the Commission to reconsider and clarify certain aspects of its *Order*.[2]

The Commission's *Order* represents a landmark decision in telecommunications regulation, and the Commission's willingness to tackle many of the problems that undermine the

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1 47 C.F.R. § 1.429.

2 *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-161, ¶ 164 (rel. Nov. 18, 2011) ("*Order*").

universal service and intercarrier compensation programs in a comprehensive way is an unprecedented achievement. In a bold move, the Commission took long overdue steps to reform and modernize these complicated programs, which in their present form no longer serve the purposes for which they were established.

USTelecom and its members support the Commission's efforts and largely endorse the *Order*. However, the *Order* falls short in several important respects, particularly regarding: (i) the Phase I of the Connect America Fund ("CAF"); (ii) the flash-cut to new CAF Phase II support levels; (iii) compelling eligible telecommunications carriers ("ETCs") to use legacy support to deploy and maintain broadband; (iv) failing to relieve ETCs of their obligations and designations when their universal service support has been eliminated; (v) reducing high-cost support based on end-user rates; (vi) the new reporting and record retention requirements for ETCs; and (vii) the Access Recovery Charge ("ARC") mechanism. Accordingly, USTelecom seeks reconsideration of these issues

In other respects, the *Order* raises issues that create potential implementation or other problems, which require clarification from the Commission. These issues include: (i) implications of the Commission's decision not to make broadband a supported service; (ii) the calculation of the Commission's broadband deployment timeframes; (iii) implementation of the incremental support regime; (iv) the phase-out of safety net additive support; (v) the treatment of financial disclosures of privately held companies; (vi) additional steps to prevent regulatory arbitrage; (vii) the treatment of originating access charges; and (viii) differences between the *Order* and the Commission's new rules.

II. THE COMMISSION SHOULD RECONSIDER AND CLARIFY CERTAIN ASPECTS OF ITS UNIVERSAL SERVICE REFORMS.

A. The CAF Phase I Deployment Requirement is Unreasonable and Counterproductive to Achieving The Commission's Universal Service Goals.

The Commission should reconsider its CAF Phase I deployment requirement, which obligates recipients of CAF Phase I incremental support to deploy broadband to one household for every $775 in support received. *Order* ¶ 138. This requirement is based on an unrealistic assessment of the cost of deploying broadband to homes in unserved areas and likely will deter carriers from accepting CAF Phase I incremental support and from deploying broadband to unserved areas in any meaningful manner.

Although the Commission was clear that it was "not attempting to identify the precise cost of deploying broadband to any particular location," the $775 per household deployment requirement will not succeed in "spur[ring] immediate broadband deployment to as many unserved locations as possible." *Id.* ¶ 139. First, it relies upon nationwide data, which ignores that broadband deployment costs can vary considerably across geographic locations.[3] Second, it relies upon limited cost projections, which do not necessarily reflect the actual cost of deploying broadband to unserved areas.[4] Third, it relies upon the costs of a hypothetical broadband provider, even though a provider's actual deployment costs can vary considerably.[5]

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[3] For example, the Commission relied upon data from the cost model developed in connection with the National Broadband Plan, though the model team itself noted that its results should be relied on only for nationwide averages and specifically acknowledged that "[f]urther analysis and improved source data would be required to refine estimates for particular geographies." Omnibus Broadband Initiative, *The Broadband Availability Gap:OBI Technical Paper No. 1*, at 5 (April 2010).

[4] Specifically, in justifying the $775 figure, the Commission cited to projections by a single mid-sized price cap carrier submitted to the Rural Utilities Service ("RUS") as part of the carrier's application for funding under the Broadband Initiatives Program ("BIP"). *See Order* ¶ 140. Even assuming data from this carrier's BIP deployment is sufficiently representative of the

The $775 figure is even more unreasonable in light of the Commission's decision to require that CAF Phase I incremental support recipients exclude areas covered by existing capital improvement plans, BIP deployment obligations, and merger commitments from areas eligible to meet a provider's broadband deployment obligation. *Id.* ¶ 146. By excluding these areas, the remaining unserved areas that are the intended beneficiaries of CAF Phase I incremental support are the most costly to serve and could not reasonably be served for $775 per household.[6]

Accordingly, to ensure that CAF Phase I incremental support achieves its intended purpose, the Commission should reconsider its $775 figure and develop more realistic deployment requirements. In particular, such requirements should address not only an individual broadband provider's cost to deploy broadband in its unserved areas (i.e., areas lacking broadband service at 768 Kbps speeds) but also the cost to upgrade service in its underserved

(footnote cont'd.)

costs of broadband deployment generally – a dubious proposition – the cost data submitted to RUS were merely projections for broadband deployment to a combination of unserved and *underserved* locations. These projected costs could vary considerably from actual costs for deployment only to unserved locations, particularly when areas addressed by BIP are not even eligible for CAF Phase I support.

5 The median cost of deploying broadband in an unserved census block group may differ dramatically from one provider to another, largely for two reasons: (i) some providers have more aggressively invested in broadband deployment in rural areas than others, as a result of which only the most expensive areas remain unserved; and (ii) some providers' service territories may include a disproportionate number of higher cost census block groups. In either instance, by establishing a per household figure that does not take into account a broadband provider's actual circumstances, the Commission would be unfairly penalizing providers based on their prior deployment decisions or on the high cost of the areas they serve.

6 For example, Frontier currently provides broadband to 92 percent of the households in its incumbent local exchange carrier ("LEC") territory and must deploy broadband to 85 percent of the households in the former Verizon territory under its merger commitments. *See Applications Filed by Frontier Communications Corp. & Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, 6001 (2010). Not surprisingly, $775 per household would not come close to covering the costs of deploying broadband to the remaining 8 percent of the unserved households in Frontier's incumbent territory and the 15 percent of the unserved households in the former Verizon territory.

areas (i.e., areas lacking broadband service at 4 Mbps speeds). This approach is more likely to "expand voice and broadband availability as much and as quickly as possible" because upgrades in adjacent, underserved areas often must precede deployment of new broadband facilities in outlying, unserved areas that are farther from a LEC's central office. *See Order* ¶ 145.

B. <u>Rather Than Requiring a Flash Cut to New CAF Phase II Support Levels, The Commission Should Adopt A Five-Year Phase-down As Recommended By the ABC Plan.</u>

The Commission should reconsider its decision to adopt a flash-cut approach to eliminating existing legacy support in connection with the implementation of CAF Phase II. Under the transition mechanism for CAF Phase II, the Commission directed that, for a price cap ETC that declines to serve all locations in its service territory in a state:

> the carrier will continue to receive support in an amount equal to its CAF Phase I support amount until the first month that the winner of any competitive process receives support under CAF Phase II; at that time, *the carrier declining the state-wide commitment will cease to receive high-cost universal service support*.

Id. ¶ 180 (emphasis added). Under a literal reading of this provision, a price cap carrier's support throughout a given state could disappear overnight simply because some other provider receives CAF Phase II support by virtue of committing to serve a few census blocks in that state. Even worse, the language cited above also suggests that a price cap carrier in one state could lose all its support in a flash-cut because some provider in another state is receiving CAF Phase II support. *See id.* ("the winner of *any* competitive process") (emphasis added). Presumably the Commission did not intend such illogical results, which itself warrants reconsideration.

Reconsideration also is warranted because the Commission's flash-cut approach is contrary to the *NPRM* and the policies embodied in the *Order*. For example, in outlining proposed reforms in the *NPRM*, the Commission stated its intent "to avoid sudden changes or 'flash cuts' in our policies" and acknowledged "the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption."[7] Consistent with this intent, the Commission adopted other reforms that included multi-year transitions from legacy support mechanisms.[8] However, for reasons never explained, the Commission decided to adopt a flash-cut mechanism in implementing CAF Phase II support levels that could result in an immediate loss of a price cap carrier's existing high-cost support.[9]

The Commission's decision was adopted without notice in violation of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553(b)(3) While the *NPRM* proposed eliminating carriers' IAS support in two years and phasing out competitive ETC support over

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7 *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, ¶ 12 (2011) ("*NPRM*"); *see also id.* ¶ 17 ("[w]e do not propose any 'flash cuts,' but rather suggest transitions and glide paths that we believe will facilitate adaptation to reforms. Change to USF and ICC policies need not and should not be sudden or overly disruptive, but change must begin so that our country can reach its broadband goals in an efficient and accountable way.").

8 *See, e.g., Order* ¶ 242 ("By adopting a multi-year transition [for implementation of urban rate floor], we seek to avoid a flash cut that would dramatically affect either carriers or the consumers they serve"); *id.* ¶ 513 (explaining how a five-year transition for competitive ETCs is "desirable in order to avoid shocks to service providers that may result in service disruptions for consumers" and how such a multi-year transition is sufficient for affected carriers to "adjust and make necessary operational changes to ensure that service is maintained during the transition"); *id.* ¶ 802 (endorsing transition plans consistent with "our commitment to avoid flash cuts").

9 While the federal courts may have deferred "to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal service system to another," *NPRM* ¶ 239 (quoting *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999)), no such deference would be warranted here. First, the decision to implement a flash-cut approach by which a price-cap carrier's support could be eliminated overnight is not predicated on any "predictive judgment." *Cf. TOPUC*, 183 F.3d at 436-37 (noting that Commission "made a reasonable determination" regarding emerging competition in local markets); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 537, 556 (8th Cir. 1998) (noting the Commission's "predictive judgment" regarding competitive pressures in the local exchange market). Second, in contrast to other transition plans to implement changes to the universal service system, "the transition period" in this case is nonexistent.

five years, it did not propose to eliminate any other high-cost support provided to incumbent LECs.[10] In fact, the *NPRM* did not expressly seek comment on any Commission-proposed transition plan for non-IAS high-cost support – let alone a flash-cut elimination.[11]

The flash-cut elimination of price cap carriers' legacy support also violates the APA because the Commission did not consider alternatives, namely the proposal to phase out such support over a five-year period.[12] AT&T included this proposal in its comments, and the five year phase-down was an essential component of the ABC Plan on which the FCC sought public

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[10] *See NPRM* ¶ 234 (proposing a two-year phase-out for IAS support but seeking comment on whether a longer transition is warranted to "minimize disruption to service providers"); *see also id.* ¶ 242.

[11] To satisfy the APA's notice requirement, the NPRM and the final rule need not be identical: "[a]n agency's final rule need only be a 'logical outgrowth' of its notice." *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). A final rule qualifies as a logical outgrowth "if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *See, e.g., Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (citations omitted). Here, the Commission fails the logical outgrowth test because the FCC expressly stated "[w]e do not propose any 'flash cuts.'" *NPRM* ¶ 17; *see CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1082 (D.C. Cir. 2009); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin*., 407 F.3d 1250, 1259-60 (D.C. Cir. 2005); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

[12] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (agency has the duty "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives") (citation omitted); *International Ladies' Garment Workers' Union v. Donovan,* 722 F.2d 795, 817 (D.C. Cir. 1983) ("[I]n addition to requiring rational consideration of alternatives, the APA demands an adequate explanation when these alternatives are rejected").

comment.[13] Nonetheless, contrary to the APA, the Commission adopted its flash-cut approach without acknowledging – let alone explaining why it was rejecting – a five-year transition.[14]

The Commission's decision to eliminate existing support on a flash-cut basis also is inconsistent with the statutory requirement that universal service funding be "sufficient." *See* 47 U.S.C. § 254(e). "Sufficiency" for universal service purposes relates to the level of support necessary "to enable all customers to receive basic telecommunications service."[15] Under the Commission's approach, support that is sufficient (*i.e.*, necessary) on January 1, 2013 to enable a price cap carrier to provide basic telecommunications services throughout its service territory is suddenly transformed into being unnecessary on January 2, 2013, simply because a CAF Phase II recipient begins receiving support to provide service in a small part of that service territory. By way of illustration, if $100 million in high-cost support was necessary for the provision of basic service in Mississippi on January 1, 2013, it seems illogical that on January 2, 2013 only $5 million in CAF Phase II support is "sufficient to achieve universal service goals." *Order* ¶ 510.[16]

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[13] *See* Comments of AT&T, WC Docket 10-90, at 109-11 (filed April 18, 2011) ("AT&T Comments"); Public Notice, *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, WC Docket 10-90, DA 11-1348, at 9 (rel. Aug. 3, 2011).

[14] *See Public Citizen v. Steed,* 733 F.2d 93, 105 (D.C. Cir 1984); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal").

[15] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (section 254 requires that there be "sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services…"); *see also Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (level of high-cost support is insufficient when it "will undercut adequate telephone services for customers …").

[16] Worse still, $0 in support would be deemed sufficient for a carrier that continues to be designated as an ETC because, as discussed below, the Commission also has declined for the time being to eliminate legacy ETC service obligations even when that carrier has lost all high-cost support in certain areas. *Order* ¶ 79. That is nonsensical and cannot be consistent with section 254(e).

C. <u>The Commission Should Reconsider Its Decision To Compel Providers to Use Legacy Support to Deploy And Maintain Broadband Service.</u>

Support under CAF is voluntary; providers may decline CAF Phase I incremental support if they "cannot meet [the Commission's] broadband deployment requirement" and may decide not to accept CAF Phase II support. *Order* ¶¶ 144 & 160. However, at the same time, the Commission's new framework compels ETCs to use their *existing* support to deploy or maintain broadband service in their service territories and, beginning in 2013, imposes strict broadband obligations on these carriers.[17] The Commission should reconsider this decision, which runs afoul of section 254 and contravenes Title I. Instead, the Commission should *permit* ETCs to use legacy high-cost support to deploy and maintain broadband service but not *obligate* ETCs to satisfy particular build-out requirements.

Requiring providers to use legacy universal service support to deploy broadband to unserved areas or to maintain broadband service in areas without a subsidized competitor contravenes section 254(b)(5), which requires "*sufficient* Federal and State mechanisms to preserve and advance universal service," and section 254(e), which provides that "any [universal service] support should be … *sufficient* to achieve the purposes of this section." 47 U.S.C. §§ 254(b)(5), (e) (emphasis added). Even though ensuring the sufficiency of universal service support is a direct statutory command,[18] the *Order* is devoid of any analysis that legacy universal

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[17] *See Order* ¶ 150 (requiring price cap carriers "receiving frozen high-cost support" to transition such support over a two-year period to "build and operate broadband-capable networks used to offer the provider's own retail broadband service in areas substantially unserved by an unsubsidized competitor"); *id.* ¶ 206 (requiring rate-of-return carriers to use legacy support to deploy 4/1 Mbps broadband "upon reasonable request" throughout its service territory).

[18] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1197, 1200 (10th Cir. 2001) (explaining that "the FCC must base its policies on the [enumerated] principles" in section 254(b) and holding that the principles' "language indicates a mandatory duty on the FCC"); *TOPUC*, 183 F.3d at 412

service amounts would represent sufficient funding to support the Commission's broadband deployment mandate and allow a carrier to meet its existing ETC obligations. In essence, the Commission impermissibly bootstraps a broadband deployment and maintenance obligation onto carriers that only receive federal universal service for the provision of voice telephony service in their geographic serving areas,[19] while turning a blind eye to the sufficiency of the support necessary to satisfy this obligation.[20]

The Commission's decision to allow rate-of-return carrier to assess "construction charges … subject to limits" is no answer. *Order* ¶ 208. The Commission does not explain how a rate-of-return carrier would reasonably recover the massive costs of broadband deployment throughout its service territory by means of special construction charges, which, by the Commission's own estimates, could be several thousand dollars per location. *Cf. id.* ¶ 140 n.233 (noting per location broadband deployment costs as high as $3,000). Nor does the Commission explain how such an ad hoc process would lend itself to the economies of scale necessary to spread the cost of a broadband network.

(footnote cont'd.)
(holding that "the plain language of § 254(e) makes sufficiency of universal service support a direct statutory command").

19 Such bootstrapping itself violates section 254(e). First, it contravenes the mandate that universal service support be used "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 U.S.C. § 254(e). It also violates the requirement that support be "explicit" by creating an implicit cross-subsidy running from voice to broadband service. *Id.* Finally, such bootstrapping also could violate section 254(b)(1)'s "affordability" mandate, as customers could be charged too much (through USF contributions) for the service (voice) to which the funding is directed.

20 For rate-of-return carriers, the Commission conditions receipt of "new CAF funding in conjunction with the implementation of intercarrier compensation reform" on the provision of 4/1 Mbps broadband service "upon reasonable request." *Order* ¶ 206. However, the CAF mechanism for rate-of-return providers simply replaces implicit revenues with explicit funding for voice service and cannot reasonably be expected to cover the cost of broadband deployment.

The Commission also lacks authority under Title I to impose a broadband deployment and maintenance obligation as a condition to carriers' receipt of legacy federal universal service support. Broadband is an information service regulated under Title I,[21] and section 3(51) of the Act expressly precludes the Commission from imposing common-carrier regulations on broadband. *See* 47 U.S.C. § 153(51). Mandatory broadband deployment and maintenance obligations are precisely the type of common-carrier regulation precluded by section 3(51).[22]

D. <u>The Commission Should Clarify That All ETCs Will Be Relieved of Their Obligations and Designations When Their Universal Service Support Has Been Eliminated.</u>

The Commission should clarify now—not in a future rulemaking—that ETCs will be relieved of their legacy ETC obligations (and ETC designations) in those geographic areas in which they do not receive either legacy high-cost support or CAF support. *See Order* ¶ 79. As the Commission phases in its new universal service regime, it cannot sensibly or lawfully maintain its existing interpretation of section 214(e) or its ETC rules, which require ETCs to offer legacy services throughout their designated ETC service areas. *See* 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.101(a).

First, by definition, the purpose of the ETC designation is to identify carriers that are, in fact, *eligible* to receive universal service funding. As section 214(e)(1) directs, a "common carrier designated as an eligible telecommunications carrier . . . *shall be eligible to receive universal service support*." 47 U.S.C. § 214(e)(1) (emphasis added). The legacy regime satisfied

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[21] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853, 14855-56 ¶¶ 1-3 (2005).

[22] *See, e.g.*, 47 U.S.C. § 214(e)(3); *Federal-State Joint Board on Universal Service: Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Memorandum Opinion and Order, 16 FCC Rcd 18133, 18140 ¶ 18 n.47 (2001) (noting that a "common carrier" may be ordered "to provide the supported services to an unserved community").

this requirement because it enabled more than one carrier to become an ETC and thereby qualify for any universal service funding distributed in a given geographic area. But the new regime will entitle just *one* provider to qualify for support in a given area in exchange for offering both legacy voice services *and* broadband. *See Order* ¶¶ 171-79 & 316. Under this new framework, many existing ETCs will no longer be *eligible* to receive funding. For that reason alone, the Commission would violate section 214 if it perpetuated ETC service obligations and designations for carriers that do not receive universal service support.

Second, for ETCs that lose their existing universal service support under the new regime – funding that is necessary to offset the cost of providing supported services in high-cost areas – the Commission could not lawfully compel these carriers to continue providing service after that support has been eliminated. Such a result would contravene section 254, which requires the Commission to design its universal service programs so that support is "sufficient" to enable providers to offer the services deemed "universal." 47 U.S.C. § 254(b)(5), (e), (f). It also would violate section 254's mandate that universal service policies be "equitable and nondiscriminatory" and competitively neutral, since an ETC that has lost its universal service support would be compelled to continue competing against a CAF-funded provider. *See* 47 U.S.C. § 254(b)(4), (d), (f).

E. <u>Reducing High-Cost Support Due to "Artificially Low End-User Rates" is Misdirected And, in Any Event, Should be Limited Only to Certain Categories of Support.</u>

The Commission should reconsider its decision to reduce universal service support to the extent a carrier's local rates do not meet "an urban rate floor," which represents a national average of local rates in addition to defined state-regulated fees. *See Order* ¶¶ 238-39. At the very least, the Commission should clarify that any such reductions in legacy support will apply only to high-cost loop and high-cost model support.

The Commission's decision to reduce a carrier's universal service support because its local rates are too low ignores restrictions under state law that prevent or at the very least hinder a carrier from increasing local rates. For example, in many jurisdictions, a price cap carrier is prohibited from increasing rates for basic service.[23] In other jurisdictions, state law limits rate increases for basic local exchange service.[24] By failing to even acknowledge these constraints, the Commission's decision is arbitrary and capricious.[25]

Furthermore, rather than penalizing a carrier for failing to do something that it cannot lawfully do (*i.e.*, raise local rates), the Commission should preempt any state laws that cause customers to pay "local service rates that are significantly lower than the national urban average." *Order* ¶ 237. The Commission unquestionably possesses the authority to preempt state laws and regulations.[26] Indeed, the Commission has not hesitated to preempt state

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23 *See e.g.*, Ark. Code Ann. § 23-17-408(c)(1) (authorizing a company electing alternative regulation to "increase or decrease its rates for telecommunications services other than basic local exchange service . . ."); *DPUC Investigation of the Southern New England Telephone Company's Alternative Regulation Plan*, Docket Nos. 00-07-17, 2001 Conn. PUC LEXIS 93 (Conn. Dep't Pub. Util. Control May 16, 2001) (rejecting Southern New England Telephone Company's proposal to annually increase rates for residential local exchange service up to the rate of inflation, subject to competitive forces).

24 *See, e.g., Petition for Approval of Storm Cost Recovery Surcharge, and Stipulation with Office of Public Counsel, by Sprint-Florida, Inc.*, Docket No. 050374-TL, Order No. PSC-05-0946-FOF-TL at 1 (Fla. Pub. Serv. Comm'n Oct. 3, 2005) (noting that Florida law only authorizes a price regulated LEC to seek a rate increase based on a "substantial change in circumstances," which is narrowly construed but includes costs associated with hurricane damage); § 392.245 R.S. Mo. (limiting rate increases for basic local exchange to changes in inflation).

25 *See, e.g., National Treasury Employees Union v. FLRA*, 466 F.3d 1079 (D.C. Cir. 2006); *Konan v. Attorney General of the United States*, 432 F.3d 497 (3rd Cir. 2005).

26 *See* 47 U.S.C. § 251(d)(3); 47 U.S.C. § 253; *Public Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1514-15 (D.C. Cir. 1990); *see also Geier v. American Honda Motor Co.,* 529 U.S. 861, 873 (2003); *City of New York v. FCC,* 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof").

regulations that conflict with a federal regulatory objective and when that conflict impinges on its exercise of its lawful authority.[27] Under the Commission's reasoning, state laws that result in artificially low local rates frustrate the Act's universal service policies and undermine the Commission's implementation of the universal service program, which warrants preemption. *See Order* ¶¶ 237 & 767.

At the very least, the Commission should clarify the legacy mechanisms subject to reduction when a carrier's local rates do not meet the urban rate floor. The *Order* indicates that the reductions will be made to "HCLS and CAF Phase I support," *id.* ¶ 239, but the reference to "CAF Phase I support" in this context is unclear. The term presumably does not refer to a carrier's "incremental support" under CAF Phase I, the purpose of which is to "provide an immediate boost to broadband deployment in [unserved] areas." *Order* ¶ 137. No relationship exists between incremental support under CAF Phase I to fund the nonrecurring costs of broadband deployment in unserved areas and basic local rates, which are intended to cover at least a portion of the recurring cost of voice service in served areas. Furthermore, the term should not be construed to refer to either legacy IAS or ICLS, since both mechanisms provide support for interstate rather than local rates. *Order* ¶¶ 130, n.207 & 241. The Commission should clarify that reductions in legacy support resulting from a failure to meet the urban rate floor, at most, will extend only to high-cost loop and high-cost model support, which are focused on providing voice service in high-cost areas.

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[27] *See, e.g., Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE,* Memorandum Opinion and Order, 23 FCC Rcd 6371 (2008); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5157 (2007).

F. The Commission's New ETC Reporting Requirements Are Unduly Burdensome and Unnecessary, Should be Prospective Only, And Should Be Implemented Effective July 1, 2012.

1. The New ETC Reporting Requirements Should Not Apply to Carriers Whose Support is Being Eliminated.

The Commission should reconsider imposing new reporting requirements on ETCs whose support is being eliminated. The new reporting requirements will involve significant costs that are unreasonable to impose on ETCs whose support is being eliminated.

To take the most egregious example, the Commission's new framework arguably will require all ETCs to produce a new five-year build-out plan by April 1, 2013, which includes progress on their broadband deployment. *Order* ¶ 587. The Commission does not explain how it intends to use a five-year plan from a price cap carrier that does not intend to participate in the CAF in the long term and that stands to lose all of its existing frozen high-cost support once CAF Phase II has been implemented.

Imposing new reporting requirements on all ETCs also cannot be reconciled with the Commission's duty to "adopt regulation only upon a reasoned determination that its benefits justify its costs."[28] Indeed, the Commission made no such determination, and, instead, vastly underestimated the burdens imposed—noting only that the new reporting regime may impose "some additional time and cost on individual ETCs." *Id.* ¶ 575. Furthermore, these new reporting requirements are inconsistent with the Chairman's stated objective to "streamline and modernize the Commission's rules and reduce unneeded burdens on the private sector."[29]

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[28] Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (2011); *see also* Exec. Order No.13,579, (Jul. 11, 2011).

[29] *International Reporting Requirements Order*, 26 FCC Rcd 7274, 7365 (2011) (Statement of Chairman Julius Genachowski).

Apart from failing to account for the costs and benefits of applying new reporting requirements to all ETCs, including those that stand to soon lose all universal service support, the Commission has not sought the requisite Office of Management and Budget ("OMB") approval of its extension of federal ETC reporting requirements for voice services to state-designated ETCs. *See id.* ¶ 580. By extending existing federal reporting requirements to state-designated ETCs, the Commission has made a "material modification" to a previously approved information collection, which requires OMB approval under the Paperwork Reduction Act ("PRA").[30] In seeking OMB approval of its current federal ETC reporting requirements in 2005, the Commission anticipated that only twenty-two carriers would be affected—a key factor in its determination of the total annual cost burden.[31] Here, the Commission seeks to extend federal ETC reporting requirements to 1,400 or more ETCs,[32] which necessitates OMB approval.[33]

More broadly, many aspects of the new reporting requirements violate multiple other substantive provisions of the PRA. Among other things, the PRA requires federal agencies to ensure that data collections are "necessary for proper performance of the functions of the

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30 The PRA in relevant part states that "[a]n agency may not make a substantive or material modification to a collection of information after such collection has been approved by the [OMB] Director, unless the modification has been submitted to the Director for review and approval under this subchapter." 44 U.S.C.A. § 3507(h)(3); *see also* 5 C.F.R. § 1320.5(g).

31 *See Public Information Collections Approved by Office of Management and Budget*, 70 Fed. Reg. 66407 (Nov. 2, 2005) (stating that the "Estimated Annual Burden" is "22 responses; 242 total annual burden hours; approximately 11 hours average per respondent").

32 *See* United States Government Accountability Office, Report to Congressional Committees, Telecommunications: FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program, at 6 (June 2008).

33 The *Order* replaces 47 C.F.R. § 54.209 with 47 C.F.R. § 54.313, and sections (1)-(6) are virtually identical except for the major change that 54.313 applies to "any recipient of high-cost support" instead of only federally-designated ETCs. *Order*, ¶ 580 & App. A. The Federal Register announcement of the *Order* lists newly implemented rules that OMB must approve before taking effect. *Connect America Fund*, 76 Fed. Reg. 73830 (Nov. 29, 2011). The list of rules does not include 54.313(1)-(6). *Id.*

agency," the information gathered has "practical utility," and the collection itself "minimize[s] the burden ... on those who are to respond[.]" 44 U.S.C. § 3506(c)(2)(A). The new reporting requirements amount to a scatter-shot data collection effort—in many cases with no potential to add any value to Commission decision-making.

2. The FCC Should Clarify That the New Reporting Requirements Preempt Existing State Requirements.

The Commission should clarify that its new ETC reporting requirements—as applied to CAF recipients—preempt existing state requirements. The Commission states that a primary benefit of its new reporting requirements is "a uniform reporting and certification framework for ETCs" that "will minimize regulatory compliance costs for those ETCs that operate in multiple states." *Order* ¶ 575. But this benefit will not be realized if the new reporting requirements remain a "floor rather than a ceiling for the states." *Id.* ¶ 574. Requiring that ETCs continue to comply with existing state reporting requirements *in addition* to the new federal requirements would be inconsistent with the Commission's contention that its new rules will "minimize regulatory compliance costs," *id.* ¶ 575, particularly since it would result in many ETCs having to prepare and submit two different USF reports per state and, in most cases, at different times of the year.

3. The FCC Should Reconsider its Tribal Reporting Requirements.

The FCC should reconsider its Tribal engagement rules and reporting requirements, which are unlawful for several reasons. *See Order* ¶ 604.

First, the Commission adopted the Tribal engagement rules without adhering to the notice-and-comment requirements of the APA.[34] Indeed, the Commission failed to "fairly apprise interested persons" of the nature of the tribal engagement requirements that were ultimately adopted. *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980). The *NPRM* generally sought comment on whether high-cost recipients should "be required to engage with Tribal governments to provide *broadband* to Tribal and Native community institutions" and asked, "Are there additional requirements that should apply on Tribal Lands?" *NPRM* ¶ 151 (emphasis added). Such generic requests did not afford parties notice that the Commission was planning to require all ETCs serving Tribal areas to engage with Tribal governments in a specific manner and to require documentation of specific items.[35]

Second, the Commission should reconsider the Tribal engagement requirements to the extent they mandate that an ETC have certain discussions with Tribal governments, document such discussions, and "market[] services in a culturally sensitive manner." *See Order*, App. A, § 54.313(a)(9)(iii). These mandates violate the First Amendment. Even speech regarding purely factual "information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001).The Commission's Tribal engagement rules not only direct speech but attempt to direct the nature of the speech in contravention of the First Amendment, which

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34 5 U.S.C. § 553(b), (c). *See, e.g., Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

35 *Order* ¶ 604. Furthermore, no comments or *ex parte* letters on the record provide a basis for the new Tribal reporting requirements. The comments cited by the Commission, *see id.* n.1049, provide no specific proposals on how ETCs should engage with Tribal governments. *See, e.g.,* Joint Comments of Native Public Media and the National Congress of American Indians, WC Docket No. 10-90 at 8-9 (noting the importance of retaining USF support in Tribal lands).

protects a speaker's "right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *See Meyer v. Grant*, 486 U.S. 414, 424 (1988).

Finally, the Commission should reconsider the Tribal reporting requirements because they are impermissibly vague. A regulation is void for vagueness if it (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The Tribal reporting requirements fail on both counts. The *Order* does not discuss, for example, what is meant by "feasibility and sustainability planning" or "marketing services in a culturally sensitive manner," let alone the "documents or information" sufficient to demonstrate an ETC's compliance. *See id.* ¶ 604. Nor does the *Order* provide minimal enforcement guidelines, creating a license for arbitrary and discriminatory enforcement. A regulation that "is so imprecise that discriminatory enforcement is a real possibility" is impermissibly vague. *See Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).

4. The FCC should clarify that the new reporting requirements are prospective only.

Even if the Commission does not reconsider its new ETC reporting requirements, it should apply them prospectively only. As written, the *Order* applies the new reporting requirements retroactively, which raises practical and legal concerns. *Order* ¶ 581.

To illustrate the practical problems, on April 1, 2012, a state-designated ETC would be required to file outage reports covering 2011 in accordance with new section 54.313, even though that ETC would have had no reason to keep its 2011 outage reports in the newly required format.[36] Repackaging existing reports would be burdensome, costly, and at odds with the Chairman's commitment to reducing unnecessary data collections.[37] Moreover, applying the reporting requirements retroactively would require carriers to produce data that may not exist. For instance, if state-designated ETCs have not been under a state obligation to track unfulfilled service requests or the number of complaints per 1,000 customers, new Section 54.313(a)(3) & (4), these data may not be available for the 2012 report. Similarly, ETCs serving Tribal areas would be required to provide in 2012 documentation on discussions with Tribal governments that took place in 2011 on the five enumerated topics, even though such ETCs would have had no reason under existing rules to retain such documentation.

Aside from presenting practical problems, retrospective application of the reporting requirements is contrary to the APA, which requires that rules adopted pursuant to notice and comment "be *given future effect only*." *Chadmoore Comm'ns Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (emphasis added) (quotation marks omitted). A rule is impermissibly retroactive if it "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *DirecTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (quotation marks and citations omitted). Here, an ETC would potentially be liable for failing to comply with the reporting requirements in 2012 that relate to activities that took place in 2011, which violates the APA.

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36 Carriers generally keep outage reporting requirements according to section 4.5 of the Commission's rules, 47 C.F.R. § 4.5, which requires outage reporting in a different format than the format required under the FCC's ETC designation process. 47 C.F.R. § 54.209.

37 *See* Statement of Chairman Genachowski, WC Docket Nos. 11-10, 07-38, 08-190, 10-132; CC Docket Nos. 95-20, 98-10 (rel. Feb. 8, 2011) ("the Commission shouldn't waste resources collecting data it doesn't need").

Moreover, imposing service quality reporting requirements on ETCs is wrong-headed and directly at odds with President Obama's directives to executive and independent agencies to minimize costly and unnecessary regulations. In 2008, the Commission eliminated similar service quality reporting requirements under the old ARMIS regime because the reports were useless and not used by consumers.[38] No reason exists to resurrect similar service quality reporting requirements under the guise of new ETC obligations.

5. The FCC should reconsider its decision regarding the effective date of its new reporting requirements.

Finally, the Commission should reconsider the April 1 deadline of its new reporting requirements and, instead, make any new reporting requirements effective no earlier than July 1, 2012. *See Order* ¶ 575.

In adopting the April 1 deadline for its new extensive ETC compliance filings, the Commission was laboring under the impression that states typically require a full six months to review ETC reports prior to submitting their annual certification to the FCC on October 1 of each year. *Id.* In fact, however, states do not require such a long lead time, and most state commissions require that data be submitted after July 1, which provides ample opportunity for them to complete their annual certifications to the FCC on a timely basis.[39]

Furthermore, an April 1 filing deadline is problematic from an ETC's standpoint. ETCs that report performance results on a calendar basis typically do not close their books until the end

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[38] *See Service Quality*, *Customer Satisfaction*, *Infrastructure and Operating Data Gathering*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, ¶ 11 (2008).

[39] *See, e.g.,* Washington (July 31), WAC § 480-123-060; North Dakota (August 1), N.D. Admin. Code 69-09-05-12.1; Idaho (September 1), IDAPA 31.46.01; Texas (August 31), 16 TAC § 26.418; West Virginia (July 1), *General Investigation Regarding Certification of Federal Universal Service Funding for Eligible Telecommunications Carriers in West Virginia,* Commission Order, Case No. 11-0818-T-GI (Jun. 13, 2011).

of the first quarter, which would make it difficult, if not impossible, to comply with a April 1 filing deadline. A deadline on or after July 1 would be more consistent with existing state certification procedures and would provide ample time for ETCs to close their books for the preceding calendar year.

G. <u>The Commission's New ETC Document Retention Requirements Are Unduly Burdensome and Unnecessary And Should Be Prospective Only.</u>

The Commission should reconsider its decision to double the existing record retention requirement from five to ten years for recipients of high-cost and CAF support. *Order* ¶ 620. The Commission based its ten-year record retention requirement on the False Claims Act. However, the False Claims Act is designed to ferret out fraudulent claims by government contractors, not to increase the recordkeeping expense of government contractors. *See* 31 U.S.C. §§ 3729-33.[40] In fact, the False Claims Act imposes no affirmative record-keeping requirements on persons or entities submitting claims to the government.

Although the False Claims Act contains a ten-year statute of limitations, 31 U.S.C. § 3731(a)-(b), this provision hardly warrants establishing an equivalent record retention obligation. Indeed, a statute of limitations period by which a claim must be brought and a recordkeeping period during which records must be maintained serve fundamentally different purposes – purposes that the *Order* conflates. Furthermore, the costs of maintaining and storing records for ten years is significant – costs that the Commission ignores and that greatly outweigh any purported benefit from having available records during the entire time that a person could assert a hypothetical False Claims Act claim.

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[40] The False Claims Act provides in part that "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty. . . ." 31 U.S.C. § 3729(a)(1)(a).

The ten-year document retention requirement is inconsistent with the Commission's existing five-year administrative limitations period for audits and investigations of universal service fund beneficiaries. According to the Commission, five years "appropriately balance[d] the beneficiary's need for finality and our need to safeguard the USF programs from waste, fraud, and abuse."[41]

A ten-year document retention requirement also significantly exceeds the period for maintaining documents under other federal programs. For example, five-year employment and call record retention requirements apply for Video Relay Services,[42] and other Commission record retention requirements extend for two years or less.[43] The unreasonableness of a ten-year record retention requirement is underscored by regulations implementing the Sarbanes-Oxley Act and the Equal Credit Opportunity Act that embody shorter record retention periods.[44]

The Commission's ten-year record retention requirement also contravenes the purpose of the PRA by maximizing the paperwork burden for USF recipients with little, if any, corresponding benefit.

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41 *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, Report and Order, 22 FCC Rcd 16372, ¶ 29 (Aug. 29, 2007). *See* 47 C.F.R. § 54.320(a)-(b) ("*Comprehensive Review Order*").

42 *See Structure and Practices of the Video Relay Service Program*, Second Report and Order, 26 FCC Rcd 10898, ¶ 28 (July 28, 2011); *Structure and Practices of the Video Relay Service Program,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545, ¶¶ 85, 87 (2011).

43 *See, e.g.*, 47 C.F.R. § 64.2008(a)(2) (one year record retention of customer proprietary network information for telecommunications carriers); 47 C.F.R. § 42.6 (18 month record retention of billing records for common carriers); *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14557, ¶ 225 (2011) (two year record retention after a covered entity ceases to offer a product).

44 17 C.F.R. § 210.2-06 (seven-year retention of audit records); 12 C.F.R. § 202.12 (25-month retention for creditor applications); 15 C.F.R. § 14.53(b)-(d) (three-year retention for recipients of federal grants, which is extendable if audit commences during that time).

Even if the Commission declines to reconsider its ten-year record retention requirement, it should clarify that it applies only to records accumulated from the effective date of the rule going forward. In 2007, the Commission amended section 54.202(e) to mandate that all ETCs must retain records for five years from the receipt of funding. *Comprehensive Review Order* ¶ 24. Practically speaking, this means that on January 1, 2012, compliant ETCs would have retained records from January 1, 2007. If the ten-year requirement of new section 54.320 were applied retroactively (even assuming it were lawful for the Commission to do so), otherwise compliant ETCs with only five years of records would be unable to comply with 54.320.

H. <u>The Commission Should Clarify The Implications of Its Decision Not to Designate Broadband As a Supported Service.</u>

The Commission declined to designate broadband as a "supported service" under section 254(c)(1) but obligated ETCs to deploy broadband as a condition for receiving universal service support. *See Order* ¶¶ 76 & 86. This decision results in several potentially anomalous results that require clarification by the Commission.

First, the Commission should clarify that states may not impose additional conditions on an ETC's provision of broadband services. According to the Fifth Circuit, section 214(e)(2), which authorizes states to designate ETCs, does not expressly prohibit states from imposing some additional eligibility requirements on ETCs. *See TOPUC*, 183 F.3d at 418. However, the court's holding is limited to supported services, and nothing in that decision or the Act could reasonably be read to authorize a state commission to impose conditions on non-supported services pursuant to section 214. Indeed, the court found that reading the plain language of section 214 to allow states to impose additional eligibility requirements on ETCs' provision of supported voice services made sense "in light of the states' historical role in ensuring service quality standards for local [voice] service." *Id.* Here, states have no similar historical role regarding broadband.

Moreover, the plain language of section 214(e) as a whole further evidences Congress's intent that the states' role in designating ETCs is circumscribed to the ETCs' provision of the supported service. Section 214(e)(1) provides that all designated ETCs "shall ... offer the services that are supported by the Federal universal service support mechanisms," 47 U.S.C. § 214(e)(1). And section 214(e)(2) permits states to designate ETCs only insofar as they "meet the requirements of paragraph (1)," *i.e*., offer the supported service. *Id*. § 214(e)(2). Any attempt by a state to impose conditions on an ETC in connection with its provision of broadband, which is not a supported service, would run contrary to section 214(e), and the Commission should clarify the *Order* accordingly.

Second, the Commission should clarify that to the extent states exercise their limited authority to impose additional obligations on ETCs' voice telephony services, states must fully fund such obligations. Although the *Order* requests that state commissions "review their respective regulations and policies" in light of the Commission's reforms, *id*. ¶ 83, the Commission should make clear that state obligations on voice telephony service that are not fully funded by the state are "inconsistent" with the Commission's rules and would "burden" the federal universal service mechanisms, and thus, would be preempted under section 254(f) of the Act. *See* 47 U.S.C. § 254(f).

Third, the Commission should clarify that support may be spent on equipment used solely to provide broadband services that may be necessary to meet any broadband obligations imposed on recipients. *See, e.g., Order*, ¶¶ 149-50, ¶¶ 205-09. The Commission indicates that CAF recipients may use support for dual-purpose equipment, such as a DSLAMs. *Id.* at n.238.

However, the *Order* is silent on the ability of a CAF recipient to use funds to purchase equipment – such as DSL line cards – that may only be necessary for the provision of broadband services. If a recipient of CAF funding is going to be held to strict broadband deployment requirements, it should have the flexibility to use funding in order to meet those requirements.

And, *fourth*, the Commission should clarify the scope of an ETC's obligation to offer voice telephony "as a standalone service" throughout its designated service area. *See id.* ¶ 80. The Commission appears to interpret this requirement to prohibit an ETC that receives high-cost support from requiring a customer to buy a service other than voice – such as broadband – "in order to purchase voice service." *See id.* n.117. However, the *Order* is silent on the ability of ETCs that receive high-cost support to bundle voice services – specifically local and long distance. Accordingly, the Commission should clarify that ETCs that receive high-cost support are permitted to bundle local and long distance voice service without running afoul of the obligation to offer voice on a standalone basis. Similarly, the Commission should clarify that ETCs receiving no high-cost support have no obligation to offer voice telephony service on a standalone basis. *See id.* ¶ 80.

I. The Commission's Deployment Timeframes Should Exclude Delays Due to Circumstances Outside the Control of the ETC.

The Commission should clarify that delays resulting from circumstances beyond an ETC's control will toll any CAF broadband build-out deadlines established in the *Order*.[45] To meet what the Commission rightly dubs "[t]he universal service challenge of our time" by

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[45] As part of CAF Phase I, ETCs "must complete deployment to no fewer than two-thirds of the required number of locations within two years, and all required locations within three years…." *Order* ¶ 147. As part of CAF Phase II, price cap ETCs accepting a state-level commitment must deploy broadband services to at least 85 percent of covered high-cost locations by the end of the third year and to all supported locations by the end of the fifth year. *Id.* ¶ 160.

deploying new broadband capability to millions of Americans, *Order*, ¶¶ 4-5, the Commission should afford ETCs some leeway when they confront the inevitable construction delays caused by local zoning, permitting authorities, and the like.[46]

Commission rules and past decisions recognize that delays beyond the control of a licensee warrant tolling applicable build-out deadlines. For example, the Commission will toll a broadcast facility construction permit deadline "when construction is prevented by ... *causes not under the control of the permittee* ... including any zoning or environmental requirement."[47] And, according to Commission's 2009 *Tower Siting Order*, nearly one quarter of 3,300 pending zoning applications for wireless facilities had been pending for more than a year. *Tower Siting Order* ¶ 33. For this reason, the Commission defined specific timeframes beyond which a state or local zoning authority's inaction on a tower siting application constitutes a "failure to act" under section 332(c)(7)(B). *Id.* ¶ 4. This same reasoning supports tolling any broadband build-out deadlines due to events beyond an ETC's control.

J. **The Commission Should Clarify Implementation of Its Incremental Support Regime.**

The Commission should clarify how and when price cap carriers will be able to request waivers of the upstream speed requirement. *See Order* ¶¶ 95 & 147. While noting that such

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[46] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994, ¶¶ 32-33 (2009) ("*Tower Siting Order*").

[47] 47 C.F.R. § 73.3598(b)(emphasis added) (listing causes beyond a permittee's control as "any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement . . . including any zoning or environmental requirement," "administrative or judicial review," acts of God, and delayed requests for international coordination); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd 9664, ¶ 58 (2011) (noting how zoning approval extends the process and increases the cost of mobile network deployment).

waiver requests are anticipated and will be handled by the Wireline Competition Bureau, the Commission should specify whether price cap carriers must request a waiver before accepting CAF Phase I incremental support or whether the waiver process will be available after such support is accepted. *See id.* at n.234 ("Upon a showing that the specified support amount is inadequate to enable build out of broadband with actual upstream speeds of at least 1 Mbps to the required number of locations, a carrier may request a waiver.").

Additionally, the Commission notes its expectation that any facilities build out pursuant to a waiver of the minimum upstream speed "will eventually be upgraded." *See id*. ¶ 95. The Commission should clarify that carriers are not obligated to make such future upgrades as a condition to receiving CAF Phase I incremental support and that a carrier will be given the opportunity to decline support without adverse consequences should its waiver be denied.

K. <u>The Commission Should Phase Out The Safety Net Additive Support Under The Same Transition Plan Established For Competitive ETC Support.</u>

The Commission should reconsider its safety net additive support phase-out. As currently constituted, certain incumbent LECs that currently receive safety net additive support will lose this support over a two-year period. *Id.* ¶ 252. However, competitive ETCs that benefit from the same support mechanism will be able to retain safety net additive support for five years under the Commission's more generous phase-down of the identical support rule. *Id.* ¶ 519. This result is unwarranted and violates section 254. *See Alenco Communications*, 201 F.3d at 616 (holding that the universal service program "must treat all market participants equally"). To avoid this result and to ensure equal treatment of ETCs, the Commission should phase-out incumbent LEC safety net additive support on the same five-year schedule as the Commission adopted for the elimination of competitive ETC identical support. Alternatively, the

Commission must treat affected incumbent LECs equally to competitive ETCs that receive safety net additive support when phasing out such support.

L. **The Commission Should Reconsider Its Decision to Make Publicly Available the Financial Disclosures of Privately Held Companies.**

The Commission should allow privately held ETCs to seek confidential treatment of their financial and operational reports which now must be filed with the Commission, USAC, and the state commissions pursuant to the new ETC compliance reporting obligations. *See Order* ¶ 602. Privately held companies do not routinely make available confidential financial and operational reports that the Commission is now requiring be filed. The Commission should allow these private companies to file such financial and operational information pursuant to Commission rules and consistent with the Freedom of Information Act.[48] Disclosure of confidential financial information beyond the Commission, USAC, and the relevant state public service commissions, *id.* ¶ 575 would serve no legitimate governmental or public interest, and the Commission has not offered any justification for treating the financial records of privately held ETCs differently than the financial records of other regulated entities.

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[48] *See* 47 C.F.R. § 0.457(d) ("Records not routinely available for public inspection; Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905."); *see also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24823 (1998) (noting the Commission's "policy of *not authorizing the disclosure of confidential financial information* …") (emphasis added) (citations omitted).

III. THE COMMISSION SHOULD RECONSIDER AND CLARIFY CERTAIN ASPECTS OF ITS INTERCARRIER COMPENSATION REFORMS.

A. The Commission Should Make Modest Changes to the Access Recovery Mechanism for Incumbent LECs.

1. The baseline revenue calculation for determining the Eligible Recovery for price cap carriers should be based on billed, not "collected" revenues.

The Commission should reconsider its decision to use "collected" revenues when calculating "Price Cap Baseline Revenues" because this approach is operationally unworkable and fundamentally unfair. *See Order* ¶ 880 (requiring for purposes of the baseline that total switched access revenues include those "for which payment has been received by March 31, 2012"). No mechanized process exists to allocate interstate switched access revenues between "billed" and "collected" revenue. Moreover, it would be difficult, if not impossible, to allocate "collected" revenues between originating and terminating access as would be required by the Commission's formula. Because the formula only includes terminating access, incumbent LECs would be forced to allocate revenues subject to billing disputes between originating and terminating access – a process that would be costly and time consuming.[49]

Because the calculation in question is a one-time event imposed by the Commission for purposes of a transition away from access charges, the Commission should not mandate the creation of a new and unduly burdensome manual process. Doing so would conflict with the

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49 More concerning, the requirement unjustly harms carriers subject to billing disputes by enshrining their inability to collect revenue in 2011 (which in many cases may be lawfully billed and ultimately collected) as a permanent reduction to the access revenue baseline for the entire six-year terminating intercarrier compensation transition path. This unwarranted decision would compound the result of a 2011 billing dispute by a factor of six. Moreover, the decision to base the access revenue baseline on collected revenues irrationally and unfairly double counts the effect of uncollectable revenue because the end-user ARC charges that will be permitted to recover the access shift will also be subject to uncollectables, most likely at rates comparable to the uncollectable rates that apply to terminating access revenue.

Commission's stated goal to provide a measure of "certainty" through predictable revenue streams as central to its intercarrier compensation reform. *See Order* ¶ 36. Rather than use all revenues "for which payment has been received by March 31, 2012," *id.* ¶ 868, the Commission and price cap incumbent LECs would be better served by using "billed" interstate switched access revenue for purposes of this calculation.

2. The Commission should reconsider the level at which residential rates are compared with the Residential Rate Ceiling.

The Commission contemplates that the "Residential Rate Ceiling" will be calculated by an incumbent LEC on a customer-by-customer basis. This approach is inconsistent with the Commission's pricing rules, which generally recognize the practical necessity of implementing rules on a study area basis. Furthermore, with limited exceptions, the vast majority of charges to be included as part of the Residential Rate Ceiling calculation do not vary across an incumbent LEC's study area, which obviates the need for a customer level calculation.[50]

However, some charges, such as E911 fees, can vary from jurisdiction to jurisdiction within a study area. It would be extremely impractical for an incumbent LEC to modify its billing systems to accommodate minor billing variations that may affect the Residential Rate Ceiling when the purpose of the Commission's rule – maintaining affordable rates – can be accomplished by applying that ceiling on a study area basis. In such instances, the Commission should allow a carrier to account for the average amount of fees varying within a study area.

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[50] The Commission identified the rate ceiling component charges as the federal Subscriber Line Charge ("SLC"), the ARC, the flat rate for residential service, mandatory extended area service charges, state subscriber line charges, state USF charges, state E911 charges, and state TRS charges. See *Order* ¶ 914.

3. The Commission should clarify that the ARC is an interstate charge, even though it may include recovery of intrastate revenues.

The Commission should make clear that the ARC is an interstate charge, even though it may include the recovery of intrastate access revenues and reciprocal compensation revenues in connection with the transition to a bill-and-keep intercarrier compensation regime. *Order* ¶¶ 847-51. Although carriers are not required to charge the ARC, the Commission has carefully delineated how the ARC is to be calculated, required that the ARC be "separately tariffed," and imposed reporting requirements on carriers charging the ARC to enable monitoring by the Commission. *Order* ¶¶ 905-12. Indeed, the Commission "expect[s] incumbent LECs to include the new ARC charges as part of the SLC charge for billing purposes." *Order* ¶ 1334.

Under the circumstances, the ARC – like the SLC – is an interstate charge.[51] However, unlike the SLC, at least a portion of the ARC is intended to recover intrastate revenues lost by an incumbent LEC as a result of the Commission's reforms. To avoid any ambiguity regarding the ARC's regulatory status and to eliminate any possibility that a state commission may seek to oversee the calculation or recovery of the ARC on an incumbent LEC's bill, the Commission should make clear that the ARC is an interstate charge subject to exclusive federal oversight.

This clarification also is necessary for practical reasons associated with universal service contributions. If carriers include the ARC on the SLC line-item on customer bills, the total

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[51] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 ¶ 53 n.160 (2010) (describing the SLC as "an end-user charge regulated by this Commission, for interstate access"); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, Order and Second Order on Reconsideration, 17 FCC Rcd 11593, ¶ 4 n.12 (2002) ("The SLC is a flat, monthly charge assessed directly on end users to recover interstate loop costs"); *see also NARUC v. FCC*, 737 F.2d 1095, 1113-1114 (D.C. Cir. 1984).

amount would be subject to USF contributions as an assessable interstate charge. LEC billing systems in many cases are not capable of mapping some, but not all, of the revenue associated with the SLC line-item on bills to its universal service contribution base of assessable revenues, and modifying a billing system to add the ARC as a separate line-item charge would be a costly and time-consuming exercise.

4. The Commission should permit incumbent LECs to receive reimbursement from the Lifeline fund for ARC charges that incumbent LECs cannot recover from Lifeline customers.

The Commission's decision to exclude recovery of ARC charges for Lifeline customers is arbitrary and capricious because it departs without explanation from prior Commission precedent and contradicts the Commission's articulated goal of eliminating implicit subsidies. Accordingly, the Commission should reconsider this decision and allow ARC recovery for Lifeline customers from the Lifeline fund.

First, ARC charges should be not be treated differently than SLCs under the existing Lifeline mechanism. Under the Commission's existing Lifeline program, an incumbent LEC effectively "waives" its subscriber line charge for Lifeline customers and recovers that amount from the Lifeline mechanism.[52] Here, by contrast, the Commission proposes that an incumbent LEC simply forgo that revenue without explanation. *Order* ¶ 909, n.1782.

Second, by prohibiting the recovery of an ARC charge from Lifeline customers, the Commission creates a new implicit subsidy between customers that pay the ARC charge and those that do not. This is the illogical consequence of the Commission's determination that

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[52] *See* 47 C.F.R. §54.403(a)(1) ("The tariffed rate in effect for the primary residential End User Common Line charge of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service[.]"); *see also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 341 (1997).

"incumbent LECs' calculation of ARCs for purposes of the recovery mechanism must identify and exclude such customers." *Id*. By excluding Lifeline customer ARC revenues from the calculation, the Commission's formula requires that non-Lifeline customers will pay a higher ARC than would otherwise be the case. This implicit subsidy is impossible to reconcile with section 254(e) (stating that universal service support should be "explicit") and the primary thrust of the Commission's reform efforts to eliminate implicit subsidies in general. *Order* ¶ 862.

B. <u>The Commission Should Take Additional Steps To Prevent Regulatory Arbitrage.</u>

1. The Wireline Competition Bureau should clarify the definition of VoIP-PSTN traffic in 47 C.F.R. § 51.913(a).

In including VoIP-PSTN traffic as part of a unified intercarrier compensation framework, the Commission intended to "minimize future uncertainty and disputes regarding VoIP compensation, and thereby meaningfully reduce carriers' future costs." *Order* ¶¶ 40 & 935. However, the Commission's ability to achieve that objective is threatened by alleged ambiguity regarding the scope of "VoIP-PSTN traffic," which the Commission should clarify.[53]

When seeking to collect terminating access charges for PSTN-originated calls, some cable providers claim that their VoIP service does not utilize Internet protocol-compatible customer premises equipment.[54] The *Order* includes cable VoIP traffic within the new "IP-

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[53] This petition seeks clarification of the scope of that definition to avoid inconsistency with the Commission's stated policy goals. It does not seek reconsideration of an entirely distinct issue that the Commission has already resolved: whether a LEC that accepts terminating traffic bound for a non-LEC VoIP partner may collect access charges for the functions performed by the non-LEC VoIP provider rather than the LEC. *See Order* ¶¶ 970-71; *cf.* 47 C.F.R. § 61.26. The Commission's resolution of that issue is now ripe for judicial review, irrespective of how the Commission rules on this petition.

[54] *See, e.g., Complaint Against Verizon Florida, LLC and MCI Communications Services, d/b/a Verizon Business Services for Failure to Pay Intrastate Access Charges for the Origination and Termination of Intrastate Interexchange Telecommunications Services by Bright House*

PSTN" category, regardless of how cable companies distribute traffic within a home or the standard cable VoIP equipment used at the customer location. The Wireline Competition Bureau should resolve any potential ambiguity between the *Order* and its rules by construing the term "customer premises equipment" in new section 51.913(a) to include any equipment at or within proximity of a customer premises that enables the use of voice handsets or other equipment used for voice functions. In addition, or in the alternative, given the intent of the *Order*, the Bureau could make clear in section 51.913 that the new rule covers terminating traffic when the associated revenues are reported by providers as interconnected VoIP on their 2011 FCC Form 499As. The Bureau has delegated authority to revise section 51.913 to make these clarifications under these circumstances. *See Order* ¶ 1404.

2. The Commission should limit the ability of LECs engaged in access stimulation to circumvent the rules by inflating mileage.

The Commission has taken important steps to address access stimulation by LECs. However, there is a potential loophole that the Commission should close – namely, the ability of a LEC engaged in access stimulation to route traffic merely to increase its recovery of mileage-sensitive charges.[55]

(footnote cont'd.)
Networks Information Services (Florida), LLC, Docket No. 110056-TP, Direct Testimony of Michael Starkey, at 10-14 & 38 (filed Nov. 1, 2011); *Armstrong Telecommunications Inc. v. Verizon Pennsylvania, Inc.*, Docket Nos. C-2010-2216205, *et seq.*, Main Brief of Armstrong Telecommunications Inc. at 36 (filed Dec. 6, 2011).

[55] For example, unscrupulous LECs have rehomed their traffic to a new tandem located in a distant geographic location in an attempt to increase terminating access charges, even though doing so is less efficient from a network routing standpoint. LECs have also leased capacity on equal access rings to inflate the mileage they collect. In this scenario, instead of paying the standard rate charged by the equal access provider, IXCs are charged the higher transport rate associated with the pumping LEC even though the traffic travels over the same facilities.

Accordingly, the Commission should make clear that the remedies associated with access stimulation are not limited to a requirement that the access-stimulating LEC refile its interstate access tariffs. *See Order* ¶ 679. If a LEC that meets the two conditions for access stimulation engages in other questionable conduct to increase artificially mileage-sensitive transport charges, the affected carrier should have the ability to utilize the Commission's complaint procedures to obtain appropriate relief.[56]

3. Competitive LECs engaged in access stimulation should be required to lower their rates to $0.0007.

The Commission should not permit a competitive LEC engaged in access stimulation to recover more that $.0007 per minute for terminating access. The *Order* concludes that "the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition." *See id.* ¶ 690. As AT&T and Sprint have pointed out, competitive LECs engaged in access stimulation have extremely low costs (because the equipment they use is almost always located in a carrier's rural central office, avoiding any outside plant charges), and a benchmark rate based on the incumbent LEC's rate would therefore continue to encourage access stimulation.[57] The Commission's approach to dial-up ISP-bound traffic provides a better approach to dealing with carriers that incur minimal costs to simply route high volumes of traffic, and thus the $.0007 rate provides a better benchmark for competitive LECs engaged in access stimulation. *See* AT&T Comments at 16.

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[56] The Commission has recognized in other contexts that it should take steps to ensure "that carriers do not shift costs between or among other rate elements, which would be counter to the principles" adopted by the Commission. *See Order* ¶ 798.

[57] Comments of AT&T, WC Docket No. 10-90 at 16-17 (filed Apr. 1, 2011); Comments of Sprint Nextel Corp, WC Docket No. 10-90 at 2, 8-9 (filed Apr. 1, 2011).

4. The intrastate rates charged by new entrants prior to July 1, 2013 should be subject to the mirroring rule at interstate levels.

The Commission's transition plan in implementing bill-and-keep as the default methodology for all intercarrier compensation traffic is, for the most part, carefully balanced. However, it does not indicate the appropriate level of intrastate access rates charged by a new entrant entering the market prior to July 1, 2013, the date by which intrastate terminating switched end office and transport rates and reciprocal compensation, if above the carrier's interstate rate, are reduced to parity with interstate access rates. *See Order* ¶ 801.

To avoid disputes regarding appropriate rates to be charged by and paid to a new entrant, the Commission should require a carrier entering the market after December 29, 2011, to charge intrastate access rates that mirror interstate rates at the outset. Unlike existing carriers competing in the market based on established business plans that include "implicit support on which they have been permitted to rely for many years," *Order* ¶ 870, a new entrant has no expectancy interest in charging legacy intrastate access rates and no need for a transition to interstate rates.

5. The Commission should clarify that suspension decisions under section 251(f)(2) do not extend to the Commission's new intercarrier compensation regime.

The Commission correctly recognized the dangers to achieving a uniform intercarrier compensation regime if state commissions were permitted to suspend or modify requirements under this regime pursuant to section 251(f)(2). *See Order* ¶¶ 822-24. However, the possibility that section 251(f)(2) could be used to circumvent the Commission's reform efforts is not limited to future petitions seeking a suspension or modification of bill-and-keep. Specifically, state commissions previously have granted numerous suspensions and modifications of obligations under sections 251(b) and 251(c), which, if allowed to remain in effect, could undermine the Commission's reform efforts. Accordingly, the Commission should make clear that any suspension or modification decision already adopted by a state public service commission under section 251(f)(2) does not extend to the Commission's new intercarrier compensation regime.

6. The Commission should clarify that its "interim default rule" allocating responsibility for transport costs between rate-of-return carriers and CMRS providers does not affect the current rules governing points of interconnection.

To minimize adverse impacts on rural, rate-of-return carriers, the Commission adopted an "interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between CMRS providers and rural, rate-of return regulated LECs," including when a CMRS provider selects an interconnection point outside the LEC's service area. *Order* ¶¶ 998-99. The Commission should clarify that nothing in the *Order* or its the interim default rule was intended to affect the rules governing points of interconnection between CMRS providers and price cap carriers. Section 251(c)(2) requires an incumbent LEC to provide interconnection "at any technically feasible point *within the carrier's network*." *See* 47 U.S.C. § 251(c)(2)(B) (emphasis added). And, the Commission specifically concluded that it would address issues concerning the "default point at which financial responsibility for the exchange of traffic [under a bill and keep regime] shifts from the originating carrier to the terminating carrier" in its *FNPRM*. *Order* ¶ 998. In the meantime, the Commission should foreclose any suggestion that it intended to modify the rules governing interconnection points between CMRS providers and price cap carriers when it created the interim default rule for rate-of-return carriers.

C. <u>The Commission Should Revisit Its Treatment of Certain Originating Access Issues.</u>

The Commission desired to "limit[] reform to terminating access charges at this time," given its intent to "further evaluate" other charges including originating access. *Order* ¶ 739. However, the *Order* may create anomalous results and potential arbitrage opportunities regarding originating access, which the Commission should address.

First, like price cap carriers, rate-of-return carriers' originating intrastate access charges should be capped at current rates as of the effective date of the rules, subject to a rate-of-return carrier's ability to apply for and obtain a waiver. Notwithstanding the Commission's suggestion to the contrary, *id.* ¶ 805, there is no evidence that rate-of-return carriers would be financially harmed by capping their originating intrastate access charges.

Second, if there was a decision to exempt toll traffic that is originated on the PSTN and terminated on VoIP facilities from the payment of originating intrastate access charges (rather than deferring this issue to the *FNPRM*), the Commission should address the consequences of that decision. *See id.* ¶ 961. At a minimum, the Commission should provide for recovery through the CAF for lost originating intrastate access revenues associated with toll VoIP-PSTN traffic, including any such revenues lost during the first half of 2012.

Third, the Commission should reconsider its apparent decision to allow VoIP providers for the first time to impose originating interstate access charges. To the extent the Commission intended to create a new entitlement, it did not explain its rationale. Furthermore, if that was in fact the Commission's intent, it would not be appropriate to rely, as the Commission acknowledges doing, on section 251(b)(5), which cannot lawfully authorize the imposition of originating access charges, whether on a transitional or permanent basis. *Id.* ¶ 961, n.1976.

D. <u>The Commission Should Clarify The Date in Rule 51.705(c)(3) (July 1 instead of January 1).</u>

In its default rules for non-access reciprocal compensation, the Commission states that "[e]ffective July 1, 2013, no telecommunications carrier's Non-Access Reciprocal Compensation rates shall exceed that carrier's tariffed interstate access rate in effect in the same state on *January 1* of that same year, for equivalent functionality." *Order*, App. A, § 51.705(c)(3) (emphasis added). The Commission's Part 61 tariff rules typically anticipate a July 1st tariff effective date.[58] As such, the Commission should conform Commission Rule 51.705(c)(3) to its existing tariffing regime and January 1st to July 1st.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom's Petition for Reconsideration.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

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December 29, 2011

[58] *See, e.g.,* Commission Rule 61.3 definitions referring to July 1 effective date for certain rate calculations. 47 C.F.R. § 61.3.

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Line-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF
<u>THE BLOOSTON RURAL CARRIERS</u>

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Filed: December 29, 2011

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Summary

The Blooston Rural Carriers respectfully submit the following issues for the Commission to reconsider regarding the Mobility Fund Phase I Rules:

First, the Commission should reconsider the reverse auction procedures adopted in the *Order*, as they will surely create a "race to the bottom" that will not serve the public interest. Construction and equipment quality short-cuts and other gaming strategies can result in deceptively low "winning bids" and are likely to require larger disbursements of high-cost support in the long term to replace inferior facilities. Further, reverse auction proceedings are susceptible to anti-competitive bidding practices by large carriers that do not need the funds to expand service. Instead of reverse auctions, the Commission should instead let carriers qualify on the basis of qualitative factors including their prudently determined costs to serve (which should not be dependent on hypothetical cost models).

In the event that the Commission upholds reverse auctions, a mechanism must be implemented that assures that a significant portion of the Mobility Fund goes to the small rural wireless carriers that already serve or hold spectrum to serve the sparsely populated areas found to be unprofitable by the nationwide carriers, particularly those areas that are in or adjacent to the rural carriers' certificated telephone service area. The Commission failed to adequately address concerns that the 'lowest per-unit bids across all areas' procedure unduly and inequitably favors large carriers when adopting its reverse auction framework. The history of spectrum auctions has shown that small and rural carriers were successful bidders only when adequate protections were implemented, including spectrum set-asides, substantial bid credits, and the restriction of license sizes. Accordingly, the Blooston Rural Carriers respectfully submit that the Commission should

implement remedial measures to help ensure that a significant percentage of Mobility Fund dollars go to local businesses that have a significant stake in seeing that the needs of their citizens, communities and anchor institutions are met, including significant bidding credits to *bona fide* small businesses and affordable roaming rights for small carriers on other networks.

Second, the Blooston Rural Carriers urge the Commission to preserve the benefits of the voluntary phase-down commitments made by Verizon Wireless and Sprint in exchange for valuable merger concessions. Verizon remains the largest wireless carrier in the country, rivaled only by AT&T. USF funds are still limited, and the Mobility Fund rules must recognize that no Tier One carrier requires financial assistance in order to complete its buildout. On reconsideration, the Commission should prevent this form of "corporate welfare" by banning Tier I carriers from participating in the Mobility Fund.

Third, the Mobility Fund should not be tailored to provide funding for sites to be added to an existing system. It should also be available to help defray the costs of "green field" projects by rural wireless carriers. While the *Order* appears to express an intent not to fund the construction of new systems, it is respectfully submitted that the *Order* fails to recognize that many remote rural areas can be substantially served with an initial build that will be no larger than the highway "fill in" efforts of larger carriers.

Fourth, the Commission should further require that service providers certify that they will not participate in exclusive arrangements for the design and/or procurement of handsets and other equipment as a condition of receiving Mobility Fund support. Small and rural carriers have made a substantial showing concerning the harms to competition and to rural consumers that have arisen from the preponderance of exclusivity arrangements for the most sought-after wireless devices. The Commission's lack of consideration on this matter is arbitrary and capricious, and a failure by the Commission to engage in reasoned rulemaking.

Finally, the Commission should require any 3G buildouts done with Mobility Fund dollars to be readily upgradeable to 4G and later standards.

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
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Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OF
THE BLOOSTON RURAL CARRIERS

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its clients listed in Attachment A (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of that portion of the Commission's *Report and Order and Further Notice of Rulemaking*, FCC 11-161, released

November 18, 2011 ("*Order*"),[1] in the captioned proceeding that adopts and discusses Phase I of the Mobility Fund. The Blooston Rural Carriers ask the Commission to reconsider its decision to award Mobility Phase I support via a reverse auction mechanism because as described below, the Mobility Fund rules as adopted will hinder the ability of small, rural carriers to extend wireless services to remote regions within their service areas, and instead will establish a corporate welfare system for some of the largest corporations in the world.

I. Statement of Interest

The Blooston Rural Carriers are providers or resellers of wireless telecommunications and information services over licensed and/or unlicensed frequency bands, or are planning to commence the provision of licensed or unlicensed wireless services within the foreseeable future. Many are wireless divisions or affiliates of rural telephone companies, but are participating in this proceeding on behalf of their existing or prospective wireless operations. The Blooston Rural Carriers participated in the proceedings below, by filing comments on December 16, 2010[2] in the Commission's Mobility Fund Notice of Proposed Rule Making in WT Docket No. 10-208.[3]

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[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund;* Report and Order and Further Notice of Proposed Rulemaking, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011 ("*Order*").

[2] Comments of the Blooston Rural Carriers, WT Docket No. 10-208, filed December 16, 2010 ("Blooston Mobility Comments").

[3] *In the Matter of Universal Service Reform – Mobility Fund,* Notice of Proposed Rulemaking, WT Docket No. 10-208, released October 14, 2010. ("Mobility Fund NPRM").

II. The Reverse Auction Procedures Adopted By the Commission Will Create a "Race to the Bottom" That Will Not Serve the Public Interest.

In the *Order*, the Commission establishes a reverse auction mechanism to distribute Mobility Phase I support, stating simply that "a reverse auction is the best way to achieve our overall objective of maximizing consumer benefits given the available funds."[4] This assertion, however, is not adequately supported by the record. As discussed below, numerous commenters, the Blooston Rural Carriers among them, pointed out a number of pitfalls involved in the reverse auction process, which the Commission does little to address.

As the Blooston Rural Carriers argued in the notice and comment proceeding, reverse auctions are susceptible to a number of shortcomings that ultimately undermine the Commission's intention of expanding existing coverage to unserved areas in the most economic way possible.[5] The Blooston Rural Carriers remained concerned that construction and equipment quality short-cuts and other gaming strategies can result in deceptively low "winning bids" and are likely to require larger disbursements of high-cost support in the long term to replace inferior facilities.[6] Other commenters added to the list of concerns, pointing out that reverse auction proceedings are also susceptible to anti-competitive bidding practices by large carriers that do not need the funds to expand service.[7] The Commission's response to these concerns was limited to the following:

> The Blooston Rural Carriers, among others, argue that reverse auctions can lead to construction and equipment quality short-cuts due to cost cutting measures. We must of course define clear performance standards and effective enforcement of those standards, as is prudent when seeking any commitment for specific performance. We expect that bidders will consider cost-effective ways of fairly

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[4] *Order* at ¶322.
[5] Blooston Mobility Comments at 2-3.
[6] *Id.* at 3.
[7] *See* Comments of the Rural Cellular Association, WT Docket No. 10-208, filed December 16, 2010, at 11.

> meeting those requirements, which in turn is consistent with our objective to extend coverage for mobile services as much as possible given available funds.[8]

While the Commission's response to these concerns is the observation that "we must of course define clear performance standards and effective enforcement of those standards", no such standards are adopted. Moreover, while the Blooston Rural Carriers agree that any funding distribution method requires clear and enforceable standards, they respectfully submit such measures are not enough in this case. Rather, the only way to effectively encourage high-quality expansion into unserved areas is to ensure that funding is directed to carriers that have a legitimate interest in building and maintaining high-quality service in these areas. Rural carriers have served the areas that the large carriers have ignored for decades, and have a continuing and vested interest to do so through strong ties to the communities they serve.

Instead of reverse auctions, the Commission should choose a method of distributing funds that takes into account an equitable comparison and evaluation of the differing cost and service characteristics of different technologies, rights of creditors and repayments of outstanding loans, and the treatment of carrier of last resort obligations, costs,[9] as well as past performance and experience providing service in the kinds of areas that generally remain unserved. Because the Commission has determined that one (and only one) carrier will received funding to build out an unserved area, it is important to take into account more factors than simply which entity can claim to do the job for the least amount of money. The Commission should instead let carriers qualify on the basis of qualitative factors including their prudently determined costs to serve (which should not be dependent on hypothetical cost models).

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[8] *Order* at ¶325.

[9] *See, e.g.,* Blooston Mobility Comments at 2.

At minimum, if the Commission insists on proceeding with the reverse auction mechanism, it should reconsider the factors that determine distribution of funds on reconsideration, as discussed in detail below.

III. If Reverse Auctions are Held, a Mechanism Must be Used that Assures that a Significant Portion of the Mobility Fund Goes to the Small Rural Wireless Carriers that Already Serve or Hold Spectrum to Serve their Sparsely-Populated Service Areas.

In the event that the Commission upholds its decision to employ reverse auctions, a mechanism must be implemented that assures that a significant portion of the Mobility Fund goes to the small rural wireless carriers that already serve or hold spectrum to serve the sparsely populated areas found to be unprofitable by the nationwide carriers, particularly those areas that are in or adjacent to the rural carriers' certificated telephone service area.

In the *Mobility Fund NPRM*, the Commission sought comment on whether it should impose any other eligibility requirements on entities seeking to receive support from the Mobility Fund, including whether there are any steps it should take to encourage smaller eligible parties to participate in the Mobility Fund.[10] In response, the Blooston Rural Carriers urged that Mobility Fund procedures give rural telephone companies and other small businesses "a fair and equitable opportunity to receive support, and not employ the proposed 'lowest per-unit bids across all areas' procedure that unduly and inequitably favors large carriers."[11] Similar sentiments were echoed by a number of others in their comments and reply comments.[12]

[10] Mobility Fund NPRM at ¶55.
[11] *See* Blooston Mobility Comments at 2-3 and 5-8.
[12] *See, e.g.*, Comments of the Joint Center for Political and Economic Studies, WT Docket No. 10-208, filed December 16, 2010, at 4-5; Comments of Rural Cellular Association, WT Docket NO. 10-208, filed December 16,

However, the Commission failed to adequately address these legitimate concerns when adopting its reverse auction framework for the Mobility Fund. Instead, the Commission dismissed small and rural carrier arguments out of hand with the following conclusory statement:

> For a variety of reasons noted elsewhere, we are confident that both the auction design and natural advantages of carriers with existing investments in networks in rural areas should provide opportunities for smaller providers to compete effectively at auction.[13]

Furthermore, the Commission declined to bar any particular class of party, with specific reference to size advantages, on the ground that the general auction rules (similar to present day spectrum auction rules) and the as-yet-undetermined Mobility Fund auction procedures to provide "a fair opportunity for serious, interested parties to participate."[14] It is respectfully submitted that the Commission's failure to examine the issues and concerns raised by the Blooston Rural Carriers and others is arbitrary and capricious. The history of spectrum auctions has shown that small and rural carriers were successful bidders only when adequate protections were implemented, including spectrum set-asides, substantial bid credits, and the restriction of license sizes. Even with these measures, the Commission's license records reflect that the larger carriers have dominated the auctions. Without such measures, small carriers would have had no realistic chance at the small measure of success they have been able to achieve.

Yet, the *Order* does not appear to provide any of the measures that present-day spectrum auction rules provide to ensure competitive participation by small carriers, such as bidding credits. As the Blooston Rural Carriers pointed out, "Section 309(j)(3) of the Communications

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2010, at 5-6, 9; Comments of Rural Telecommunications Group at 7-8 and 10-14; Comments of Mid-Rivers Communications, WT Docket No. 10-208, filed December 16, 2010, at 6.

[13] *Order* at ¶326.

[14] *Order* at ¶409.

Act requires Commission spectrum auctions to be designed and conducted, *inter alia*, in a manner to 'promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a variety of applicants, including small businesses [and] rural telephone companies.' 47 U.S.C. §309(j)(2)."[15] If the Commission intends to rely on existing spectrum auction principles, it must do so in a way that ensures the Section 309(j) small business and rural telephone company requirement is met.

The Commission's reliance on undetermined further procedures provides little comfort for rural carriers who are routinely at a disadvantage to larger carriers. Rather, the Commission should, on reconsideration, take real, concrete, active steps to ensure equal opportunity and competitive participation amongst all carriers, such as the requirement for an apples-to-apples comparison of small service areas, and the introduction of bidding credits for small businesses, similar to the Tribal bidding credit currently provided for in the *Order*.[16]

The Blooston Rural Carriers also pointed out that Broadband Technology Opportunities Program (BTOP) grants and Broadband Initiatives Program (BIP) grant/loans appear to have been distributed equitably to a varied group of large, mid-sized and small entities, and suggested that these programs were successful largely because NTIA and RUS had selected projects on the basis of qualitative factors such as project purpose, benefits, viability, budget and sustainability. Other commenters suggested that qualitative factors should play a more significant role in

[15] Blooston Mobility Comments at 4-5.
[16] *Order* at ¶490.

making sure the Mobility Fund serves its intended purpose.[17] The *USF/ICC Order* fails to adequately address commenters' proposed use of these qualitative factors in identifying projects that should receive funding.

As it is currently designed, participation in the Mobility Fund will significantly favor large, nationwide carriers whose capital and operating costs are significantly lower than small and rural service providers. For instance, the use of road miles as the measure of a successful bid will favor large carriers proposing to cover highways, rather than small carriers trying to provide wireless to the truly remote areas that cannot otherwise be served without the benefit of Federal funding – i.e., the stated purpose of the Mobility Fund.

Accordingly, the Blooston Rural Carriers respectfully submit that the Commission should implement remedial measures to help ensure that a significant percentage of Mobility Fund dollars go to local businesses that have a significant stake in seeing that the needs of their citizens, communities and anchor institutions are met. Such remedial measures would include granting significant bidding credits to *bona fide* small businesses.

The Commission should also implement safeguards to ensure fair participation by small businesses and rural carriers. Specifically, the roaming requirement discussed in the *Order*[18] must be made to flow in both directions, such that potential recipients of Mobility Fund support that are small or rural carriers are able to obtain roaming rights on other networks in order to compete. As rural carriers have long pointed out, large carriers have little or no incentive to

[17] *See, e.g.*, Comments of Rural Telecommunications Group at 8-10.
[18] *Order* at ¶¶397-398.

negotiate roaming with small rural carriers, despite the requirements of the Commission's rules.[19] As the Commission decided to go beyond its existing roaming rules to ensure Mobility Fund Phase I recipients would offer roaming, so should it go beyond the existing roaming rules to ensure they are able to receive it elsewhere, as well.

Additionally, the Commission must ensure that roaming is affordable. Because the customers of a small carrier spend more time roaming on other networks than other networks' customers spend roaming on the small carrier's networks, it is possible for roaming costs under the current rules to mount rapidly. Therefore, the Blooston Rural Carriers also urge the Commission to take steps to ensure that roaming is affordable for small carriers. Otherwise, many small and rural carriers may ultimately suffer *losses* from roaming arrangements where their customers spend more time roaming than on the home network.

The Commission should also prohibit the use of package bidding, as the ability to accumulate census blocks into one large bid proposal will create an apples-to-oranges comparison that will heavily favor large carriers. Currently, the issue of package bidding is left to the Wireless Telecommunications Bureau to decide under delegated authority.[20]

Finally, as discussed below, the Commission should limit the entities that can seek Mobility Fund dollars based on size and need.

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[19] *See, e.g.*, Comments of North Dakota Network Company, WT Docket No. 05-265 (*filed* Nov. 18, 2005); Comments of the National Telephone Cooperative Association, WT Docket No. 05-265 (*filed* Nov. 28, 2005); Comments of the Blooston Rural Carriers, WT Docket No. 05-265 (*filed* June 14, 2010).

[20] *Order* at ¶426.

IV. Tier One Carriers Should Not Be Allowed to Participate in the Mobility Fund.

The Commission states that it will not bar any party from seeking Mobility Fund Phase I support based solely on the party's past decision to relinquish Universal Service Funds provided on another basis, with specific reference to the relinquishment of support by Verizon Wireless and Sprint in exchange for valuable merger concessions.[21] Specifically, the Commission concludes that there is no inconsistency with these entities' relinquishment of support under the identical support rule because under that rule, there was no specific obligation to expand voice coverage where it was lacking.[22] This conclusion is plainly in error.

Rather, the *entire purpose* of the Universal Service Fund is to expand the availability of telecommunications services, including voice services, to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas.[23] Furthermore, the Commission expressly conditioned recent mega-mergers by both Verizon and Sprint on a phase-down of USF support over a five year period, finding that such a phase-down was unequivocally in the public interest.[24] Yet, in refusing to bar such entities from seeking Mobility Fund Phase I support, the Commission inexplicably casts

[21] *Id.* at ¶408.
[22] *Id.*
[23] 47 USC § 254(b)(3).
[24] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) (*Verizon Wireless Merger Order*); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570 (2008) (*Sprint Merger Order*).

aside these facts (along with the concomitant benefits they represented) with hardly any consideration.

In the context of the Verizon-Alltel merger, the Commission stated as follows:

> [t]he proposed transaction constitutes a merger of the largest wireless company in the United States, based on revenues, as well as the number of retail customers, with another wireless company that is the largest recipient of the high-cost competitive ETC support. Such unique facts and large scope of this transaction compel us to condition our approval of the proposed transaction on Verizon Wireless's commitment to phase down its competitive ETC high cost support over five years, as discussed herein."[25]

The Blooston Rural Carriers respectfully submit that nothing has substantially changed. Verizon and its subsidiaries had net income of $10.217 billion in 2010 and $11.601 billion in 2009, compared to $3.962 billion in 2008.[26] Verizon Wireless remains one of the largest wireless providers in the country, rivaled only by AT&T.[27] And, were it not for the Commission's conditioning the Alltel merger upon a phase-down of USF receipts, it stands to reason that the merged entity would have remained the largest recipient of high cost funding, as well.

At the same time, the Commission has repeatedly warned of the tight funding limits under which it seeks to accomplish its goal of extending wireless services to unserved areas under Mobility Phase I.[28] The Commission accepted the USF phase-downs proposed by Verizon

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[25] *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17532 (F.C.C. 2008).
[26] Verizon Communications 2010 Annual Report, Consolidated Statements of Income – As Adjusted, p. 42.
[27] Verizon Wireless boasts 107.7 million connections, *see* http://aboutus.verizonwireless.com/ataglance.html; AT&T boasts approximately 97 million, *see* http://www.att.com/Investor/Financial/Earning_Info/docs/1Q_11_slide_c.pdf; Sprint is the next closes with some 51 million, *see Sprint Nextel First Quarter 2011 Results,* available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzk1MDg5M3xDaGlsZElEPTQyNDA2OHxUeXBlPTI=&t=1 (Websites last visited December 28, 2011).
[28] *See, e.g., Order* at ¶¶ 321, 323, and 337.

and Sprint in order to alleviate such cost limitations.[29] Yet, the *Order* would undo any benefits reaped from the withdrawal of Tier I giants like Verizon and Sprint from USF by allowing these companies to simply re-apply for funding before they have even finished the phase-out conditions on the lucrative mergers they have been allowed to complete.

In this regard, the Mobility Fund rules must recognize that no Tier I carrier actually requires financial assistance in order to complete its buildout. While AT&T is not subject to an existing phase-down order, it had net income of $19.864 billion in 2010 and $12.138 billion in 2009, and a loss of $2.625 billion in 2008[30] (or an average annual net income of $9.792 billion during the three-year period). Notwithstanding the fact that the recent annual profits of either AT&T or Verizon could fund the entire proposed $4.5 billion annual high-cost program budget with room to spare (in fact, AT&T could take a complete second lap), the Commission is looking to give them substantial new CAF and Mobility Fund support (as well as major access and reciprocal compensation savings) without any reference to their earnings. On reconsideration, the Commission should prevent this form of "corporate welfare" by banning Tier I carriers from participating in the Mobility Fund.

V. The Mobility Fund Should Be Available for Rural Carriers to Launch Small Wireless Systems.

The Mobility Fund should not be tailored to provide funding for sites to be added to an existing system. It should also be available to help defray the costs of "green field" projects by rural wireless carriers. For many rural carriers holding RSA-sized licenses, the money that would

[29] *See* Sprint Merger Order; Verizon Wireless Merger Order.
[30] AT&T Inc. 2010 Annual Report, Consolidated Statements of Income, p. 59.

allow a Tier I carrier to add a few sites to an existing system could give the rural carrier the funding it needs to accomplish a significant portion of its initial implementation in an area that is otherwise currently unserved. This would be consistent with the purpose of the Mobility Fund as stated at paragraph 324 of the *Order*:

> We observe that the areas eligible for Mobility Fund Phase I funding generally are ones where the economics have not been sufficient to date to attract private investment. While it may be true that some of these areas potentially could be built out using private investment over time, our goal in establishing the Mobility Fund is to provide the necessary "jump start" to accelerate service to areas where it is cost effective to do so.

There are numerous RLECs that have a vested interest in providing wireless service to truly remote areas, because these areas are in or adjacent to the carriers' certificated telephone service areas, and such areas can often be served with a relatively small number of cell sites; however, these carriers need an economic "jump start" that will enable them to overcome the high initial costs of reaching remote areas that often feature rugged terrain, lack of good roads and an extremely low population density. While the Order appears to express an intent not to fund the construction of new systems,[31] it is respectfully submitted that the Order fails to recognize that many remote rural areas can be substantially served with an initial build that will be no larger than the highway "fill in" efforts of larger carriers.

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[31]*See, e.g., Order* at ¶340 ("However, the areas that currently lack basic mobile services are likely to be among the most difficult or expensive to serve and would likely require significant ongoing support to remain operational. Given the limited size and scope of the Mobility Fund Phase I, we do not believe that this support mechanism, even with a priority for completely unserved areas, would most efficiently address those areas. Rather, we address these areas in the parts of this Order and the FNPRM addressing ongoing support for wireless services and highest cost areas.").

VI. Exclusive Equipment Arrangements Should Not be Allowed for Mobility Fund Applicants.

In its Mobility Fund NPRM, the Commission proposed that recipients of Mobility Fund support would be subject to public interest obligations, including data roaming and collocation requirements.[32] The Blooston Rural Carriers suggested that the Commission should further require that service providers certify that they will not participate in exclusive arrangements for the design and/or procurement of handsets and other equipment as a condition of receiving Mobility Fund support.[33] However, the Commission failed to adopt this measure in its Mobility Fund rules, and it never discussed why imposing a limitation on handset exclusivity arrangements upon Mobility Fund recipients would not be in the public interest.

Small and rural carriers have made a substantial showing concerning the harms to competition and to rural consumers that have arisen from the preponderance of exclusivity arrangements for the most sought-after wireless devices.[34] It is well established that these arrangements impair the service and competitive options of smaller carriers, deprive the customers of such smaller carriers of roaming capabilities and service features, and increase the cost of the mobile broadband services and equipment available to customers of smaller carriers.[35]

In its discussion of "other qualifications" for Mobility Fund recipients, the Commission makes a passing reference to the Blooston Rural Carriers' proposal at Paragraph 407 of the *Order*. Yet there is no meaningful analysis or discussion of the pros and cons of adopting a limitation on handset exclusivity arrangements, and no explicit disposition of this issue. Mere

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[32] *See Mobility Fund NPRM* at ¶36.
[33] *See* Blooston Mobility Comments at 8-9.
[34] *See* Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497, (*filed* May 20, 2008); Comments of Blooston Rural Carriers, RM-11497, (*filed* Feb 2, 2009).
[35] *Id.*

citation to the Blooston Rural Carriers' proposal is hardly sufficient, and it provides no evidence that the Commission even considered the matter. Ignoring the proposal is arbitrary and capricious, and a failure by the Commission to engage in reasoned rulemaking.[36]

VII. Funding Should Go Toward 4G Construction or 3G Construction that Can Be Reasonably Upgraded to 4G in the Near Future.

During the underlying rulemaking, the Blooston Rural Carriers asserted that, because of the substantial existing and potential funding demands upon Universal Service Fund ("USF") programs, the Commission should expressly restrict participation in the Mobility Fund reverse auction to bidders whose proposed third generation ("3G") mobile wireless broadband networks and facilities are capable of ready, efficient and economical conversion to fourth generation ("4G") mobile wireless broadband networks.[37] Paragraph 37 of the Mobility Fund NPRM had expressly asked whether supported 3G networks should be required to present a path to 4G service. In this regard, the Blooston Rural Carriers observed that some 3G facilities and equipment can be readily and economically converted to 4G networks, but that others cannot. It appears that some of the non-convertible 3G facilities and equipment would have to be extensively reconfigured at great expense to provide 4G services, and that others might need to be replaced in substantial part.

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[36] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 462 US 29, 43 (1983)(Holding "the requirement that an agency action not be arbitrary and capricious includes a requirement that an agency adequately explain its result"); *Evangelical Lutheran Church in America v. Immigration and Naturalization Service*, 288 F.Supp 2d 32, 47 (D.C. Cir. 2003)(*quoting Pension Benefit Guar. Corp. v. LTV Corp.*, 496 US 633, 654 (1990)(Stating agencies must take whatever steps are necessary, "to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision.").

[37] Blooston Mobility Comments at 3-5.

The *Order* discusses the difference between 3G and 4G supported services at paragraph 360, but fails to specifically address the Blooston Rural Carriers' request that 3G be supported only if it is readily upgradable. Instead, the Commission merely concluded:

> Mobile service providers receiving non-recurring Mobility Fund Phase I support will be obligated to provide supported services over a 3G *or better* network that has achieved particular data rates under particular conditions. Specifically, Phase I recipients will be required to specify whether they will be deploying a network that meets 3G requirements or 4G requirements in areas eligible for support as those requirements are detailed here. [38]

It is respectfully submitted that the Commission should take the opportunity on reconsideration to address the Blooston Rural Carriers' request head on. As this Commission is well aware, funding for the proposed Mobility Fund and for other existing and contemplated USF programs is subject to considerable and increasing needs as the current mixed-use public network evolves more and more toward a National Broadband Network. Small wireline and wireless carriers need sufficient USF support to continue providing quality and affordable voice and data services in high-cost rural areas, and are likely to need increased support to continue upgrading their networks to deploy broadband facilities and services at speeds that are reasonably comparable to those available in urban areas.

At a time when there are substantial competing needs for USF funding, it would be unreasonably inefficient and wasteful for the proposed Mobility Fund to support capital expenditures for non-convertible 3G facilities and equipment when superseding 4G service roll-outs are already being advertised in urban areas. Scarce USF funds should not be used to deploy non-convertible 3G facilities that are likely to become outmoded and will need to be replaced by

[38] *Order* at ¶360.

4G networks within the immediately foreseeable future. It will be far more efficient and less expensive in the longer run to require the Mobility Fund to support only 3G facilities and equipment that can be readily and economically converted to 4G services, or to postpone its operations for a year or two until 4G facilities and equipment become readily available.

VIII. Conclusion

The Blooston Rural Carriers appreciate the Commission's effort to fashion the Mobility Fund as a means of directing support to the remote areas that still lack advanced wireless services. However, as shown above, the Commission erred in addressing certain very important issues surrounding its proposed Mobility Fund rules. In certain cases identified above, the Commission was presented with facts and arguments by the Blooston Rural Carriers and others, and simply failed to address the issue raised at all, which is an arbitrary and capricious failure to provide the public and the courts with a record adequate to judge whether the Commission's actions were justified. In other cases, including the critical creation of the mechanism for awarding Mobility Fund grants, the Commission enunciated a plan, but the plan failed to adequately address important facts reflected in the record, and as a result reached an erroneous decision. Moreover, the Commission failed to consider alternatives (such as bid credits and other protections for small rural carriers) that would have better ensured that the purposes of the Mobility Fund were fulfilled, while at the same time meeting the Congressional mandate in Section 309(j) to facilitate rural telephone carrier participation in the provision of advanced wireless services to their rural service areas.

It is vital that the Commission correct these shortcomings in the *Order*. *See Jacob Siegel Co. v. FTC*, 327 US 608 (1946)(remanding case in which FTC ordered company to abandon allegedly deceptive brand name but did not reasonably consider whether a lesser alternative method would suffice); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, (1971) (A reviewing court must determine "whether the decision was based on a consideration of the relevant factors"; Failure to consider the concerns that animated the rulemaking casts doubt on the reasonableness of the agency's decision-making process.) *Cf. Natural Resources Defense Council, Inc. v. SEC*, 196 U.S. App. D.C. 124, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995), *citing City of Brookings Municipal Tel. Co.*, 822 F.2d at 1169 ("The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules. The failure to do so permits reversal of the FCC's attribution rule."). 47 C.F.R. § 1.425 ("The Commission will consider all relevant comments and material of record before taking final action in a rulemaking proceeding and will issue a decision incorporating its finding and a brief statement of the reasons therefor."); Courts have long held that an agency must respond to "relevant" and "significant" comments. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977); *see also United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (stating that once a comment is "significant enough to step over the threshold requirement of materiality," the "lack of agency response or consideration becomes a concern"). The opportunity to comment is meaningless unless the agency responds to significant points raised by the public. *Portland Cement Ass'n v. Ruckelshaus*, supra, 486 F.2d at 393-394.

Based on the foregoing, it is respectfully requested that the Commission revise the *Order* on reconsideration, consistent with the showings made herein.

Respectfully submitted,

BLOOSTON RURAL CARRIERS

By______________________________
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Filed: December 29, 2011

Attachment A

The Blooston Rural Carriers

Big Bend Telephone Company, Inc.
Butler-Bremer Communications
Clear Lake Independent Telephone Company
Custer Telephone Cooperative, Inc.
Gold Star Communications, LLC
Manti Telephone Company
Midstate Communications, Inc.
Northeast Louisiana Telephone Company, Inc.
NNTC Wireless, Inc.
Public Service Telephone Company
Penasco Valley Telephone Cooperative, Inc.
Sagebrush Cellular, Inc.
Smithville Telecom, LLC
Strata Networks
Walnut Telephone Company, Inc.
West Texas Rural Telephone Cooperative, Inc.
Wiggins Telephone Association
WUE, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION
OF
SPRINT NEXTEL CORPORATION

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December 29, 2011

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	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION
OF
SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby requests that the Commission clarify and reconsider certain aspects of its *USF/ICC Transformation Order* in the above-captioned proceedings.[1] As demonstrated below, clarification and reconsideration of the newly adopted rules to address traffic pumping are required to ensure that these rules achieve their stated purpose, to make the rules more effective, and to minimize pumpers' ability to game the system at the expense of the public interest.

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[1] *Connect America Fund, et al.*, Docket Nos. 10-90, *et al., Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161 (Nov. 18, 2011), published in 76 Fed Reg. 73830 (Nov. 29, 2011) ("*USF/ICC Transformation Order*" or "*Order*").

I. INTRODUCTION AND SUMMARY

The Commission was entirely correct in describing the negative multi-billion dollar impact of traffic pumping,[2] in emphasizing that access stimulation must be "reduced,"[3] and in deciding that expedited implementation of the adopted remedies was essential.[4] While Sprint is hopeful that the steps taken by the Commission in this proceeding will indeed reduce traffic pumping, we request that the Commission clarify certain of its rules to close loopholes (perceived or actual), and that it reconsider certain of its rules to make them more effective at reducing traffic pumping schemes and disputes.

Specifically, the Commission should clarify that:

- The *Order* does not overturn previous Commission rulings or standards for determining whether a LEC's free service provider partner is a legitimate end user/customer under its access tariff;
- The *Order* does not overturn the statutory requirement that telecommunications services be offered "for a fee";
- Assuming that the Commission retains its price cap LEC rate benchmark remedy, a CLEC engaged in traffic pumping may include in its rate benchmark only those

[2] *See, e.g., id.*, ¶ 663 ("access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment") and ¶ 665 ("access stimulation also harms competition by giving companies that offer a "free" calling service a competitive advantage over companies that charge their customers for the service").

[3] *See, e.g., id.*, ¶ 662 ("The record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate switched access rates remain just and reasonable…"). Indeed, the title of the section of the *Order* addressing traffic pumping (Section XI.A) is entitled "Rules to Reduce Access Stimulation."

[4] *See, e.g., id.*, ¶ 701 ("taking this basic step [adoption of new rules to reduce access stimulation which become effective December 29, 2011] will immediately reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes").

price cap LEC rate elements associated with functions the CLEC actually performs;

- For benchmarking purposes, a CLEC must use the price cap LEC's average local transport miles, or the CLEC's actual local transport miles, whichever is less.

In addition, Sprint urges the Commission to reconsider the following aspects of the *USF/ICC Transformation Order*:

- Use of price cap LEC rate benchmarks, or recalculated 61.38 rates, for LECs that meet the traffic pumping triggers. Instead, the Commission should mandate use of a rate of $.0007 for all LECs that meet the triggers;

- That if a CLEC's stimulated traffic volume exceeds the price cap LEC's traffic volume, the Commission "will" (rather than "may") reevaluate whether any further rate reductions are warranted. A true-up mechanism must be incorporated to help ensure that rates for the entire monitoring period are just and reasonable;

- That LECs that cease engaging in traffic pumping may revert back to the old way of establishing rates. Here again, a true-up mechanism must be incorporated into the revised ratemaking process;

- That LECs have 45 days after meeting the triggers to file a revised access tariff. This period is too long, and should be reduced to 15 days at the longest.

II. ISSUES FOR CLARIFICATION

The Commission explicitly, and correctly, found in the *Order* that traffic pumping has serious deleterious effects and that stimulation schemes must be curbed. Astonishingly, certain parties have characterized the Commission's order here as somehow legitimizing traffic pumping. For example, Farmers & Merchants has asserted that the *Order* "...acknowledges that...such service [pumped traffic] _is_ access service under the Commission's Rules, regardless whether the CCCs qualify as 'end users.'"[5] The Commission promptly rejected this assertion, stating that by omitting a

[5] See letter dated November 29, 2011 from John Cooney, counsel for Farmers & Merchants, to Mark J. Langer, Clerk of Court, US Court of Appeals for the DC Circuit, in *Farmers & Merchants Mutual Telephone Co. v. FCC*, No. 10-1093 at 1-2 (emphasis in original).

"critical…qualifier" when quoting the *Order*, Farmers deliberately misrepresented a qualified, limited Commission statement as being an absolute assertion.[6]

To short-circuit further attempts by traffic pumping LECs and their revenue sharing partners to mischaracterize or otherwise manipulate the Commission's new traffic pumping rules, Sprint requests that the Commission clarify several points.

First, the Commission should explicitly state that nothing in the *Order* overturns previous rulings and existing standards for determining whether pumped traffic is access traffic or whether a LEC's traffic pumping partner is a legitimate end user/customer under its access tariff. If an entity does not qualify as an end user under the terms of the LEC's access tariff, calls generated by that entity and terminated by the LEC in question do not constitute access traffic, and access charges do not apply.[7] This is the case today, and will be equally true after December 29, 2011, when the new traffic pumping rules take effect.

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[6] See letter dated December 1, 2011 from Joel Marcus, Counsel, FCC, to Mark J. Langer, Clerk, US Court of Appeals for the DC Circuit, in Case No. 10-1093 ("In the new order, the FCC rejected the proposition (¶672) that "traffic directed to [conference companies] should not be subject to tariffed access charges *in all cases.*") In any event, where, as in Case 10-1093, the case involves a tariff interpretation, the prospective *Order* "has no bearing on that issue."

[7] *See Qwest Communications Corp., Complainant, v. Farmers and Merchants Mutual Telephone Co., Defendant,* File No. EB-07-MD-001, *Second Order on Reconsideration*, 24 FCC Rcd 14801, 14814 (¶26) (2009). *See also Qwest Communications Corp. v. Northern Valley Communications,* File No. EB-11-MD-001, *Memorandum Opinion and Order,* 26 FCC Rcd. 8332 (2011), *reconsideration denied*, 26 FCC Rcd 14520 (Oct. 5, 2011); and *Sprint Communications Company, L.P. v. Northern Valley Communications*, File No.EB-11-MD-003, 26 FCC Rcd 10780 (2011), *reconsideration denied*, FCC 11-170, 2011 FCC Lexis 4630 (issued November 14, 2011). Northern Valley has filed petitions for review of these decisions before the U.S. Court of Appeals for the D.C. Circuit. *Northern Valley v. FCC*, Case No. 11-1467 (2011) (appealing the Qwest decision) and *Northern Valley v. FCC*, Case No. 11-1468 (appealing the Sprint decision). The cases have been consolidated.

Although it would seem to be self-evident, the Commission also should explicitly state that the *Order* does not (indeed, cannot) overturn the statutory definition of telecommunications service. The Act defines telecommunications service as "the offering of telecommunications for a fee directly to the public…."[8] If a LEC provides exchange service to an entity free of charge (that is, not "for a fee"), termination of calls to such an entity by that LEC by definition does not constitute telecommunications service and thus such calls are not subject to access charges.

The Commission stated that the scope of revenue sharing includes agreements:[9]

> …whether express, implied, written or oral, that over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers.

Sprint fully supports the Commission's efforts to define revenue sharing in such a way as to capture various types of payments and to capture arrangements with both independent entities and the LEC's own affiliates, and thus limit the access charge levels assessed on legitimate telecommunications services provided by an entity engaged in revenue sharing. Sprint is concerned, however, that the definition as currently structured could be read in conjunction with the new limit on access charges to conflict with the statutory definition of a telecommunications service by implying that access can be charged on non-telecommunications services. In order to render it explicitly consistent with the statutory definition, the Commission should clarify that when a carrier engages in a revenue sharing arrangement that encompasses the provision of service to the "other party" (the

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[8] 47 U.S.C. 153(53).
[9] *Order,* ¶ 669.

revenue sharing partner) without assessment of a fee, the non-telecommunications traffic handled by that carrier is not subject to access charges of any type.

For the above reasons, Sprint asks for a clarification of the FCC's decision stating that the FCC was not modifying the definition of a telecommunications service. If, however, the FCC interprets this new rule in a manner that would apply access rates to services not provided for a fee, Sprint seeks reconsideration of the Commission's decision. By definition, services not provided for a fee are not telecommunications services and can neither be tariffed nor subjected to access charges.

A third area of clarification involves benchmarked rates. Under the new rules, CLECs that meet the access stimulation triggers (revenue sharing and traffic volumes) must revise their tariff to reflect "a rate no higher than the lowest rate of a price cap LEC in the state."[10] Assuming that this rule is retained,[11] the Commission should specify which price cap LEC rate elements may be included in this composite rate, or, at a minimum, explicitly direct the CLEC to tariff a rate that reflects only those functions it actually performs. A CLEC may not aggregate every rate element tariffed by the price cap LEC, and charge that aggregated rate, if it does not perform each of the functions associated with each rate element included, for each minute of traffic on which the composite rate is assessed.[12]

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[10] *Order*, ¶ 689. Section 61.26(5) specifies that a CLEC is to file "a rate for interstate switched exchange access services," defined as "the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges."
[11] See pp. 7-8 below, requesting reconsideration of this rule.
[12] It is axiomatic that a carrier is not allowed to include in a benchmark rate the costs for services it does not provide. *See, Access Charge Reform,* 19 FCC Rcd 9108 at ¶ 21 and fn. 70 (2004).

Most if not all price cap LECs have a local transport rate structure that includes a per mile element. Sprint urges the Commission to clarify that in setting a composite rate, a CLEC engaged in access stimulation must base any local transport charge on either the price cap LEC's average local transport miles, or the CLEC's own transport miles for the call in question, whichever is lower. A limit on local transport mileage charges is critical to prevent "local transport pumping" – a situation in which a LEC will drag a call to a far-distant interconnection point, even if there is a closer interconnection point, simply to maximize transport revenues. This sort of gaming of the system is not idle speculation. Sprint has been victimized by at least two LECs, which changed the point of interconnection from a relatively close end office to a far distant end office (in one case, the point of interconnection was changed from an end office 10 miles from Sprint's point of presence, to one 158 miles away). Such action was not necessitated by any network purpose, or justified by any engineering principle; to the contrary, the LECs in question re-routed Sprint's traffic solely to maximize the number of miles for which they could impose a per-mile local transport fee. The Commission should exert its authority to ensure efficient interconnection, and put an end to transport pumping by capping allowable local transport miles in traffic pumping situations.

III. ISSUES FOR RECONSIDERATION

In addition to clarifying the traffic pumping section of the *Order* as discussed above, the Commission should also reconsider four issues to further reduce the deleterious effects of traffic pumping.

First, the Commission should reconsider the rate remedy that will apply in situations in which the traffic pumping triggers are met – for CLECs, the rate charged by the price cap LEC with the lowest rates in the state, and for rate-of-return LECs, the rates derived from a Section 61.38 analysis. Instead, the Commission should require LECs that meet the traffic pumping triggers to charge a default rate of no more than $.0007 per minute.

As Sprint has demonstrated, a rate of $.0007 for this stimulated traffic is compensatory, simple to implement, is widely used in other intercarrier compensation situations, and has passed judicial review.[13] The Commission has since recognized that the existing rate structure/intercarrier compensation mechanism for price cap LECs is seriously flawed, and has adopted a transition plan to the most optimal mechanism – bill and keep.[14] This transition to bill-and-keep for terminating traffic is being phased in over the next several years to give LECs the opportunity to adapt to the new regime for what is presumably legitimate access traffic involving legitimate end users. This is not the case with traffic pumping LECs. The Commission has found that traffic pumping is contrary to the public interest, and, in the cases scrutinized by the Enforcement Bureau, that the stimulated traffic is not access traffic. Thus, it should not provide a safe harbor for CLECs to continue to engage in these schemes and earn unreasonable returns by charging rates which, while lower than those assessed prior to December 29, 2011, are still far above cost. If the Commission, out of an excess of caution to protect legitimate business arrangements to increase access traffic (*e.g.*, the new call center scenario), declines to implement bill-and-keep immediately on stimulated traffic, it should allow CLECs that have met the traffic pumping triggers to charge no more than $.0007.

[13] *See, e.g.*, Sprint's comments dated April 1, 2011 in the instant proceedings, pp. 5, 15-19.
[14] *Order*, ¶¶ 736-808.

The remedy for rate-of-return LECs that meet the traffic pumping triggers should also be revised. Rather than undergoing a Section 61.38 rate process – with all the attendant problems associated with forecasting and evaluating prospective demand and costs in a short timeframe – rate-of-return LECs that meet the triggers also should be allowed to charge no more than $.0007.

A second area for reconsideration involves situations in which a CLEC which has met the traffic pumping trigger has traffic volumes that exceed those of the price cap LEC to which it is benchmarked. The Commission has stated that "should the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted."[15]

The Commission's policy here should be strengthened as follows. When a competitive LEC that meets the traffic pumping trigger has traffic volumes that exceed the traffic volumes of the price cap LEC to which it benchmarks, the Commission *will* reevaluate the appropriateness of the competitive LEC's rates. The competitive LEC shall base its rates by dividing its forecasted costs by its forecasted minutes of use, using a TELRIC methodology, and shall if necessary implement a true-up, based upon 12 months' of actual results, to ensure that the forecasted rates were just and reasonable. The tariffs reflecting the forecasted rates shall not be deemed lawful and shall be subject to an accounting order. Alternatively, the competitive LEC may assess a default rate of $.0007 on all of its traffic, until such time as the price cap LEC has implemented bill-and-keep, at which point the competitive LEC must also implement a bill-and-keep

[15] *Order*, ¶ 690.

mechanism for all rate elements for which the price cap LEC has implemented a bill-and-keep methodology. Tariffs reflecting a $.0007 rate need not be subject to an accounting order.

A third area for reconsideration is the Commission's decision to allow LECs that terminate their revenue sharing arrangements to revert back to the "old" rules for setting their rates.[16] While Sprint agrees that LECs should be encouraged to terminate revenue sharing agreements and cease traffic pumping, they should not be allowed to avoid the consequences of the rules once their "circumstances" have changed. While there is considerable merit to the "you made your bed, now you must lie in it" approach to rate making (*i.e.*, requiring a traffic pumping LEC to keep its rates at the adjusted level for a prescribed period of time such as a full 12 months), if the Commission does allow a LEC that has ceased engaging in traffic pumping to revise its rates, it should at a minimum require such a LEC (rate-of-return or competitive) to include a true-up mechanism in its ratemaking process. Under this true-up process, the LEC would have to adjust its prospective rates by any overearnings generated while it was engaged in traffic pumping. The maximum allowable return would be the authorized rate of return for rate-of-return ILECs, and the LEC's true up calculations should be available for review by interested parties.

Evaluating rates in situations in which the CLEC's traffic volume exceeds the benchmark ILEC's traffic volume is necessary to ensure that rates are just and reasonable as required by Section 201(b). There are cases in which a CLEC engaged in traffic pumping has generated usage far in excess of that handled by non-pumping price cap

[16] "If a LEC's circumstances change because it terminates the access revenue sharing agreement(s), it may file a tariff to revise its rates under the rules applicable when access stimulation is not occurring" (*Order*, ¶ 671, footnote excluded).

LECs. In such situations, the traffic pumping CLEC does not resemble the price cap LEC and closer regulatory scrutiny of the CLEC's rates is clearly warranted.

Finally, the Commission should reconsider its decision to require a LEC that meets the traffic pumping triggers to file revised tariffs "within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition."[17] 45 days is excessive; LECs that have entered into revenue sharing agreements obviously know of the existence of such agreements, and know in virtually real time whether they have met the traffic volume trigger or the 3:1 terminating to originating ratio. Such LECs should be required to charge a rate of zero until such time as they have a new/revised tariff filed and effective (the approach adopted in Iowa). At the very most, LECs that meet the traffic pumping trigger should be required to file revised tariffs within 15 days. Any time in excess of 15 days (arguable, in excess of 1 day) for filing a revised tariff gives such LECs an unnecessary and unwarranted extra period in which to assess their inflated, excessive rates.

IV. CONCLUSION

As the Commission has correctly found, traffic pumping is a pernicious practice which has already cost the industry billions of dollars. Clearly, the public interest demands that such practices be curtailed to the maximum extent possible. By issuing the clarifications discussed above, and adopting the rule changes discussed above, the Commission will make its rules more effective at reducing access stimulation.

[17] *Order*, ¶ 691.

Respectfully submitted,

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December 29, 2011

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION OF METROPCS COMMUNICATIONS, INC. FOR CLARIFICATION AND LIMITED RECONSIDERATION

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SUMMARY

MetroPCS Communications, Inc. ("MetroPCS") is asking the Commission on reconsideration to clarify or modify its rules pertaining to traffic stimulation in a few limited respects in order to prevent profiteers from trying to exploit potential loopholes.

First, MetroPCS seeks a clarification of the definition of an "access revenue sharing agreement" to make clear that an arrangement in which a third party receives compensation for activities which result in traffic stimulation is included whether or not the payment is tied directly to the amount of billings or collections of access charges. Otherwise, traffic stimulators may try to evade the rule by adopting fixed fee arrangements.

Second, the Commission should clarify that the access stimulation definition extends to third party arrangements not only with the terminating LEC, but also with any affiliate of the terminating LEC. This is implied by the current definition, which extends to direct and indirect arrangements, but should be express.

Third, MetroPCS is asking the Commission to clarify the manner in which the 3:1 traffic imbalance ratio will be applied in order to deter foreseeable approaches unprincipled carriers may take to evade this prong of the access stimulation test.

Finally, the Commission is asked to fill a gap in its traffic stimulation rules by applying them to intrastate traffic. Otherwise, there is a gap in the Commission's reforms that will encourage arbitragers to move their traffic pumping schemes to the intrastate access segment of the market.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
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Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION OF METROPCS COMMUNICATIONS, INC.
FOR CLARIFICATION AND LIMITED RECONSIDERATION

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys and pursuant to Section 1.429(a) of the Commission's Rules,[2] hereby respectfully requests that the Commission clarify certain aspects, and to reconsider other aspects, of its *Order*, FCC 11-161, released November

[1] For purposes of this Petition, the term "MetroPCS" refers collectively to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] 47 C.F.R. Section 1.429(a).

18, 2011 in the above-captioned proceedings ("Petition").[3] As set forth in detail below, the Commission's admirable steps to discourage traffic stimulation or traffic pumping are more likely to succeed if the Commission clarifies or revises the rules in limited respects to prevent opportunistic profiteers from exploiting potential loopholes. In support, the following is respectfully shown:

I. INTRODUCTION

MetroPCS previously has congratulated this Commission for crossing the finish line on the first leg of what already has been a decade-long marathon to comprehensively reform *both* the intercarrier compensation system and the universal service fund. The recent *Order*[4] involved significant tradeoffs for all affected carriers, and reflected a careful, well-reasoned balancing of *all* interests after extensive deliberation.[5] MetroPCS was particularly gratified by the significant and long overdue strides the Commission has taken to curb traffic stimulation in both the interstate access and local reciprocal compensation markets. The Commission, in its *Order*, recognized that traffic stimulation is a major form of uneconomic regulatory arbitrage in the current intercarrier compensation regime and, in response, adopted measures to eliminate, or at the very least mitigate, disruptive traffic stimulation from occurring. Specifically, the Commission adopted prophylactic measures: (1) with respect to interstate switched access

[3] This petition is being filed within 30 days following the date of publication of the subject order in the Federal Register, which occurred on November 29, 2011. *See* 76 Fed. Reg. 73830 (Nov. 29, 2011). Thus, the Petition for Clarification and Reconsideration is timely under Sections 1.429(d) and 1.4(b) of the FCC Rules. 47 C.F.R. §§ 1.4(b) and 1.429(d).

[4] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (the *"Order"*).

[5] While MetroPCS applauds the Commission's efforts, MetroPCS is disappointed that the Commission reconsidered on its own motion certain aspects of the *Order* as they relate to CMRS-LEC interconnection and MetroPCS remains concerned that the delay in effectiveness of the rules may lead to traffic stimulation. *See* MetroPCS *Ex Parte* filed December 21, 2011 in this proceeding.

traffic; and (2) with respect to intraMTA LEC-CMRS traffic. While these measures will go a long way to mitigating historical arbitrage, MetroPCS is concerned that there are possible ambiguities which unprincipled arbitrators might seek to exploit. In order to assure that the Commission's efforts do not result in continued or modified traffic stimulation, MetroPCS urges the Commission to reconsider and/or clarify a few aspects of its new regulations pertaining to traffic stimulation in order to prevent traffic stimulators from exploiting potential loopholes in the Commission's proposed rules.[6]

II. BACKGROUND

The Commission correctly concluded that interstate access stimulation is a major problem in the current intercarrier compensation regime, finding that "the record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate access rates remain just and reasonable."[7] The Commission found that uneconomic access stimulation occurs when "a [local exchange carrier] with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls," and such arrangement inflates or stimulates the access minutes terminated to the LEC, and "the LEC then shares a portion of the increased access revenues resulting from the increased demand with the "free" service provider, or offers some other benefit to the "free" service provider."[8] The Commission held that "the combination of significant increases in switched access traffic with unchanged access

[6] Traffic stimulation is like a balloon, unless the Commission constrains all ways it can occur, efforts to "squeeze" it in one area will merely result in it "popping" up elsewhere.

[7] *Order* at para. 662.

[8] *Id.* at para. 656. To the knowledge of MetroPCS, traffic pumping has moved far beyond the traditional forms of chat lines and free conference calling services. Some schemes involve the delivery of streaming audio services (e.g., radio broadcasts) which generate open lines of communication and inordinate call lengths. In other instances, unscrupulous profiteers appears to be using auto-dialers to generate traffic solely for the purpose of triggering terminating compensation obligations (and shared revenue).

rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under Section 201(b) of the Act."[9] Thus, the Commission "adopt[ed] revisions to [its] interstate switched access charge rules to address access stimulation."[10]

As part of its revisions, the Commission adopted a two factor test to identify when a LEC is engaged in traffic stimulation and therefore must refile its interstate tariffs at rates that are presumptively consistent with the Act. The first factor may be satisfied by evidence demonstrating that the LEC has met either of the following: "the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year."[11] This prong is designed to identify particular traffic patterns which historically have been indicative of a traffic pumping scheme.

The second factor is that the LEC must have entered into an access revenue sharing agreement with a third party. The Commission defined an access revenue sharing agreement as an arrangement in which a rate-of-return LEC or competitive LEC

> has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless or form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.[12]

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[9] *Id.* at para. 657.

[10] *Id.* at para. 656.

[11] *Id.* at para. 667.

[12] *Id.* at para. 669.

The Commission held that a "complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint," and that such a showing "will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules."[13] The LEC would then "have the burden of showing that it does not meet both conditions of the definition."[14] If the LEC is unable to make such a showing, it will have to refile its tariff in accordance with the Commission's rules, which the Commission anticipates will result in significantly decreased access stimulation revenues.[15]

In addition, the Commission adopted separate measures to eliminate, or mitigate, traffic stimulation in the local reciprocal compensation market. The Commission did so by adopting bill-and-keep as the end point for intercarrier compensation reform. Of particular importance to MetroPCS as a wireless carrier, the Commission adopted a prompt transition to a bill-and-keep regime for the exchange of intraMTA LEC-CMRS traffic.[16] The Commission found "a greater need for immediate application of a bill-and-keep methodology in [the non-access] context to address traffic stimulation."[17] The Commission correctly noted that the record demonstrates "a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-CMRS

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[13] *Id.* at para. 699.

[14] *Id.*

[15] *Id.* at para. 679.

[16] Initially, the CMRS/LEC transition to bill-and-keep was to be immediate. *Id.* at para. 995. The Commission later, ostensibly on its own order, reversed its decision to immediately apply a bill-and-keep to all intraMTA LEC-CMRS traffic. Rather, the Commission delayed the bill-and-keep transition for intraMTA LEC-CMRS traffic exchanged pursuant to an existing interconnection agreement to July 1, 2012. *See Order on Reconsideration* (WC Docket No. 10-90), FCC 11-189 released December 23, 2011. The Commission retained the immediate transition to a bill-and-keep regime for intraMTA LEC-CMRS traffic not exchanged pursuant to an existing interconnection agreement. While the immediate transition for some of the traffic will curb some of the reciprocal compensation traffic stimulation, to the extent traffic pumpers already have existing agreements, they will be incented to engage in traffic pumping at an accelerated pace before the July 1, 2012 effective date.

[17] *Order* at para. 995.

non-access traffic."[18] Indeed, MetroPCS repeatedly has demonstrated that traffic stimulation is an escalating problem that has moved from simple arbitrage to wide-scale fraud. What started as a cottage industry where LECs with unjustifiably high rates encouraged customers of other carriers to call, has morphed into an enterprise where carriers and other parties are going to alarming lengths, such as using auto-dialers, third party "customers," and streaming audio services to generate fraudulent high-cost traffic. The Commission correctly found that "addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC-CMRS traffic, and the bill-and-keep methodology we adopt today should eliminate the opportunity for parties to engage in such practices in connection with such traffic."[19]

Thus, the Commission's *Order* includes long needed mechanisms to decrease traffic stimulation activities in both the interstate access and reciprocal compensation contexts. However, the Commission's *Order* neglects to address traffic stimulation in the intrastate access context which is a matter of concern because MetroPCS has already started to see access stimulation in this segment of the market.[20] MetroPCS, therefore, urges the Commission to adopt regulations on reconsideration that will immediately address intrastate access traffic stimulation. In addition, MetroPCS also is concerned that the Commission's definitions are ambiguous in some respects and may lead to unnecessary confusion as to what qualifies as traffic stimulation, as well as potential mischief from traffic stimulators who are attempting to evade the Commission's new regulations. Thus, the Commission should clarify its revenue sharing agreement definition and the manner in which the 3:1 traffic imbalance component of the access

[18] *Id.*

[19] *Id.*

[20] Since intrastate access rates are generally higher than interstate access rates, states with multiple MTAs no doubt will experience an immediate explosion of traffic pumping in this market segment.

stimulation is applied. Only when all of these issues are addressed can the Commission have comfort that its traffic stimulation rules will have their intended result.

III. THE LEGAL BASIS OF THIS PETITION

A petition for reconsideration is appropriate if it is based on new evidence, changed circumstances, or if reconsideration is in the public interest.[21] MetroPCS is an "interested person" eligible to petition for reconsideration and clarification of the new construction requirements and the other auction rules challenged herein.[22] MetroPCS has been a very active participant in the Commission's intercarrier compensation proceedings over the past ten years, filing substantial comments, reply comments and *ex partes,* as well as meeting on numerous occasions with Commission staff. Moreover, MetroPCS will be directly adversely affected if the rules are not changed. As a consequence, MetroPCS has standing to submit this petition for clarification and reconsideration.[23]

As noted in detail below, the limited clarifications and reconsideration of the rules requested here by MetroPCS meets the public interest requirement as contemplated by Section 1.429(b)(3). The Commission also has stated that "[r]econsideration is warranted . . . if the petitioner cites material errors of fact or law or presents new or previously unknown facts and circumstances which raise substantial or materials questions of fact that were not considered and that otherwise warrant [the] review of [the] prior action."[24] Clarification and reconsideration of the cited rules also is justified under this standard.

[21] *In the Matter of Numbering Resource Optimization,* Fourth Order on Reconsideration, 22 FCC Rcd 8047 at para. 5 (rel. Apr. 26, 2007).

[22] *Cf.* 47 C.F.R. Section 1.429(a).

[23] 47 C.F.R. Section 1.106(b)(1) ("any party to the proceeding, or any other person whose interests are adversely affected by an action taken by the Commission … may file a petition requesting reconsideration of the action").

[24] *Lancaster Communications, Inc.,* 22 FCC Rcd 2438 at para. 20 (rel. Feb. 7, 2007).

IV. THE DEFINITION OF "ACCESS STIMULATION" SHOULD BE CLARIFIED

As noted above, the *Order* wisely adopted rules to reduce uneconomic access stimulation.[25] The Commission recognized that certain local exchange carriers ("LEC") with high switched access rates ("High Priced Terminating Carriers") were entering into arrangements with third parties ("Traffic Stimulators") to inflate, stimulate or pump traffic as a form of arbitrage.[26] In taking this action, the Commission recognized that access stimulation arrangements can take a variety of forms, and purposefully adopted a broad definition of access stimulation. Thus, the definition is not only limited to direct, express, written agreements between the High Priced Terminating Carriers and the Traffic Stimulators. Rather, the definition extends to express and *implied* as well as written or *oral* arrangements.[27] The definition also includes arrangements that not only result in a net payment to the Traffic Stimulator, but also to its "affiliates."[28] And, the definition includes arrangements that would "directly or indirectly" give rise to payment. The clear purpose of these expansive elements of the definition was to make sure that it captured the broad variety of schemes that had been and could be put in place to artificially pump traffic to High Priced Terminating Carriers. The Commission certainly was justified in adopting such a broad definition as experience shows that arbitragers are quick to exploit gaps in the intercarrier compensation system in order to create arbitrage opportunities.

There are, however, two aspects of the definition of "access stimulation" that should be clarified to make sure that the Commission's effort to eliminate all uneconomic arbitrage

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[25] See *Order* at Section XI.

[26] While this originally manifested itself through free services offered using access revenues (e.g., free international calling, free conference calling), it has now morphed into LECs sharing revenues with illegitimate customers who use auto-dialers solely for the purpose of triggering terminating compensation payments and sharing a portion of the proceeds.

[27] FCC Rule Section 61.3(aaa)(1).

[28] *Id*.

schemes is successful. First, the Commission must clarify that its access stimulation definition will be broadly construed so that the prohibited arrangements are not limited solely to those in which the revenue payment is directly "based on the billing or collection of access charges" but rather includes other circumstances when payment is being made for the purpose of traffic stimulation. Absent clarification, Traffic Stimulators and High Priced Terminating Carriers may try to craft revised payment schemes and claim that they do not fit squarely into the Commission's definition of access stimulation. For example, a terminating LEC might claim that it is permissible to make a non-variable payment because the amount is not strictly tied to access billings or collections. This should not be permitted when the arrangement at its core is designed to stimulate traffic. Second, the Commission must make clear that the definition of access stimulation includes arrangements that involve not only a terminating carrier which is a CLEC, but also any "affiliate" of that CLEC. Without this clarification, traffic pumpers might believe that it is permissible for a revenue sharing payment to be made by an affiliate of the LEC, rather than the LEC themselves. Obviously, the relevant consideration should be whether a net payment is being made to stimulate traffic to the LEC. As discussed in detail below, both of these clarifications fall within the scope of the original rules when read in their proper context and making them will prevent traffic stimulation activities from continuing under a difference guise. While the Commission could clarify these points in the context of disputes, the better course is for the Commission to clarify its intent so as to discourage gamesmanship before it occurs.[29]

[29] MetroPCS believes that such situations already are covered by the Commission's existing language, and only submits this clarification request out of an abundance of caution.

A. The Phrase "based on the billing or collection of access revenues" Must be Clarified

A simple illustration will demonstrate the basis of the MetroPCS concern that unscrupulous High Priced Terminating Carriers and Traffic Stimulators may try to evade the access stimulation definition by seizing upon the requirement that such arrangements be "based on the billing or collection of access revenues." Consider a situation in which a High Priced Terminating Carrier and a Traffic Stimulator have a long-standing arrangement in which the Traffic Stimulator receives a percentage of the switched access revenue generated by numbers assigned to the Traffic Stimulator by the High Priced Terminating Carrier. This is a classic traffic pumping arrangement that would fall squarely within the definition of "access stimulation." However, because the long operating history of these two parties will have resulted in a measurable income stream, the participants could easily convert the arrangement to a fixed monthly payment, unaffected directly on a going-forward basis by the "billing or collection of access charges from interexchange or wireless carriers."[30] Neither, the substance of the arrangement or the public harms identified by the Commission will have changed, but a technical argument can be made that the new arrangement does not satisfy the letter of the definition.

This potential loophole can easily be closed by the Commission. On reconsideration, the Commission need merely clarify that any arrangement between a LEC and a third party that results in the generation of switched access traffic to the LEC and provides for the net payment of consideration of any kind to the third party will be deemed by the Commission to be "based upon the billing or collection of access charges," regardless of the manner in which, or the formula by which, the consideration is calculated. This simple clarification will prevent parties

[30] A High Priced Terminating Carrier could elect to absorb any collection risk associated with access billings as another way to funnel money to the Traffic Simulator in a manner unrelated directly to access traffic volume.

to prior access stimulation arrangements, and parties to new arrangements, from attempting to sidestep the Commission's rules by restructuring or crafting their payment mechanisms.

Notably, this clarification will not serve to sweep in legitimate arrangements. The arrangements encompassed by the clarified definition still will be those relating to traffic stimulation. Other net payment arrangements not related to traffic generation will not meet this definition. Further, since an arrangement also must trigger either the 3:1 traffic imbalance or 100% growth factor test in order to be deemed traffic stimulation, the clarification sought by MetroPCS will not result in an overly inclusive definition.

B. Arrangements with Affiliates of High Priced Terminating Carriers Must be Covered by the Commission's Rules

As earlier noted, the access stimulation definition expressly provides that it encompasses not only arrangements where a LEC makes net payments to another party, but extends to "a net payment to the other party (*including affiliates*)."[31] This reference to affiliates is important because parties to traffic pumping schemes have been known to set up affiliated shell companies to conceal access stimulation schemes and their economic effect. The same consideration requires clarification that the definition of access stimulation encompasses arrangements involving payments not only by the High Priced Terminating Carriers, but also affiliates of such LECs.

This requested clarification falls well within both the letter and spirit of the current rule. The rule makes clear that it applies to arrangements resulting in payments both "*directly or indirectly*,"[32] which should be interpreted by the Commission to include payments involving

[31] FCC Rules Section 61.3(aaa)(1)(i) (emphasis added).

[32] *Id.* (emphasis added).

affiliates of the LEC.[33] MetroPCS raises the point out of an abundance of caution since the rule makes an explicit reference to "affiliates" with respect to the "other party," but does not explicitly do so with respect to the LEC. Again, MetroPCS fears that an unscrupulous LEC may seize upon this fact to craft a semantic argument that the rule only reaches to arrangements to which the LEC is a party and not to those involving the LEC's affiliates. The clarification sought by MetroPCS will avoid gamesmanship of this nature.

A final clarification of the rules also would reduce the prospect of controversies with regard to the definition of access stimulation. MetroPCS notes that the word "affiliate" is not specifically defined in Section 61.3 of the rules. However, the term "affiliate" is specifically defined in the Communications Act as follows:

> The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.[34]

MetroPCS assumes that the Commission plans to apply the statutory definition of affiliate in this instance. However, since the legal term affiliate can be used to describe a variety of relationships between two entities in different contexts, for the avoidance of doubt, the Commission should clarify that the statutory definition of affiliate will be used in interpreting the access stimulation definition.

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[33] To the extent that any such affiliate arrangement is unrelated to the delivery of traffic (e.g., such as the sale of CPE), this clarification will not come into play because the traffic pattern should not change nor would such payment be based on traffic. However, to the extent the arrangement is for the originations of traffic, such arrangement with an affiliate should be swept into the traffic stimulation rules.

[34] 47 U.S.C. Section 153(1).

V. THE COMMISSION SHOULD CLARIFY THE MANNER IN WHICH THE 3:1 TRAFFIC IMBALANCE COMPONENT OF THE ACCESS STIMULATION DEFINITION IS TO APPLY

In keeping with comments made by MetroPCS and others,[35] the *Order* recognizes that an imbalanced traffic flow can be an important indicator of a disruptive traffic stimulation scheme. For example, chat lines and free conference call lines, which the Commission specifically identifies as prime examples of services that stimulate high volumes of traffic,[36] are essentially one-way services; the numbers devoted to these services generate a high volume of inbound calls, but rarely are used to generate outbound calls. This leads to a significant traffic imbalance. Thus, the Commission wisely included within the test for access stimulation a criterion that the LEC have "an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month." MetroPCS supports this test and again commends the Commission for adopting it. MetroPCS asks, however, that the Commission clarify the 3:1 test in two respects in order to make sure that it works properly as traffic stimulation activities evolve over time.

First, the Commission should make clear that a carrier cannot defeat the 3:1 traffic imbalance standard merely by offsetting a one-way business plan in one discrete line of business that generates high volumes of inbound traffic against a separate and distinct one-way business plan in a different discrete line of business that generates high volumes of outbound traffic only. A real world example in which MetroPCS was directly involved serves to demonstrate the point. As the Commission is aware, MetroPCS was involved in an extended controversy with CLEC North County Communications Corp. ("North County") arising out of North County's chat line services, which MetroPCS had identified as a local reciprocal compensation traffic pumping

[35] See, e.g., Comments of MetroPCS filed April 1, 2011 at p. 6-14.

[36] *Order* at para. 656

scheme.[37] Notably, although North County admitted that nearly 100% of the traffic from its chat line service was inbound to North County, North County nonetheless claimed that, overall, its inbound and outbound traffic was balanced. It made this claim based upon the fact that another component of the North County business was to serve telemarketers, which generated high volumes of outbound traffic and little or no inbound traffic.[38]

The important point here is that the distinct outbound telemarketing traffic of North County did not in any way mitigate the uneconomic effect of the high volume of the inbound chat line traffic that MetroPCS was being asked to pay for at an exorbitant termination rate. Indeed, the North County business model resulted in uneconomic traffic stimulation in two directions: inbound chat line traffic to garner intraMTA reciprocal compensation payments and outbound telemarketing to garner originating access payments. The Commission's goal should be to deter all uneconomic traffic stimulation business plans, even if they are crafted as two distinct one-way models. For example, to do so, in applying the 3:1 ratio, local reciprocal traffic should be considered separately from interstate access, and interstate originating access should be considered separately from intrastate access traffic. By doing so, the Commission would eliminate the ability of carriers to evade the Commission's traffic imbalance test.

Second, the Commission should clarify that there may be instances in which the traffic imbalance threshold will be deemed to be met when there is a 3:1 or greater imbalance in the traffic exchanged between a terminating carrier and another complaining carrier, even if the terminating carrier's overall traffic mix on an aggregate basis with all other carriers is more balanced. The Commission's access stimulation rules clearly contemplate that a complaining

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[37] The MetroPCS/North County controversy is cited throughout the *Order* and motivated the Commission to take a series of steps to curb traffic stimulation in the wireless reciprocal compensation market. *See, e.g., Order* at paras. 977, 983, 985.

[38] *See* North County Order on Review, 24 FCC Rcd 14036 at para. 3 (2009).

carrier can make a *prima facie* case of traffic imbalance based on its own traffic exchange pattern with the terminating carrier.[39] However, the language in the 3:1 imbalance rule appears to suggest that the ultimate determination of imbalance will be based upon the terminating carrier's overall traffic mix with all other carriers, not merely upon the bilateral exchange ratio with the complaining carrier.[40]

It is a matter of concern that MetroPCS could experience a severe traffic imbalance with a particular carrier that would not meet the definition of access stimulation because the imbalance does not exist on an aggregate basis. For example, MetroPCS has reason to believe that some Traffic Stimulators were buying multiple MetroPCS phones and using them in connection with auto-dialers to generate high volumes of calls to certain LECs with high termination rates, presumably to take maximum advantage of a revenue sharing scheme.[41] MetroPCS, like all flat-rate, unlimited usage carriers, is particularly susceptible to schemes of this nature. Schemes which generate a serious traffic imbalance between one originating carrier and the terminating LEC can be pernicious whether or not the terminating LEC happens to meet the 3:1 imbalance test considering its traffic as a whole with all of the carriers with which it exchanges traffic. The risk is particularly great for flat-rate unlimited use carriers whose customers are prime targets of the cost shifting that motivates Traffic Stimulators.[42]

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[39] *Order* at para. 675.

[40] MetroPCS reaches this conclusion because the language in Section 61.43(aaa)(1)(ii) of the rule is framed in general terms, and appears to refer to the terminating carrier's overall ratio of traffic, not the ratio with the terminating carrier. If this was not the Commission's intent, the rule should be clarified.

[41] The other Commission rule which amplifies this problem in the wireline interexchange market is the rate averaging rule which requires all long distance rates to be averaged as opposed to particularly focused on the costs imposed on the wireline carrier. This is not a problem for wireless carriers as the Commission has forborn from applying this rule to such carriers.

[42] Customers of post-paid carriers who pay metered rates are less likely to place an inordinate number of calls with long average call lengths.

To address this concern, MetroPCS asks the Commission to clarify that a terminating LEC may overcome a *prima facie* case of traffic imbalance based upon the complaining carrier's own traffic data only with clear and convincing evidence that the carrier-to-carrier data is not indicative of a traffic stimulation scheme directed at the complaining carrier.[43]

VI. THE COMMISSION SHOULD REVISE ITS RULES TO PROHIBIT TRAFFIC STIMULATION VIA INTRASTATE ACCESS, INCLUDING INTRASTATE, INTERMTA, TRAFFIC

The *Order* does not specifically address traffic stimulation in the intrastate access context.[44] The Commission explicitly states that it is adopting revisions to its interstate switched access charge rules to address access stimulation.[45] While the Commission did seek to address traffic stimulation in the local intraMTA market by moving to a bill-and-keep regime[46] for LEC-CMRS non-access traffic, this still leaves a significant gap with respect to intrastate access traffic, as well as intrastate, interMTA CMRS traffic. This gap is especially problematic since the rates for intrastate access are generally higher than interstate rates. This has already led to some carriers starting to stimulate traffic in the intrastate exchange context. Accordingly, this gap must be rectified by the Commission.

MetroPCS operates in several states which encompass multiple MTAs, including California, Texas, Florida, and Pennsylvania, among others, and is concerned that current traffic

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[43] If the Commission does not want to go this far, at a minimum, it should limit the balance to like kinds of traffic (e.g., unlimited, measured, etc.). It is more likely that a High Priced Terminating Carrier will target a subsegment of the market and try to balance it with other one-way traffic in another segment. Just like the Commission should segment the traffic of the High Priced Terminating Carrier, it should likewise prevent it for the originating carrier as well.

[44] Of course, to the extent that the *Order* adopts a bill-and-keep regime for intraMTA traffic exchanged between CMRS carriers and LECs, traffic stimulation will be deterred. However, in most instances, a single state encompasses multiple MTAs (*See* Attachment A), which means that there can indeed be intrastate, interMTA traffic that is not addressed by the local reciprocal compensation bill-and-keep rule for CMRS carriers. *See* discussion, *infra.*

[45] *Order* at para. 662.

[46] *Id.* at para. 995.

stimulation schemes to which it is subject will not be addressed by either the interstate access stimulation rule or the wireless intraMTA bill-and-keep rule.[47] Continuing to allow traffic stimulation in the intrastate access charge marketplace would not serve the public interest. And, creative arbitragers certainly will move to exploit this loophole by shifting their intraMTA and interstate traffic pumping schemes to the intrastate, interMTA market. The Commission must close this potential loophole immediately, as the Commission's concerns with traffic stimulation in the interstate access and reciprocal compensation markets apply equally to intrastate access stimulation. Indeed, "an agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem."[48] In this case, allowing traffic stimulation in the intrastate access market to continue and expand is a critical problem that the Commission did not adequately consider in its *Order*. The Commission must expect existing traffic pumpers to try to salvage their arbitrage business. By not closing this loophole, the Commission will no doubt see a significant rise in intrastate access stimulation complaints as some of its other rules become effective.

The Commission correctly notes that it has the authority to regulate intrastate access traffic exchanged between LECs and CMRS providers under Section 332 of the Act, and does regulate such traffic with respect to the ultimate transition of all traffic to bill-and-keep.[49] While such intrastate access rates will be capped by the Commission as of January 1, 2012, this cap is not sufficient to ensure that traffic stimulation activities will not occur with respect to intrastate access traffic because there is a substantial difference between intrastate and interstate

[47] Indeed, MetroPCS already has seen such scenarios occur in California.

[48] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)

[49] *Order* at para. 779.

access rates. Indeed, the Commission's entire transition plan is premised on the finding that intrastate rates are too high and must move down over time.

As noted above, MetroPCS already has seen evidence of traffic stimulation within the intrastate access marketplace. Moreover, and most importantly, MetroPCS is certain that intrastate traffic stimulation activities will increase materially due to the steps the Commission has taken to eliminate traffic stimulation in the interstate access and local reciprocal compensation markets. Traffic pumpers are arbitrage experts and are quite adept and have not hesitated to exploit omissions, or loopholes, in the Commission's rules. Providing such profiteers with the potential opportunity to continue to exploit the Commission's intercarrier compensation regime via intrastate traffic stimulation activities – which the Commission has condemned in the interstate and reciprocal compensation contexts – would go against the Commission's stated determination to reduce arbitrage.

The record evidence clearly establishes that traffic pumpers move quickly to exploit arbitrage opportunities, which is why access stimulation morphed into reciprocal compensation stimulation. For instance, the Commission noted that is was adopting a bill-and-keep regime for all LEC-CMRS traffic, not only LEC-CLEC traffic, even though "the record reflects that LEC-CMRS intraMTA traffic stimulation is growing most rapidly in traffic terminating by competitive LECs."[50] The Commission took this step due to its concern that "absent any measure to address traffic stimulation for intraMTA LEC-CMRS traffic, incumbent LECs that sought revenues from access stimulation may quickly adapt their stimulation efforts to wireless reciprocal compensation." The Commission must expect the same to occur with respect to intrastate access. Even if traffic stimulation in the intrastate access market has not been a focus

[50] *Id.* at para. 995.

of prior concern, the Commission should nonetheless anticipate and stop such arbitrage. Not only is this good public policy, but it also will conserve scarce Commission resources by relieving the Commission from having to address this problem in a separate rulemaking or multiple complaint proceedings. Thus, the Commission must take similar measures to prevent traffic stimulators from shifting their activities from the interstate access stimulation and reciprocal compensation markets to the intrastate access and interMTA markets.

Revising its rules to discourage traffic stimulation activities in the intrastate access market would help further "reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes."[51] The Commission should change its new rules to include both interstate and intrastate traffic, and the separate rate caps that apply to CLECs and rate of return LECs with respect to interstate access stimulation should apply to intrastate access stimulation as well, subject, of course, to the bill-and-keep regime that applies to CMRS-LEC intraMTA traffic.

In sum, the Commission noted in the *Order* that traffic stimulation schemes "involve service providers exploiting loopholes in our rules and ultimately cost consumers hundreds of millions of dollars."[52] This Commission should not allow similar loopholes to be exploited via its revised intercarrier compensation reforms. A revision to incorporate prohibitions against traffic stimulation in the intrastate access context would certainly be in the pubic interest, as it would eliminate traffic stimulation schemes that currently are occurring in the context of intrastate access, as well as prevent future schemes from being exploited in the intrastate access context. Thus, the Commission should modify its rules to allow interexchange carriers and

[51] *Id.* at para. 701.

[52] *Id.* at para. 649.

wireless providers to file intrastate access stimulation complaints, in addition to interstate access stimulation complaints, to eliminate, or at the very least, mitigate, traffic stimulation activities.

VII. EXPEDITED ACTION IS REQUESTED

MetroPCS urges the Commission to clarify and modify its traffic stimulation rules as requested in this petition *as soon as possible*. The relief MetroPCS is seeking is narrowly drawn and, if granted, will serve to better fulfill the worthy Commission goal of discouraging disruptive and uneconomic arbitrage. In the absence of prompt relief, the traffic pumping activities that already have survived too long in the intercarrier compensation market will be perpetuated. The public interest will be served by expeditious Commission action to close the potential loopholes identified by MetroPCS.

VIII. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission clarify and/or reconsider certain of its rules relating to access stimulation. In doing so, the Commission would eliminate gaps that exist that could potentially undermine its extensive findings relating to the dangers of access stimulation, and similar arbitrage.

Respectfully submitted,

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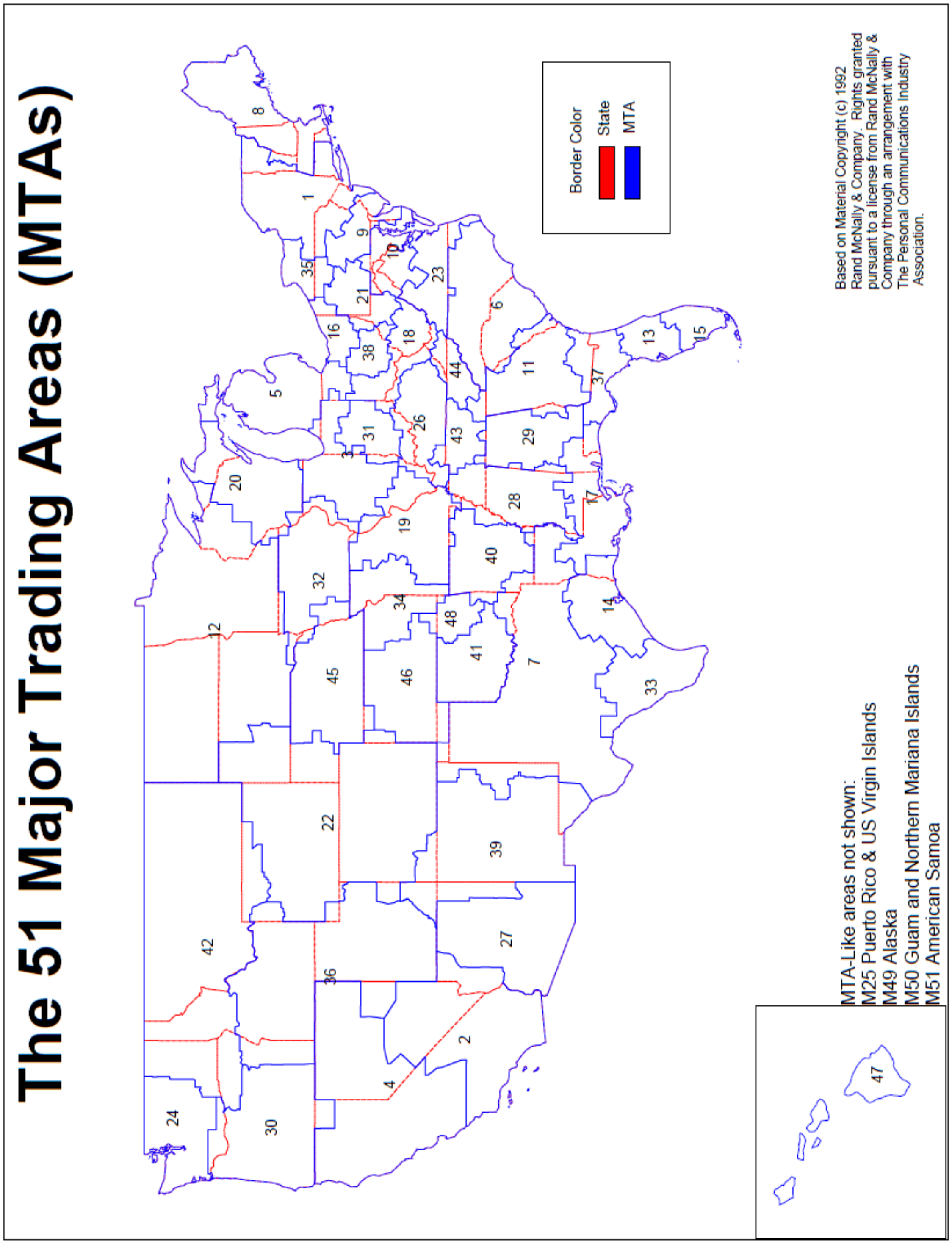
December 29, 2011

Attachment A

The 51 major Trading Areas (MTAs)



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CERTIFICATE OF DIGITAL SUBMISSION

I, James M. Carr, hereby certify that with respect to the foregoing:

(1) there are no required privacy redactions to be made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 11.0.5002.333, and according to the program are free of viruses.

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11-9900

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161, Petitioners

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on June 25, 2012, I electronically filed the foregoing Motion to Hold in Abeyance with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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